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Official Report of Debates (Hansard)

Wednesday 4 October 2000

Journal des débats (Hansard)

Mercredi 4 octobre 2000

Standing committee on general government

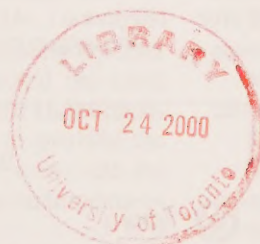
Subcommittee report

Ontario Marine
Heritage Act, 1999

Comité permanent des affaires gouvernementales

Rapport du sous-comité

Loi de 1999 sur le patrimoine
marin de l'Ontario



Chair: Steve Gilchrist
Clerk: Anne Stokes

Président : Steve Gilchrist
Greffière : Anne Stokes

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LEGISLATIVE ASSEMBLY OF ONTARIO

ASSEMBLÉE LÉGISLATIVE DE L'ONTARIO

STANDING COMMITTEE ON
GENERAL GOVERNMENTCOMITÉ PERMANENT DES
AFFAIRES GOUVERNEMENTALES

Wednesday 4 October 2000

Mercredi 4 octobre 2000

The committee met at 1534 in committee room 1.

SUBCOMMITTEE REPORT

The Chair (Mr Steve Gilchrist): Good afternoon. I'd like to call the standing committee on general government to order for the purpose of considering Mr Barrett's private member's bill.

As the first order of business, if I could get someone to read the report of the subcommittee into the record and then we of course have to approve that.

Mr Ted Chudleigh (Halton): I believe I've been delegated, Mr Chairman.

The Chair: Excellent choice.

Mr Chudleigh: I have to read this entire thing?

The Chair: Yes, sir.

Mr Chudleigh: No one can dispense?

The Chair: The clerk looks askance at that sort of thing.

Clerk of the Committee (Ms Anne Stokes): It should be read into the record.

Mr Chudleigh: All right.

Your subcommittee met on Thursday, September 28, 2000, to consider business before the committee and recommends the following:

(1) That the committee consider at its next order of business, private member's Bill 13, An Act to preserve Ontario's marine heritage and promote tourism by protecting heritage wrecks and artifacts.

(2) That the committee meet on Wednesday, October 4, 2000, and Wednesday, October 11, 2000, in Toronto to hold public hearings into the bill.

(3) That an advertisement be placed on the Ontario parliamentary channel and the Legislative Assembly Web site. The clerk is authorized to place the ads immediately.

(4) That the committee clerk contact directly by mail the list of names that have already contacted the clerk and the list of names held by the member for Haldimand-Norfolk-Brant, Mr Barrett. Mr Barrett is to provide the list of names to the clerk. The mailing is to include the advertisement and a review of the draft amendments to the bill.

(5) That witnesses be given a deadline of Wednesday, October 11, 2000, at 12 noon to make their request to appear before the committee.

(6) That witnesses be given a deadline of Wednesday, October 11, 2000, at 12 noon for written submissions.

(7) That the clerk contact the following major shareholders: Fédération des activités subaquatiques, Montréal; ACUC International; PADI; Underwater Canada; Ontario Archaeological Society, Toronto; SOS Kingston; and two other names to be provided by Mr Barrett to appear before the committee.

(8) That the major shareholders be allotted 15 minutes for each presentation, all others 10 minutes for each presentation and each caucus make an opening statement of up to 10 minutes each.

(9) That the clerk of the committee, in consultation with the chair, be authorized prior to the passage of the report of the subcommittee to commence making any preliminary arrangements necessary to facilitate the committee's proceedings.

The Chair: The clerk advises me that in (7) and (8) there was a typo. Will you see it as a friendly amendment that the word "shareholders" should actually have read "stakeholders"?

Mr Chudleigh: Yes.

The Chair: Would you move adoption of the report.

Mr Chudleigh: I so move.

The Chair: All those in favour?

Mr Dave Levac (Brant): On a point of clarification, Mr Chair: Do we know the two names from Mr Barrett who are going to appear before the committee?

Mr Toby Barrett (Haldimand-Norfolk-Brant): I'm going to have to check.

The Chair: It's OK. The clerk has it: Goderich Marine Heritage Committee and the South of the Surf Dive Shop.

Mr Levac: Thank you, Chair.

Second clarification, the number of names on the mailing list held by MPP Barrett: approximately 200?

The Chair: The clerk informs me it was approximately 182.

Mr Barrett: We probably came up with about 182 address labels or e-mail addresses.

Mr Levac: As they came in to you?

Mr Barrett: Yes. We've certainly had phone calls from well over 200 people over the last 11 months.

Mr Levac: Thank you for that.

A final one: I don't know if this is normal protocol. In our first discussion, I guess it was a pre-subcommittee discussion, a point that I brought to your attention was

the possibility of adding a day in the event we find that a large number of people feel they want to present. Is that still available even if we adopt the minutes?

The Chair: These are the minimum, so we have not spoken to what the committee will be doing after those two days.

Mr Levac: Very good. Thanks, Mr Chairman, I appreciate the clarification.

The Chair: Any further discussion on the subcommittee report?

Mr Chudleigh has moved its adoption. All those in favour? Contrary, if any? The subcommittee report is passed.

For the benefit of any committee members who did not know, we have a new clerk joining us for the first official duty today, Anne Stokes. Welcome aboard, Anne.

Clerk of the Committee: Thank you.

The Chair: You're following in Viktor's big footsteps, and I mean that literally.

1540

ONTARIO MARINE HERITAGE ACT, 1999

LOI DE 1999 SUR LE PATRIMOINE MARIN DE L'ONTARIO

Consideration of Bill 13, An Act to preserve Ontario's marine heritage and promote tourism by protecting heritage wrecks and artifacts / Projet de loi 13, Loi visant à préserver le patrimoine marin de l'Ontario et à promouvoir le tourisme en protégeant les épaves et les artefacts à valeur patrimoniale.

The Chair: This takes us to the first order of business. We had agreed there would be opening statements. Mr Barrett, you have the first 10 minutes.

Mr Barrett: With respect to Bill 13, the Ontario Marine Heritage Act, I appreciate it finally getting to the committee. I recognize that this decision was just made very late last week, and unfortunately today is short notice for our presenters. However, I trust there will be additional time for other people. I know people who are still out on the lake somewhere right now and may not even know about this, or are perhaps in other provinces.

I'm looking forward to input from all MPPs. Over the last 11 months, we all have received a large number of e-mails and letters and phone calls. I mentioned we've been in contact over the past almost year now probably with about 200 individuals and organizations. I think we all realize my purpose in introducing this bill was to enhance the protection and preservation of Ontario's marine heritage resources and, secondly, to promote tourism and in particular dive tourism.

I am from a tourist town, Port Dover, which was formerly and still remains a commercial diving town. Over the years, we have now seen the recreational divers, the charter boats. The industry is becoming very significant. I'm just making reference to one small town down on Lake Erie.

A year ago last summer, a friend of mine from Port Dover, Jim Murphy, wrote me a letter to my constituent office urging tougher marine heritage protection for shipwrecks and artifacts that lie in Ontario's waters. Mr Murphy pointed out that the dive tourism industry was booming in Lake Erie, partly because of the quagga mussel, the zebra mussel and the clarity of the water. In his letter, Mr Murphy stated, "With a province-wide diving community of several thousand divers, it is imperative that we have a strong protection mechanism in place to protect these sites from looting divers."

Under our current laws, the Ontario Heritage Act legislation does not specifically address marine issues. For example, words like "shipwreck" or "marine" are not in the Ontario Heritage Act, meaning, people have told me, that the Ontario Heritage Act needs to be supplemented with a clear message on the protection of marine heritage sites.

This bill is designed to deal with some of the current weaknesses with respect to marine protection. As well, beyond Mr Murphy, many other divers, historians and conservationists have argued for something like a new marine heritage act to ensure that the hundreds of wrecks lying in Ontario's waters are protected. It was input like this that pushed me to draft legislation to deal specifically with the protection of marine heritage.

On November 10, 1999, last year, which was the 24th anniversary of the sinking of the Edmund Fitzgerald, I announced my intention. I had a bit of a news conference in the Port Dover Dairy Bar and pulled together our local SOS group, the board of trade, some other business groups and some journalists. At that news conference, a number of groups seemed to like what they were hearing as a minimum first step to controlling what's going on on the bottom of our lake, Lake Erie, and other lakes.

In the interests of time, I'm going to skip some of the historical aspects. Probably the first ship lost would have been the Griffon, in 1679. Over the years, as we know, hundreds of ships and boats have gone down in hundreds of storms, perhaps thousands have gone down if you consider the American side. In fact, I will mention that—my figures here—there was a survey; the US government did a chronicle of the two decades between 1878 and 1898 and reported 5,999 vessels wrecked or foundered on the Great Lakes. Well over 1,000 were total losses.

I want to make very clear, and with many phone calls over the past almost year have made it very clear, that this legislation is not intended to be a barrier to recreational divers. We've all received many, many e-mails with this concern. The legislation, in part, is to educate people that shipwrecks are precious, that they're a non-renewable resource, and we must ensure a balance between protecting and preserving Ontario's marine heritage sites while at the same time encouraging tourism and business, especially in many of these far-flung port towns where shipping commerce is history now. Many of them are certainly in rural Ontario and could use some help.

Over the winter and this spring there has been a lot of discussion concerning improvements to the original draft legislation, again under the category of amendments. This proposed act will make it illegal for anyone to knowingly access or enter a prescribed heritage wreck—when I say “prescribed” wreck, we’re not referring to all the wrecks down there; we’re referring to a handful of wrecks that people would agree need to be protected. I’m thinking of the Atlantic and Lake Erie, the Edmund Fitzgerald, for example. This act will make it illegal for anyone to knowingly access or enter one of these prescribed heritage wrecks or to move part of a heritage wreck or remove silt—and I know this is controversial, and we may hear a discussion of that today—or other naturally occurring substances unless he or she is licensed to do so.

Under this proposed legislation, it would be an offence to remove a protected artifact from a heritage site unless that person, again, is licensed to do so. The act is meant to ensure that divers are careful, as it makes it an offence to damage a marine heritage site or a protected artifact.

Currently, a person who finds a shipwreck is not required to report the location of that wreck, and some divers use this fact to keep newly discovered wrecks or artifacts to themselves. This is natural. Like I say, I’m from a commercial diving town, and over the years a number of people have made a bit of a living doing that. I might mention that a very large number of basements and rec rooms in Port Dover have artifacts from ships that have come out of Lake Erie over the years. The bill requires that anyone who finds a shipwreck must notify the Ministry of Citizenship, Culture and Recreation of the nature and location of the wreck as soon as possible.

Trying to think ahead to the impact of some of these amendments, very simply, with the amendments we’re proposing, there are two classes of shipwrecks: the prescribed-by-regulation sites or prescribed by this legislation, the very sensitive sites, perhaps not yet surveyed; and sites that have human remains, either within them or perhaps on the outside of the wreck. Hence the rationale to prohibit access or entry without a licence. Again, I’m thinking of the Edmund Fitzgerald and others on this list for various reasons—the Hamilton and the Scourge in Lake Ontario, the Atlantic, as I mentioned, the recently discovered Wexford in Lake Huron. All other sites—the other category of wreck—are available for diving on, but there would be prohibitions with respect to moving artifacts or damaging the wreck, of course.

Secondly, with the amendments, this issue of the minister publishing a record of all marine heritage sites: that would mean more work for people who work for the government.

How stands the time?

The Chair: Wrap it up.

Mr Barrett: The minister would specify which on that list—there may well be several hundred shipwrecks on that list. The minister would have to clearly describe those wrecks that are prescribed as heritage wrecks.

I would like to wrap up my comments. I am very pleased to see the delegations here today. My purpose over the past year or so has been to attempt to consult and to generate as much participation—I have sent out news releases and many letters and packages to people. My goal is to foster as much discussion and consultation as possible on what I consider a fairly important issue that, to my knowledge, hasn’t been addressed in this province.

1550

Mr Levac: I’m going to start by indicating on the record that in the first discussion between Mr Barrett and me, I indicated to Mr Barrett that it sounded like he was going down the right road and that it was a very noble thing and the right thing to do. Subsequent to that I have done some homework and have been deluged, as has Mr Barrett, with many e-mails.

I want to point out that a lot of the direction I am being pointed in is the Ontario Heritage Act. There seems to be general agreement that there is some fault in the Ontario Heritage Act, and not necessarily a very large need for Bill 13, if the Ontario Heritage Act were to be amended and corrected to compensate for the lack of mention of marine heritage. So it’s going to be on the table that maybe we had better be taking a good, hard look at the Ontario Heritage Act. But we’re here to discuss Bill 13, and I will be sharing a few moments of my time with Mr Crozier on this side.

What I want to say is that I have reviewed every e-mail that has come to my office, including the ones that ended up in Mr Crozier’s office, and I believe I forwarded them to Mr Barrett as well. Of all the ones I have gone through—and I did it again today to ensure I was going to say something that is correct—every single e-mail had problems with the bill. The e-mails were coming from tourist operators, from municipalities, from individual divers, from clubs—from all parts of the community that is involved and impacted by diving—and indicated to some degree, and in a positive way, that the intent was right and that Mr Barrett’s précis of the amendments, which he was prepared to offer, was a good step. But they still had reservations. So I’m going to state again that I am very pleased to hear the Mr Barrett has indicated his willingness and desire to enter into a very open dialogue and to see what we can do in terms of the best possible legislation the province can put out as far as protecting and understanding the multi-level issue we are talking about in terms of diving.

The simple issue of just the silt has created quite a bit of controversy and discussion, as Mr Barrett pointed out, and I believe that needs to be looked at very carefully. I only hope this doesn’t become an exercise to simply defend legislation, versus entering into the dialogue Mr Barrett is talking about.

Regarding some of the information he started the crusade on—I also put this out as not necessarily a teaser but as a challenge to indicate that when we hear from one source only as to their validity and their reasons for operating and asking for such a bill—the question I would ask

is, of the surveys and the finding of wrecks, are we not re-announcing the find of a wreck? Are we not using materials that have been previously submitted by marine archaeologists? I think we have to be very careful that self-interests are not looked at as simply the reason we need this bill.

That being said, I'm going to wrap up my comments by telling you that I will be listening very carefully. I will be open-minded as to the validity of the bill, compared to whether we should be reinvestigating the Ontario Heritage Act.

I will leave with a little quote that I think we are all familiar with. There is a little joke from elementary school that I am familiar with: if there is something wrong with a screen door on a submarine, you don't close the door. Amendments might not make that screen door on the submarine go away. I think we might have to investigate getting rid of the screen door and adding the metal door back on to the submarine, where it belongs.

I'll defer to Mr Crozier for the rest of the 10 minutes.

Mr Bruce Crozier (Essex): I know my colleague Mr Gerretsen would like to make a few comments, Chair, so if you could let me know when there are about two minutes left, I'll jump off.

I too have a keen interest in this on behalf of some of my constituents, on behalf of the community of Leamington, where I live, and of course on behalf of the diving community at large.

Back in 1992, when I was mayor of Leamington, I worked very closely with John Karry of SOS to begin the process of what has developed into a diving park called ErieQuest. At that time, we looked at the fact that about 275 ships have been recorded as being sunk somewhere in the Pelee Passage between Point Pelee and Pelee Island, which is where I live. To date there are about 50 known locations of shipwrecks in the Pelee Passage.

It was with keen interest that I looked at your bill, Mr Barrett. In fact, the day before it was to be debated, I too was prepared to support your bill. I thought it was the right thing to do, until I quickly got on the phone and started speaking with some people, telling them about the bill and reading the bill myself. I found that even though the intent of the bill is the preservation of marine heritage, I thought it was going to be a barrier to preservation. Not only was it going to make wrecks almost inaccessible or illegal to access; I feel it was going to encourage those who find new wrecks not to provide that information to anyone but a few of their diving friends.

You mentioned that this would only apply to prescribed wrecks. That's going to be a difficult issue to address as well. One might ask, why shouldn't it apply to all wrecks?

But we do want to encourage the diving community from a tourism standpoint. It means some \$4 million in tourism revenue in my area alone. So I want us to work in the right direction, and I want us to do the right thing.

There also has been some question raised about where federal jurisdiction may lie, and we have to answer those questions.

I like the idea of private members' bills passing, because it gives some indication that this Legislature can be open to ideas from all areas. But I too have heard, and am inclined to agree, that you can't take a poorly written bill and correct it by amending it. I think in this case we should get the weight and resources of the government to carry this forward, and it should be done through amendments to the Ontario Heritage Act. I hope we can work toward that end.

Mr John Gerretsen (Kingston and the Islands): Just a very few comments; I don't want to repeat anything my colleagues may have already stated.

I too come from a community where diving is a thriving business. We have over 17 different operators who charter dives. As you can well imagine, in the eastern end of Lake Ontario, with the prevailing westerlies we have, over the years there are many hundreds of shipwrecks in the eastern end of Lake Ontario. So it's a big business for my community, it affects a number of different businesses and it's something we're certainly greatly interested in.

I know there will be some people from Kingston who will be presenting here today and next week as well. I hope they and the others will be listened to and, since this is a private member's bill, that we will keep as open a mind as possible on all these issues and do what's right.

I must say, from the amount of correspondence and the number of discussions I've had with people in my area, there seems to be something drastically wrong with this bill. I hope if at the end of the exercise we come to the conclusion that this is not the right way to go, that we will work collectively toward a bill that will work to everyone's advantage, including the tourism industry which is a major portion not only in Port Dover but also in the Kingston area.

1600

Mr David Christopherson (Hamilton West): I'll be very brief. I think most of what I want to put on record has already been said, so I won't duplicate it.

My colleagues in the House on the day this was introduced supported it in principle to get it into committee. Like my colleagues from the other parties, we've received some of the concerns that are out there. I think Mr Barrett's ideal and his goal are worthy. I hope that by the end of the presentations today, we will have an opportunity to see our way clear to provide the kind of balance everyone can live with and that preserves the heritage that I know everyone, including divers, wants to maintain, bearing in mind that the last thing we want to do is damage both the recreational life of individuals and their right to enjoy their leisure time. The economics of diving tourism need to be given weight, and hopefully at the end of the day there don't have to be winners and losers in this but we are collectively smart enough to find a way to craft legislation that will achieve all the goals. I will start out as an optimist, believing we can do that.

I would say, for the record, that my colleague Rosario Marchese is actually the member of this committee and will be following through on it, Toby. But I will apprise

him of everything I hear today and make sure he gets copies of all the materials so there isn't any loss of continuity of our understanding of the issue.

Let me just say as a footnote that as a Hamiltonian, the Hamilton and the Scourge, warships of 1812 that have been mentioned, are really important to our community. I suspect there are a whole lot of communities that can name specific sites that are of importance to them. We also have a lot of divers in our community. One of the presenters is from my community. So if ever there was a microcosm of our problem, it is there. For that reason, in addition to others, I will be paying very keen attention.

The Chair: Before I invite the first guests forward to make their deputation, I would like to thank them all for responding on such short notice. It needs to be said that of necessity, private members' bills have relatively short notice because government bills take priority. So whenever we have an opportunity, this committee has tried very hard to accommodate the various interests that all three parties have brought forward to us through private members' bills.

Let me say as well, without in any way prejudging the outcome of this bill, that within the last year we've seen an NDP private member's bill on franchising and a Liberal member's bill on Mental Health Act reform both turned into government bills. What happens at the minimum is that we have an opportunity to hear all sides in the debate on a topic, and there's not necessarily one conclusion to that. But I really want to thank everyone who has responded today. The clerk informs me that other names are coming in for next Wednesday, and we hope the word gets out and that everyone who has a point of view has an opportunity to come and make their representation.

ACUC INTERNATIONAL

The Chair: Having said that, our first group today is ACUC International. I invite them to come forward to the witness table. Welcome to the committee. We have 15 minutes for your presentation. You can either use it all for your presentation or leave time for questions and answers.

Mr Robert Cronkwright: Mr Chair, members of the standing committee and Mr Barrett, I would like to thank you for the opportunity to speak to the committee today. My comments will be very brief. The short notice I received regarding this committee sitting hasn't allowed me to correctly put forward a presentation regarding the bill. In addition, I have not received a final draft of the proposed Bill 13, therefore I am unable to speak directly to the bill. My comments will centre around the intent of the legislation to protect our marine heritage.

First, allow me to applaud the efforts put forward by Mr Barrett to preserve the marine heritage that abounds in the waters under the protection of the government of Ontario. The court decision regarding the Atlantic clearly showed a need to improve the legislation. ACUC had always been a proponent of marine conservation and

shipwreck preservation. An integral part of our open-water diver training addresses this concern. Included in my handout are examples of how marine heritage is incorporated within our training program.

Since the original meeting with Mr Barrett and his subsequent recommended amendments to the bill, I have been in conversation with a vast number of ACUC members regarding this very bill and wish at this time to express their concerns.

Number one is that the divers request a list of the sites and locations, if known, of all wrecks in Ontario waters covered by this act. The reasoning is that the wrecks, for the most part, do not carry name tags, and the divers won't know if they have found a new, unrecorded wreck or not. This allows the divers to report new finds. In addition, the location of wrecks that require a permit will be easier to identify if the location is known.

By what method will wrecks and sites be legislated as requiring a permit? Will there be a checklist of criteria used to determine the status of each? If so, this checklist should be published. What will be the procedure for filing to have a site listed as requiring a permit? The concern is that self-interest groups will have wrecks signified "off limits" for their own gratification rather than the actual heritage.

How will sites requiring a permit be delisted, and how will this information be made public? The concern is confusion regarding what dive sites are and are not permitted for diving.

Has any thought been given to how this act will be policed? I suspect that any action taken will be as a result of someone filing a complaint. The recent artifacts removed from the Wexford is a prime example of exactly what I mean.

Unfortunately for you all, page 2 is missing, but it was very brief and I can send you a copy. Actually, I was winding up by saying I respectfully request that these committee meetings be tabled until the stakeholders have a chance to read and comment on the wording of the amended act.

The Chair: If that's the end of your comments—

Mr Cronkwright: That's it.

The Chair: —we'll certainly open it up for questions. We probably have time for a couple of minutes from each caucus, so we'll start with the Liberals.

Mr Crozier: Just one quick question: are there amendments that have been tabled?

The Chair: My understanding is that nothing has been tabled. Mr Barrett, do you want to comment about the status?

Mr Barrett: I have not tabled amendments. I have a list of amendments.

Mr Crozier: But you're referring to amendments, sir.

Mr Cronkwright: I have copies that Mr Barrett sent, suggesting amendments to the act.

Mr Crozier: Would Mr Barrett like to share them with the committee?

Mr Barrett: Yes. That would probably have been last winter or spring.

Mr Cronkwright: Yes, in the spring, in March.

Mr Barrett: That was sent out to about 200 people. Since then, things have gone around the table once again and around the province. I have a more recent list of amendments. It's still a work in progress. I could table that now.

Mr Crozier: It's up to you, I guess. I just want to make the point that nothing has been tabled, then.

Mr Christopherson: There's been enough reference to it by you and now by the first presenter. It would just be helpful. I don't think it precludes you from doing anything. This is not meant to be a controversial arena.

The Chair: I might offer, Mr Barrett, that you could introduce something as a piece of evidence, if you will, without committing yourself to actually reading it into the record, because we're not at clause-by-clause anyway. So technically speaking, it's for information purposes only and the clerk could make copies.

Mr Barrett: I think that would be helpful. Things were moving pretty quickly for us in the last few days as well. In discussions, in the give-and-take, I do have basically a thumbnail sketch of suggested changes. It may need some explanation, but I can make that available. These are solely my amendments; these are not government amendments. I've tried to summarize what we've been doing.

The Chair: Perhaps the clerk could make copies of that, circulate them and offer some for the people in the room as well.

Do we have any questions?

Mr Gerretsen: Just on that point, I have a copy of what is called Amendments to Bill 13, a summary. I assume that since he circulated them to the people who sent him e-mails and letters, this is their response to those amendments that I guess he circulated. So we might just as well see them. In other words, people are responding to your amendments in their e-mails and letters, so we might as well see what they are.

1610

Mr Levac: That being said, I do have a copy of questions regarding the presentation. If you had your way and were able to give the input you're looking for after you get the consultation, your understanding of the bill is that it's headed in the right direction, that there is some type of understanding that we want to try to protect our marine heritage. The question that then begs is this: is it better to amend the Ontario Heritage Act or is it better to implement a private, separate bill on marine heritage?

Mr Cronkwright: I believe a purpose would be served if the Ontario Heritage Act were amended to include marine.

Mr Levac: A follow-up to that would be, as the chairman, Mr Gilchrist, pointed out, we have had private members' bills change directions and end up as government bills. In consultation with this, Mr Barrett has indicated a very willing and open process that allows all of this comment to go in the direction of trying to get the best possible bill for the industry. Would it then be your opinion and your group's opinion that if Mr Barrett were

to put forward an amended bill that the government picks up and then all of a sudden mysteriously turns into a better heritage act, you would be satisfied, and probably more satisfied?

Mr Cronkwright: I would be satisfied if—

Mr Levac: If it covers off the things you're talking about.

Mr Cronkwright: If it covered off the questions I had asked and put in place maybe a little more explanation of just exactly what each point meant.

Mr Levac: That's fine.

The Chair: Mr Christopherson, do you have any questions?

Mr Christopherson: It's a little difficult because things are sort of shifting in front of us as we discuss it. I don't have a lot of special knowledge in this area, but you seem to ask very legitimate questions.

In the interest of furthering the issue rather than any kind of partisan activity, if Toby had the extra time and he could answer some of these questions in a way that would get the conversation going, I'd be quite prepared to defer my time to Toby to allow him to do that.

Mr Barrett: You've certainly posed a number of questions in your brief. There's one thing I wanted to raise: I don't think you made mention of the whole issue of silt. I don't know whether your organization had any thoughts on that. In the original legislation it was written that it would be illegal to disturb silt. At the time my understanding of that was to anchor a barge and a sandsucker over a wreck and start excavating, basically. It was explained to me by divers, who used this term "finning silt," which was a new expression for me. "What if I'm down there diving and my fin touches the silt and leaves a mark? Am I going to be charged by the OPP?" That certainly was not the intention of that. That debate continues.

To my mind, if someone unknowingly disturbs the silt, I don't see that as a problem. Or, say, a commercial fisherman is trawling or dragging and drags or comes up on a wreck, which does happen certainly in Lake Erie, and has disturbed the silt, if they have unknowingly done this—I feel that "knowingly" should be included in the legislation.

To my mind, when you are diving down there—and I'm not a diver; I've spent a lot of time on the surface but I don't dive—I can see it's natural to pick up an artifact or to clear away debris. How sticky should we be in the legislation as far as this issue of silt? Many people have raised that.

Mr Cronkwright: I don't think sandsuckers should be allowed to go in and clean out vast areas of a wreck unless there is an archaeological dig that's going on, at which point there should be some form of a licence granted to the individuals who are doing this. I believe there has to be a specific purpose laid out for the archaeological dig, not just that a group on a Saturday wants to go and explore a wreck.

Having said that, there was no mention in my report about silt. The letter from yourself dated March 13 states,

"I am recommending that the section dealing with entering a wreck and removing silt be deleted from the legislation." So I didn't address that with the divers. It was brought up to me on a number of occasions, what constitutes silt, and I said, "Don't worry about it. It has been taken out of the legislation." So there was no comment there.

Mr Barrett: That was my feeling. However, there still does seem to be a debate on that between people who want access and want to do these things and other people who want to preserve what's down there to the nth degree.

The other question you raised was, and I could answer this in part: how will the act be enforced? I do not see an OPP diver stationed down there on, say, these 20 wrecks that have to be protected, like the Hamilton and the Scourge. A system was set up on the Atlantic. I think this is maybe public knowledge. I will make it public anyway.

As you know, hundreds and hundreds of artifacts were removed from the Atlantic by both Americans and Canadians, and I think they were within their rights to do that. I don't have all the details of that resulting court case. However, after that the Ontario government decided to enforce it and to keep these people from diving on the Atlantic. They had an opportunity with Long Point and the lighthouse and they set up radar on top of the lighthouse—it's a 90-foot lighthouse—to constantly monitor that area above the Atlantic. But that didn't work because lightning would hit the lighthouse. So it's obviously very difficult. The technology isn't there, to my understanding.

I think the answer to your question is the good work that is done by organizations like SOS. Anybody who is in this business—in the dive tourism business, the charter boats—knows darn well that if they're bringing a dive crew back and somebody has picked up something, the captain and the organizers are going to detect that because, again, they lose their business, in many cases, when these wrecks are stripped or altered to any great degree. It leaves us with perhaps self-regulation, and the sincere interest of divers and people in Ontario to ensure that these wrecks aren't stripped and to work together.

There are penalties within this legislation. If someone is caught, there would be highly publicized fines. The media play a very important role. I will mention that this winter I attended the weekend convention of the OUC, the Ontario Underwater Council, and there I noticed a "Wanted" poster and a reward was posted. Somebody had removed a brass plaque off I think a steam engine. I think it was down Kingston way.

Mr Gerretsen: Don't you point your finger at me.

Mr Barrett: I think it was down your way. So again, "Wanted" posters and posting rewards. I doubt they got that brass plaque back. I don't have the information on that.

I think we are looking for partnerships with the dive community and people who are out on the lake. Commercial fishermen are out there when the tourists aren't.

They know what's going on, oftentimes. The Coast Guard may have a role. This is a tough one.

I'll make mention of the Wexford. That steamer went down in 1913 in that three-day storm, as I understand. It was recently discovered by a recreational fisherman, and I think within weeks somebody got in there and started taking items off that wreck. That was just this fall. So what we have now isn't working.

The Chair: Mr Barrett, Mrs Munro has a very brief question.

Mrs Julia Munro (York North): In the comments you made at the very beginning, where you talked about your support for the intent, I wondered, as someone really unfamiliar with the issue in the way that you are familiar, whether or not there is in your mind a distinction or a difference potentially between what people might describe as the tourist diver, if you like, the person we're talking about as part of that tourist industry, and the professional archaeological kind of diving. Is there a difference, or is that a difficult line to draw?

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Mr Cronkwright: There are a lot of, we'll say, amateur archaeologists within the recreational diving field. These divers like to plot out a wreck and go through it piece by piece and look at the wreck as much as they can, whereas the professional archaeologists go in with the full equipment, do a lot of measurements, do very position-specific drawings. So there certainly is a difference between the two.

I would suspect that the marine archaeologists, the professionals, would be looking for specific items or specific places; for instance, the Avro Arrows. I'll mention those, and I'm certain there's a lot of interest going on about where to find those, if they haven't been found already. I don't believe the average Joe diver should be allowed on those presently until all of the historical information has been gotten from them, and then they can be opened to the general public; the same with any of the archaeological wrecks. For instance, a new wreck, if it's suspected that there were bodies on that wreck, should be preserved until such time as it could be investigated. If in fact it was a gravesite then it should be, as far as I'm concerned, banned for all time. You should not be allowed to dive on a gravesite.

There are specific things that could be put into place to handle this type of thing, and the chance of having a marine act such as this would possibly work toward that. But if the Ontario Heritage Act could be amended, it would serve the same purpose without having another piece of legislation.

The Chair: Thank you, Mr Cronkwright. I appreciate your coming on very short notice. Let me just remind you that we haven't set a fixed end to these hearings, and if you have any other thoughts, please feel free to send them either to the clerk or Mr Barrett. I'm sure either one would appreciate it, and they'll be disseminated to all members of the committee.

PROFESSIONAL ASSOCIATION OF DIVING INSTRUCTORS

The Chair: Our next group will be the Professional Association of Diving Instructors, PADI. Good afternoon and welcome to the committee. I just want to declare a conflict as a PADI member.

Mr Randy Giles: Mr Chairman, members of the standing committee on general government, ladies and gentlemen, first, thank you very much for the opportunity to communicate with you today.

As a scuba diver, concerned Canadian, former archaeologist and the Canadian national manager for the Professional Association of Diving Instructors, I would like to share my concerns and offer the expert assistance of PADI in protecting our marine heritage and promoting tourism in Ontario.

First, it is reasonable that PADI's voice be put into context. PADI is the largest recreational diving education organization in the world, with over 100,000 professional instructors and dive masters, 4,000 dive retailers and resorts in over 176 countries and territories training over 800,000 PADI divers annually. PADI Canada's professional members train about 85% of Canada's divers. We're the largest and most active dive industry organization in the province of Ontario.

PADI's official corporate mission statement states, "We are committed to the protection of underwater cultural heritage for the future of divers and non-divers alike." What that means to you is that we are partners in the preservation of cultural heritage. It means that not only do we have no argument about preservation, but additionally, that you have our support in this noble goal.

We have concerns about Bill 13. Our concern is simple. We would like to ensure guaranteed public access to shipwrecks of Ontario. Further, we are concerned that Bill 13 does not specifically protect access. There are many unanswered questions around the issue of access, some of which I will list shortly.

Additionally, we are concerned that Bill 13's development could not move forward without sufficient input from one of the largest, if not the largest, stakeholders in the province. That would be PADI. Put simply, I feel we have much to offer and that our extensive knowledge and experience has not sufficiently been taken advantage of in the development of a bill such as Bill 13.

Bill 13, as it stands, may well not be able to accomplish its stated goals. One of the recent suggested amendments states that the regulations would include a list of sites to which divers could have unrestricted access. Turn it around; why not a list of sites that have limited access? What is the mechanism for determining which ships have unrestricted access and which ones have limited access? Who decides on the access issues? Who has the right to provide input? How is a poor decision appealed?

Surely we have the ability to develop access guidelines that would be fair and clear. PADI feels it is reasonable that the diving community has answers to all of these questions prior to the passing of any legislation.

PADI would be happy to enter into discussions that would assist in the answering of these critical questions.

Ontario is not the first jurisdiction in the world to address the protection of subaquatic cultural heritage. There are many examples from around the world of well-balanced approaches that have been developed by governments, industry and other stakeholders. I am very pleased to say that PADI's expertise has been sought and used many, many times.

PADI has extensive experience in historic shipwreck issues. As an example, if this committee is unaware of the United States federal Abandoned Shipwreck Act instituted by the US Department of the Interior's National Park Service in 1990, then I would suggest it be reviewed. These guidelines were designed for use by both the state and federal agencies in establishing shipwreck management programs. PADI was an active participant and a consultant in the development of these guidelines.

Many jurisdictions feel that the close co-operation between divers and government, guaranteeing diver access to shipwrecks, is an important component in historic preservation. As an example from our neighbours to the south, according to the United States National Trust for Historic Preservation, I'd like to quote three points.

(1) The role of sport divers. Their involvement in managing shipwrecks is critical because the public the shipwrecks are managed for are divers. Divers, through co-operation and education, provide effective self-regulation; for example, peer pressure against looting wrecks.

(2) Due to limited law enforcement personnel—an item that has been mentioned earlier in this meeting—it falls to sport divers to act as the state's eyes and ears. As noted, sport divers and commercial fishermen discover most wrecks. Their concern for the integrity of historic shipwrecks translates to a virtual extension of the state's monitoring authority. They regularly monitor the condition of many of the wrecks and are sometimes able to discover who is looting them through their own information networks.

(3) It is to state managers' advantage to enlist the aid and services of sport divers. Some shipwreck program managers have devised incentives for sport divers to encourage them to be more forthcoming with their knowledge of new wreck sites so that the states can begin to make some headway in developing an inventory file and attempt to evaluate historic significance. Some states try to motivate divers by providing educational outreach in the form of lectures, courses, brochures, slides and films. Other states encourage disclosure by giving credit and publicity to divers who voluntarily report new sites or return to it souvenirs collected and kept. Artifacts on public display are credited to divers who returned them to the state, and photographs of co-operative divers are circulated in newsletters and other periodicals.

The US Abandoned Shipwreck Act stipulates reasonable public access and guarantees recreational exploration of shipwreck sites. I'm going to state for you some

of their guidelines, keeping in mind that this is just one jurisdiction. If we had enough time today I could go over hundreds of jurisdictions with you that have tackled this problem in very effective ways. I'm going to suggest to you that we might not need to reinvent the entire wheel.

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"Guideline 1: guarantee recreational exploration of publicly owned shipwreck sites. At a minimum, any person should be able to freely and without a licence or permit dive on, inspect, study, explore, photograph, measure, record, fish at, or otherwise use and enjoy publicly owned shipwrecks (including historic shipwrecks and shipwrecks whose historical significance has not yet been evaluated) when the use or activity does not involve disturbing or removing parts or portions of the shipwreck or its immediate environment."

Their point is to create the access but to control the parts of access that become the issues.

Their second guideline is to establish lists of shipwrecks having recreational value. Their third point is to facilitate public access to shipwrecks. Their fourth point is to consult with interest groups prior to imposing any restrictions on access. Their fifth point is to regulate access at few, if any, shipwrecks.

Other Canadian jurisdictions have had excellent results by working closely with the diving community. In many parts of the world the UASBC, which is the Underwater Archaeological Society of British Columbia, is looked at as the ideal model for marine heritage management. Here, active divers enhance the work of heritage conservation without the necessity of any types of restrictions that have been alluded to in Bill 13.

I would like to offer PADI's assistance in helping to develop an approach that reflects on existing excellent models from around the world while incorporating any specific measures that may be unique to Ontario. I'd like to at this point invite any questions or comments you might have that I might be able to shed some light on.

The Chair: Thank you very much, Mr Giles. This time the questioning will start with Mr Christopherson.

Mr Christopherson: In your opinion, do you think amendments can be made to the existing bill that's before us that will work, or would you advocate that we need to start from scratch, or amend the Ontario Heritage Act?

Mr Giles: I would not go forward with the existing bill. There are too many problems with it. I would have to take a very good look at the heritage act prior to commenting on it, though I have reviewed it briefly. My brief review of it was that it seems quite sound.

Mr Christopherson: When you mention the BC experience, I'm assuming that when you make reference to it, it's because you had both sport divers and the people who are advocating the preservation of heritage wrecks onside with the bill.

Mr Giles: Absolutely. What the British Columbia government has done is provide some minimal funding. I think in the case of BC—don't quote me on this—it's probably around \$20,000 a year. The provincial archaeology people are involved. The group is educated by

both the government and—because they are a keen group of interested people, they want to do this right. They take great pride in discovering, listing, identifying and recording the history of the wrecks. Plaques are put on the sites; the sites are posted. There's a great and fantastic honour system. By the way, at the end of the day you're going to be stuck with an honour system, no matter what you do, until the OPP can spend 24 hours a day underwater on each of those wrecks. The way to do this is to get the buy-in from the community that has access.

What I hear from the members out there, the divers in the communities, is, "These are our wrecks. We found them. We're the ones who spent the time and the money and the gas in the boats and bought the GPS and went out and found these things." The Ontario government isn't going to come up with the funds in short order to go and identify all of these wrecks. So you're stuck with these people one way or another. The trick they've done in BC is that they've brought these people into the fold. Anybody who's interested in underwater archaeology for the most part gets involved with that group and they are taught proper protocol—I used to teach with the underwater archaeology; I mentioned to you that I have a background in archaeology—so they would understand the issues of how to protect a site and what's going on there.

Mr Christopherson: Have there been measurable results that you can compare? Is it actual legislation, or guidelines? What is it?

Mr Giles: It's not legislated. It is an ad hoc group with co-operation from the government.

Mr Christopherson: Are there results that can be studied that show before and after to prove that it's successful?

Mr Giles: Yes. It would take no great deal of homework to take a look at it and learn that they've been able to find wrecks that have been on the list for a long time, because they have a coordinated effort. They have combined the resources; they have encouragement and recognition in the community. They are very active and have found, listed and categorized many of these wrecks.

Another piece to share with you is that a wide amount of the wrecks that are down there today, regardless of all the protection you can provide, are not going to be there in 20 years from now. Mother Nature is taking its toll. One of the things we hope to do—and in the archaeological world this is always true—is to seek the information while the information is still extant. Once that's gone it's gone forever. Sometimes these things actually work to our benefit, when managed properly.

The Chair: We have time for a very brief question from each caucus.

Mrs Munro: I appreciate your comments and your comparison with BC as a model. We've had a number of people make suggestions with regard to amendments to the Ontario Heritage Act. In what way would that be different? What are we talking about as an amendment?

Mr Giles: First of all, I did not say and did not mean to be taken as saying that I thought we should amend that

act. I stated that I was unfamiliar with it in its complexity.

Mrs Munro: I appreciate that.

Mr Giles: So I would have to take a look at that.

The thing we're driving for here is what comes from Toby's big heart and his right-minded approach to begin with: to protect our heritage. We need to do that. Our organization is a global organization and we have that stated in the values of our company. It's right there for everyone to read. We feel it is so very important. So when Toby came to us with that as a goal, there's a full salute to that.

The trick is that we also have to be pragmatic in how we go about doing that. The thing is that a piece of legislation, despite the fact that its heart may be in the right place, if it's ill-founded is not going to accomplish those objectives; it just might make things more complicated. I would say that what we need to do is take a look at the answers to the questions I have listed here. If those answers are found within the Heritage Act, then that is something worthy of a debate. We would love to see what those answers are prior to committing to anything. You wouldn't buy a car before taking a look at it or giving it a test drive. We shouldn't accept legislation until we see exactly what it is and how it impacts the community.

Mr Levac: One quick question: are you familiar with Scott McWilliam?

Mr Giles: Yes, I am.

Mr Levac: Scott McWilliam shared with me almost verbatim the concerns you've voiced, that the bill should actually be dropped and then we work collectively as an entire community and industry for the same premise that Mr Barrett is after but is ill-guided.

Mr Giles: Right. The goal versus the means.

Mr Levac: Exactly. In making that statement, Mr McWilliams is identified as an expert. Would you concur that he is an expert in this area?

Mr Giles: Mr McWilliam is a very informed individual. I have reviewed much of his material and have found it not lacking in any way. I think that anytime you can bring someone who has a passion for archaeology and experience with archaeology into the fold, we can't help but come a step ahead. Even if it's a contrary opinion, we need to hear it.

Mr Gerretsen: One very quick question. I understand that there are thousands of wrecks when you include the entire Great Lakes area. How many of these wrecks would you consider to be heritage wrecks?

Mr Giles: If you're speaking to the archaeologist in me, you're going to find that is one of the biggest, longest-outstanding debates, but I think that is a matter to be determined by a broader group than just myself. Heritage means many things to many people. Even as we've seen in this country, as the years have moved forward we have defined heritage more broadly as we see new issues. I would say that we need to sit down and take a look at a lot of the general questions and examine what others have taken a look at in terms of heritage and share

from there. I don't have an easy answer for you. I wish I did.

The Chair: Thank you, Mr Giles. We appreciate your coming forward today. I'm sure Mr Barrett will avail himself of your expertise as we move forward on this.

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SAVE ONTARIO SHIPWRECKS

The Chair: Our next presentation will be from Save Ontario Shipwrecks, Mr Tim Legate. Good afternoon and welcome to the committee.

Mr Tim Legate: Good afternoon. Thank you very much for the opportunity, on behalf of SOS and myself, to be here. It's been very interesting listening to several of the comments and where the bill is headed.

First of all I'd like to personally thank Mr Barrett for bringing forward his bill. I think it's been one of the most important milestones in marine heritage to come along in many years, not so much because he's got a wonderful bill, but because he has elevated the discussion; he's brought it right up to the forefront, he has a bill before the Legislature, and you gentlemen and ladies are sitting here today really looking at the issues of Ontario's marine heritage and the pros and cons. I think we've come further in that with Mr Barrett's legislation since November than since we started to look at the amendments to the Ontario Heritage Act some 10 or 12 years ago.

First of all, I'd like to tell you a little bit about Save Ontario Shipwrecks. We are a volunteer provincial heritage organization. We're totally volunteer. We were incorporated in 1981. The aims of our organization are the study, preservation and promotion of an appreciation of Ontario's marine heritage. We have chapters right from Ingleside to Windsor and up to Thunder Bay. We're pretty well all over.

I guess we are one of the few marine heritage organizations in Ontario; there are several others more local in nature. We are primarily sport divers. We are the avocational archaeologists you've heard mentioned, and therefore we are also the dreaded special interest groups you have heard about.

Myself, I've been a diver and a scuba instructor for over 20 years. I've got some 2,000 dives under my belt. I've been involved in marine heritage for the last 17 years—SOS, POW and so on. I've held some archaeological licences for study under water, and I've been involved in several. I worked very closely with the Ministry of Citizenship and Culture for years and years.

That having been said, I do feel there are some major problems with the bill. First of all, to answer one of the questions that has been going around, Save Ontario Shipwrecks believes very strongly that Ontario needs a distinct Marine Heritage Act. Amendments to the Ontario Heritage Act won't cut it. Why? First of all, because the Ontario Heritage Act was designed with land-based sites—buildings and structures and so on—in mind, and

really addresses that sort of issue, a lot of which is on individual property.

The other point is the serious distinction between marine heritage and land-based heritage. What is that? Basically, it speaks to value: what is the value of Ontario's marine heritage? A lot of the debate you're hearing today stems from the answer to that question. Well, the answer is really twofold. There is a very major diving-tourism-recreational component to value. That brings economic values, where all these people want to dive. In Ontario, the only place to really dive is shipwrecks. There are other places, caves and so on, but primarily the diving that goes on in this province is shipwreck diving.

On the other end is what I would call the heritage value. What can these sites tell us about our past and the development of Ontario? The committee needs to understand the nature and the scope of what I would call Ontario's marine heritage. The bill as it's worded is the Ontario Marine Heritage Act, not the Ontario shipwreck act. Ontario's marine heritage is far more than just shipwrecks. We have submerged towns and villages. We have inundated aboriginal sites. We have underwater caves with fossils that have washed out of the limestone and are sitting on the bottom as wonderful paleontological sites. All of these are more or less fragile and, as they are visited, tend to deteriorate. So the first thing I would request would be a broadening of the definition of Ontario's marine heritage in this act to encompass all of these types of sites. I think there is also a submerged forest down in Toby's area that we've come across, is there not? So it's an incredibly broad field.

Secondly, it's out of sight, and anything that's out of sight is difficult to manage. The best analogy I can give the committee is to take the Royal Ontario Museum, turn off all the lights, remove all of the cases, remove all of the security guards, don't keep any log of who's going in and who's coming out, spread all the stuff around the floor, and who cares where anybody walks. That's sort of what a shipwreck site looks like.

I will make a statement that my colleagues can argue with or take issue with if they want. I don't care how good a diver is—and I'm pretty fair—you cannot dive inside and around a shipwreck without doing damage, period. As you visit these sites, they will be damaged. That's just the nature of the beast. The same thing happens with the pyramids, the same thing happens with everything. The more people go through, the more damage it does to the sites. We have wrecks out in the Brockville area, where I'm from, that get 200 to 300 visits a day. You've got divers swimming through, their bubbles are going up—even if they don't touch the wreck, the bubbles are going up, carrying silt, knocking off punky wood and so on.

Shipwrecks may look fairly solid but they're really not. The water over the last 100 or 200 years has been washing away the structural integrity of the wood itself, and if you put your hand on it and pull yourself around a corner, you rub some off. One diver, more or less, isn't

going to do a lot of damage if he's careful, but put 3,000 divers on it in a year and, the next thing you know, that corner is now all worn away.

Does this mean that SOS wants to legislate divers off wrecks? Not in any way, shape or form. This is who we are. We love to dive on shipwrecks. We're there because we want to be. So what does this really mean? What it means to me is that we have a wonderful resource there, which is non-renewable, largely, I hope—because who wants to see more wrecks go down—and we must be as careful with it as we can. Yes, by all means have access, but there are some wrecks—and in the several hundred e-mails that we all played with last November, most of them will begin with, "Yes, we all agree that some wrecks need protection, but I want to be able to dive any wreck I want." Somewhere there's a balance that has to be struck. In the amendments Mr Barrett is proposing, I think he has the right idea.

I envisaged three classes of marine heritage sites; one would be a fairly robust site that had very little heritage value and so, "Go dive on it all you want. We don't really care. It's not a big issue. Go play." I might cite the Wolfe Island wreck that was put down in Kingston as a dive site as an example of that sort of thing.

The next class would be the vast majority of shipwrecks, which are interesting dive sites, have a very strong recreational component and probably a less strong heritage component. These sites should be freely accessible to divers but not with freedom to do anything you want to do. With access comes responsibility. I believe that the dive community has a duty of care when they're on these sites to look after them. Anybody defacing or damaging them diminishes the value significantly, not only from a heritage point of view but from a recreational point of view. If somebody wants to go down and do a significant amount of damage or take stuff off it, that diminishes it for me. So you're going to have to figure out whose toes you want to step on, and you're going to take some flak.

The third class of wreck we've already mentioned, things like the Hamilton and Scourge, the Atlantic, maybe the Wexford. I think there are some sites that we need to be extremely careful what we do with. That doesn't mean to say we can't let people dive them, but I think some mechanism needs to be in place where we say, "All right, Mr Legate, if you want to go down and take pictures of the Hamilton and Scourge, first of all, do you have the capability of doing it with a minimum of damage? Secondly, when are you going to go? How are you going to go? What are we going to do with the material you bring back up?" Let's just make sure that everything makes sense. "Mr Legate, if you want to be down there on the Hamilton and Scourge and do an archaeological project which is going to dismantle the entire wreck"—once you tear it apart, as they did in Red Bay, you can't put it back together. We don't allow that indiscriminately either.

Somebody needs to make the choice. Who should that be? Well, who owns these things? Who has the value of

heritage? I had this discussion with a number of people over the Internet and, I'm sorry, Mr Diver, it isn't yours. It isn't mine. It belongs to the people of Ontario and the people of Canada. A lot of the immigrants, in the immigration to this country, went through the Great Lakes. So whether the guy in downtown Winnipeg who likes to play tennis knows it or not, this is part of his heritage, and at some point he may have some interest in it. So it's not just the dive community that you need to take account of; it's your other constituents.

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On the other hand, significant wrecks such as Hamilton and Scourge have absolutely no value if nobody ever looks at them or goes down and does the archaeology. Those things have been known for 25 or 30 years; nothing has been done. An archaeologist will say, "That's fine. Somebody will come along in 100 years and do it." They have that long-term mindset, and maybe that's no a bad approach.

The other major thing with this bill, and anytime you're looking at this kind of legislation, is to keep in mind the level of resources the province is going to be prepared to put at marine heritage. We've been in the marine heritage game for 20 years, and Save Ontario Shipwrecks and the Ministry of Citizenship and Culture have been one of the leading partnerships over the years—and with that I'll include POW; sorry, I didn't mean to miss you—in bringing on avocationalists when it was not cool to do so. Notwithstanding that, the province's total dedication to Ontario's marine heritage at this point is one guy and a secretary in one office. Give me a break.

I'm not lobbying. I don't want millions of dollars for SOS. But when you consider that there is marine heritage in every single river and every single lake, and that it is probably easier to get information out of a marine heritage site than out of a land-based site—and I cite South Lake, for example, where instead of bringing up little pieces of Indian pottery and spending hundreds of hours trying to put the jigsaw puzzle together, these guys are bringing up entire pots. It's stunning what's under there. But we don't know it all because nobody is looking. The government doesn't have the resources and isn't prepared to allocate resources, and I understand that. We've got bigger fish to fry. But when you're considering how we're going to handle this, the point has been made, and it is absolutely true, that it has to be with the goodwill of the dive community and it has to be basically an educational effort.

Sometimes you start to wonder. Last weekend they opened up a new wreck in Kingston, and I heard about three divers who were sitting inside a lifeboat hanging from a davit. Hello. That isn't going to stay long. What are you going to do? Do I want to keep them off? No. I'd like to give them a little brick alongside the ear. What do you do as a diver? Last year we watched someone on a shipwreck grabbing beams and trying to rip them off—just for fun; no reason. These guys either just don't know it or don't get it.

From my point of view I want some legislation where I can go and talk to this lad and give him this little brick alongside the ear, and if I find him doing it again, there are some people we're going to have to get somebody else to come and stomp on a little bit. How we do that, I'm not 100% sure.

I'd like to open up for questions. If someone takes issue with me or if you guys and ladies have any questions, I'd love to look at it.

The Chair: Unfortunately you've taken the full 15 minutes, but we've been a little flexible with each group so far. This time we'll start the questioning with the government, but I'm going to limit it strictly to one minute per caucus.

Mr Barrett: You indicated three classes of wrecks, and I assume these would be on a list. My amendment proposes two classes that prescribe, say, those 10 or 20 wrecks you would basically need a licence to go on. You could go on the other ones, but don't damage them. This actually came up earlier today: does the minister decide, do the bureaucrats decide which are the precious wrecks, or do we need a board of some kind drawing on—I look at the expertise in this room today. Any suggestions?

Mr Legate: It makes sense to me. I think the board makes a lot of sense, and that board should include some sport-diving people, some archaeological people and some lay people. Somebody has to come up with this balance somewhere along the line. I think the legislation and the regulations need to spell out what is important in each area.

One thing I forgot to mention is that the reason I came up with three sites is that on the average dive site I would really like to see it mandatory that there be a mooring in place if somebody is going to go there with a charter or take students on these sites. More damage is being done by anchors of boats going into shipwrecks than there is by people swimming around them. It's a really serious problem. I think we need to attack that head-on. In that regard, it would be really nice if we could pry some money out of the province. Again, that will be a real co-operative venture between the two, where these moorings get installed. But I think that for the vast majority of those wrecks that are being commercially exploited it be required for them to have moorings.

That having been said, you also need to understand a little bit about the dive industry: there's not a lot of money in it. A lot of these boats, these charter operators, are guys who are semi-retired and they're just trying to get enough money for to pay for their boats. So they're not making hundreds of dollars here; these are just break-even propositions.

Mr Levac: I'll be brief. It sounds to me like you have indicated that you do have some problems with the bill because of the scope and everything else. Our previous speaker offered some suggestions. I guess the best question we can ask at this moment—because I think everybody has come to an agreement that there have been some real concerns with the bill and the process—is that you're definitely not in favour of looking at the Ontario

Heritage Act as a vehicle to correct that problem, except would you, along with the other groups that have made the offer—and I'm sure the rest of the groups will make the same offer—assist us to create a hybrid of Bill 13?

Mr Legate: Underwater Canada, Save Ontario Shipwrecks and the Ontario Underwater Council agreed and have a memo of understanding that we will co-chair a forum on a marine heritage act. One of the reasons I'm a little skeptical about the Ontario Heritage Act is that I was involved in its revision starting about 10 years ago. I've watched it work through. There's one sitting on the shelf, but it isn't going to go anywhere; fair enough.

The answer to your question is yes, we will work together and we will host and provide the forum for that.

Mr Levac: I thank you for that, because that, to me, is what we're looking for. I'm absolutely convinced, and I won't speak for Toby, but I do understand the intent of what he said earlier, that that's what he's looking for. I don't know that we're really reinventing the wheel, except getting the best possible legislation we can.

Mr Christopherson: If I could pick up where Mr Levac was, Mr Giles talked a lot, and I was asking questions—and I know you were here—about the BC experience. Would you concur that that's a model that (a) works for BC and (b) would achieve the goals that certainly you at SOS would like to see?

Mr Legate: Largely that is true. I've worked fairly closely with Tom Beasley, who was the previous president of UASBC, and we've had a lot of discussions. Their experience is a little different from ours, but it's still very much along the same lines, and he would be an integral part of that forum. There is also some very interesting stuff going on in Australia where on their significant heritage sites they mark off an area of about 200 hectares and boating and diving is not permitted in there. So for the police, from the enforcement side, if you find a guy sitting there on top of his boat and he's got a bunch of scuba tanks, he's got an offence right there and that's all you have to worry about. You don't have to prove he was down there; you don't have to prove he did the damage. That would be for the very few sites which you want to be really careful with.

One other point: you talked about limiting diving on sites with human remains. We have wrecks in Kingston that are dived constantly that have human remains. I will pose the question: what do you do when you come across human remains on a shipwreck site? Why is it any different than if you came across human remains in a national park? First of all, how do you know that what you found belonged to the shipwreck? How do you know it wasn't that somebody killed somebody and dropped the body there? Do you leave them there? Do you cover it up and turn it into a gravesite? Do you put a headstone on it? Do you bring them up and re-inter the bodies? I don't know the answer to those. But if you're going to limit that, you're going to take out probably 20% of the known wrecks now that are dived. Yes, we have had to take back the odd jawbone and put it back where it belonged, and that's happened in Kingston several times.

There are people out there who just don't get it. What can I tell you?

The Chair: Thank you very much. I appreciate your coming all this way to make a presentation today.

1700

KINGSTON DIVING CENTRE

The Chair: Similarly, from the Kingston area, our next presentation will be the Kingston Diving Centre. Good afternoon. Welcome to the committee.

Mr Nick Drakich: Good afternoon. Thank you for having me speak at this committee meeting. Trying to follow up on what has been stated before by the other presenters, again you have to look at working with the diving industry and working with the divers with respect to any legislation. I'm a director and owner-operator of Kingston Diving Centre. I'm in the diving tourism business. I'm a member and a past director for Preserve Our Wrecks, Kingston, a marine heritage group for preserving shipwrecks. I'm a member and a past director for the Ontario Underwater Council. I've been involved in diving since 1967, with marine heritage for the last 20 years and with the diving tourism industry in the last 10.

I've seen a lot of changes over the years: 20 years ago you had one in every 10 divers taking artifacts off the shipwrecks; 10 years ago maybe one in 100; today, maybe one in 1,000. We have through our own self-regulation improved the preservation of the shipwrecks enormously. With respect, as Tim mentioned, the moorings, the anchor damage had been the greatest damage to the shipwrecks. Preserve Our Wrecks puts moorings out every year, and with that we've had a lot of protection and saved a lot of damage that could have taken place. What we have is the industry working together and also working together with the government and government agencies.

The situation where I have a difficulty with Bill 13 is that up until now shipwrecks in the Great Lakes have been under the jurisdiction of the Canada Shipping Act, the federal jurisdiction. That has addressed the shipwrecks. When somebody finds a shipwreck, you have to report it to the receiver of wrecks at which time determination of ownership is made by the receiver of wrecks. This has been the only real protection we've had in place for the shipwrecks, and many have felt that that has been inadequate. I believe that Mr Barrett brought forth this provincial legislation, this bill, because the federal legislation has not been adequate. However, the federal legislation is being revised. Bill C-35 has already passed first reading and is being reviewed. The Canada Shipping Act, part VII, with respect to shipwrecks, is being revised to cover heritage shipwrecks, to actually put in better protection.

What I find with having provincial and federal legislation, two different pieces of legislation, coming forth, is a conflict being created here with the establishment of Bill 13 and Bill C-35. So the issue has to be re-addressed with respect to what's happening with the federal legis-

lation and there has to be greater provincial and federal co-operation in working on developing this preservation.

I'm not very familiar with legislative procedures or how the legislators work together on these issues at the different government levels, or if they do. I am having to deal, though, with whatever legislation there is, and there have been a number of—again, this is one matter that is coming up. Within the issue itself one of the points that has not been mentioned has been ownership. As I've said, you had to go to the receiver of wrecks to establish ownership. To my understanding, that still is the law and that means Ontario, wishing to establish ownership of a shipwreck, would have to go and establish it through the receiver of wrecks, as everybody else does.

I have my limited understanding of the process here, but we do have a conflict when we have legislation already in place and we are now looking at bringing in new legislation. We are creating a conflict. I don't think we need to create that conflict.

I think Mr Barrett has brought this issue forward because it needs to be addressed. As to Bill 13 addressing it, I think it was drawn up without realizing all the complexity of the issue. The months that it has been developed are very little compared to the years the Canada Shipping Act has been developed and the part with respect to shipwrecks.

I would like to see something else done in place of Bill 13 to accommodate the federal legislation and have everyone working together to come up with a method of really preserving the wrecks and allowing the diving industry to grow. It's something that hasn't been mentioned.

The other issue that hasn't been mentioned is ownership and liability issues. We're evolving from that. If you take ownership of a shipwreck, what are you liable for? What do you have to do with respect to that? Is there actually a need to establish ownership? I believe that in British Columbia they don't establish ownership; I think Randy talked about that. They allow access to the shipwrecks and they also protect the wrecks, saying you're not to take anything or destroy anything. This is what we're looking at. Ownership is not a matter of whether somebody owns a shipwreck or not; they can be protected without having to establish ownership. I believe that can be done. That's it.

The Chair: OK. Thank you. You've left time for a very quick question from each caucus.

Mr Gerretsen: Thank you very much, first of all, for coming here on such short notice, Nick. I understand you were only advised that there was time available maybe a couple of days ago, so thanks for that.

Could you just address the tourist potential? You're an operator. What would it mean to your business if this legislation, the way it sits right now, were passed?

Mr Drakich: The biggest point is restriction of access for tourism. We're competing with the state of Michigan; they're there in the Great Lakes. They actually have a written guarantee of access in their legislation to allow sport diving, people to go and visit any shipwreck. This

is a big drawing card for them. They have been able to advertise this and get tourists to come there and go diving.

For Kingston and the Islands, for our area—for all the Great Lakes in Ontario, actually—we have a lot of divers. The bulk now are starting to come from the north-eastern United States. They come here with their tourist dollars. That's money coming into Ontario, money coming into Canada. If you take away that access, if you can't guarantee them that access, they will be looking toward Michigan or going to the east coast. It takes away from our ability to draw the tourist dollar in. So it would be restrictive access. Again, I had this discussion with Mr Barrett. It was my key argument, when I had met him, that we need to guarantee access or we will lose our business.

Mr Christopherson: A question, and if you aren't able to answer it, then maybe Mr Richmond can enlighten us or commit to it: what is the separation of constitutional responsibilities with regard to the federal and the provincial over the shipwrecks? Does anybody know?

The Chair: Do you wish to comment on that or are we going to ask the researcher?

Mr Drakich: I don't have the legal expertise down. To the best of my knowledge, the shipwrecks are actually under the federal jurisdiction of the Canada Shipping Act.

Mr Jerry Richmond: I will convey that concern to one of our staff lawyers and they will prepare an appropriate memo for the committee. We will clarify.

Mr Christopherson: I think it's very important because, first of all, we want to make sure you're in areas where we can legislate, and second, if there's an overlap, and I suspect there might be, then we want to make sure there's coordination going on, particularly if the feds have already got a bill in the House, as we heard here today.

Mr Richmond: We will clarify that.
1710

Mr Barrett: Thank you, Nick. We met at the dive show last year. The issue with the Canada Shipping Act, I do know last November, came up and it was unclear where it was heading or when that would be wrapped up. For that reason I did make an amendment under section 10, striking out the phrase "on the day it receives royal assent," if this is passed, and substituting "on the day to be named by proclamation by the Lieutenant Governor." My understanding was that this work with this legislation wouldn't get the final seal until we find out what the Canada Shipping Act is going to say. We're left hanging. I understand that's why we will wait on the Canada Shipping Act. How long would we wait? There may be a federal election. I don't know what impact that would have on that bill.

I might mention too, in the amendments I'm suggesting that section 3 be eliminated. That states, "The crown in right of Ontario owns every heritage wreck and protected artifact." We could delete that. We don't own them. But again, with that Atlantic case, at that time

when the California pirates, as I refer to them, were diving and removing artifacts, it seemed for a while that Ontario or Canada couldn't prove that we owned that wreck even though it was on crown land. There was a court case, as I understand, that determined Ontario owned it, although the artifacts did go to the receiver of wrecks.

Whether we want to own them or not, diving is a fairly risky business, whether the people of Ontario want to take on the liability of people who are diving. These are some questions that are unanswered that I'm hoping to accommodate in these two amendments.

The Chair: Thank you, Mr Barrett, and thank you very much for coming all the way from Kingston. We appreciate your comments very much.

DIVER CITY CHARTERS

The Chair: Our final presenter this afternoon will be Diver City Charters. Brian Taylor, good afternoon and welcome to the committee.

Mr Brian Taylor: I'd like to thank everybody for listening to me too. I'd like to try and figure out what hasn't been said. Everything I have on my checklist has been checked here, so I'd just like to maybe reiterate on a few key issues.

I'm owner-operator of a dive charter business. I'm a member of Preserve Our Wrecks. I've filmed wrecks for Presqu'île museum. I've been working with marine heritage and dive tourism for the last 10 years.

One of the things that Bill 13 doesn't address is anchoring. I'm not saying particularly divers; I've as many times come across fishermen using these wrecks when I'm out there on the water. Preserve Our Wrecks has provided moorings and some kind of policing for this for a number of years. Nobody has really talked that much about Preserve Our Wrecks. I feel that their work with the coast guard—in the past the coast guard has helped put these mooring blocks, which are massive, several tonnes, and a good thick line, maybe several inches in diameter—they're expensive. These are raised through private donations and charitable donations. They've been doing a great job on this.

I haven't seen too much on Bill 13 regarding this. I think after today these issues probably will be pointed out and dealt with. I'm a PADI instructor. A lot of the things that Randy said reflect my personal training and my understanding of what heritage is. His mission statement is probably very similar to mine.

Another point I'd like to bring up is human remains. Several of these wrecks we are diving right now have human remains. I don't know how to deal with that issue either, but I'd hate to see wrecks closed for diving on that one point because they have been dived for the last 10 to 15 years without any disturbing of the human remains, and several people know where they are.

Self-policing comes into this. The charter boat guys are the ones who are on the water. We see the OPP out there but they don't venture more than a couple of miles

from shore. We're 12 to 15 miles from shore. I can't see the OPP having jurisdiction that's working when we're over the horizon. They can't even see us from shore.

That brings up the lighthouse issue with radar and stuff. I think they're tearing down lighthouses too. Where are we going to put these things?

How this is going to affect me is I'm a full-time charter operator, one of the few, who makes my living entirely on charter operations. It's only about three or four months of the year, so I have a long time to repair my boats in the wintertime.

With the added regulations from the Coast Guard, they also have stepped up their monitoring of the vessels to make them safer. I don't know if this is a result of developments that have happened in the Great Lakes, but we already pay money to the Coast Guard for maintenance of the navigational buoys and they already have a substantial contribution in the mooring buoys. This is a federal concern. Again, as Nick said, I'd be interested in seeing how Bill C-35 handles the whole heritage issue.

If Bill 13 does restrict diving or even the regulation incurs more cost to the dive operators, this is going to make it so we can afford to run fewer boats. The sport is growing. There are more divers than there are boats right now in the Kingston area; it's a huge resource. This not only affects the divers; the dollars they spend in Kingston on a charter, maybe a quarter of that would go to the actual charter. The major expenditure is in hotels, restaurants, night life, fuel to get here and back from home—which can be far away, it can be the northern states, it can be Quebec; it's people from all over the northeastern North America—kids' day care even comes into it, entertainment, souvenirs, tips and gratuities for the people working on the boats and in the restaurants. It will all be lost forever if these boats go off the water, if the opportunity for the dive boats fades away due to overlegislation or just cost, which is what I'm worried about. It's killing a market that's growing that I'm worried about with this bill.

That's about all I can add. Again, the bill is well-intended. Heritage is—without these wrecks, I don't have a business. So I certainly applaud the intent of the bill; I just hate to see things get all bogged down in legislation or tying up these wrecks for years and years while bureaucrats decide what we can dive on—the class 1, class 2, class 3 wrecks. Access is the key, to reiterate what everybody else has said. I'd like to see the access guaranteed on the wrecks.

The Chair: This time the questions will start with Mr Christopherson.

Mr Christopherson: Just to see if we've got total unanimity—which does not happen very often around here at all—are you like-minded in thinking that there's a way to achieve all the goals that we have, both by looking at other models and being somewhat creative?

Mr Taylor: I think looking at other models is a good idea. I'm not sure that Bill 13 can be torn apart and put back together or whether it should be new legislation.

Mr Christopherson: But the goal of finding a balance that everyone can live with, without having a world of winners and losers, you think is achievable too?

Mr Taylor: Absolutely, there's a balance out there, for sure. I have been on wrecks and I have seen people bringing up items that are artifacts, that have been hundreds of years old, and I have been instrumental in replacing these artifacts back on the wreck. With each dive crew that I send down, with each group of divers, it's right in my speech when I'm telling them about the wreck. I tell them what they're going to find on the wreck and I tell them not to touch it; to leave it there for other divers. Education is key. When I'm teaching divers in my open-water course, I touch on this subject several times over five or six nights of training. We get back to what they're going to see on the wreck, because a lot of these guys think they're going out treasure hunting. So you have to educate. Most people are not ill-intentioned; I think it's only a few people who actually are going to go out and pillage the wrecks. Like Nick says, 20 years ago maybe one in 10 divers brought home a souvenir; 10 years ago maybe one in 100; now I think it's probably less than one in 1,000. I think those numbers are pretty close.

Mr Christopherson: Thank you very much for your contribution today.

1720

Mr Garfield Dunlop (Simcoe North): Mr Taylor, up in my part of the country, we're on Georgian Bay so we only see the Coast Guard, but I'm curious about the jurisdiction with the Americans when you get into Kingston and the Thousand Islands. Do you ever come across any kind of disputes?

Mr Taylor: They have guns on their boats. I don't have guns on mine. We don't dive too much in US wrecks. We don't do money transactions on their side and vice versa. That's basically the way it works. Now there's a fine line there, but we don't run into it that much.

Mr Dunlop: So it's not very often that you hear of a dispute of where the wreckage actually is?

Mr Taylor: Oh, the wreckage is on GPS coordinates. We can tell within 10 feet of where that is. If that is on one side of the dotted line or the other or if it's split in two, we can tell immediately. As far as I know, all the dive shops on the US side work in conjunction with us. It's a very good working relationship right now. I don't know of any issues. Most of my divers, by the way, are American. I would say probably two thirds of my divers are from the States, bringing tourist dollars in.

Mr Gerretsen: I just have one question. Thank you, Brian, as well for coming on such short notice. I know you can only speak for yourself but obviously you've got a lot of contacts with a lot of the other professional charter boat operators etc. Would you say that the attitude you've displayed here today, the kind of warnings or the kind of instructions you give to the divers, is standard with respect to most of the people you know, or do you have any comments on that?

Mr Taylor: Absolutely across the board. We have a charter boat organization. We discuss these issues. We work closely with Preserve Our Wrecks on these issues. Everybody's interest is in preserving these wrecks. There is nobody I know who takes out charters for money, who is commercially involved, who will even allow a bottle to be brought up, even if it's a beer bottle.

Mr Gerretsen: How much diving is done privately, without the use of charter boats? Do people go out there on their own?

Mr Taylor: Yes. This is part of where the education comes in with dive training. PADI already has in place a project. Randy talked about it. Part of my training in Project Aware and part of my training with the divers is to point out respect for property, to keep this around for our kids. My kids are both divers. I would like them to see the stuff that I've seen underwater. They have a better opportunity now with the zebra mussels clearing up the water, stuff that I couldn't see until I bumped into it. I certainly think this is across the board with all the divers in the Kingston area and, as far as I know, up the St Lawrence. From what I've heard from all the other chapters of SOS, I think it's pretty well across the board with everybody, except for a few—the minority—which is probably where this legislation is aimed.

Mr Levac: First of all, let me thank you for your patience and your flexibility. Also, on behalf of our caucus, I'd like to say to all of our presenters, thank you very much for giving us insight into areas where we needed to have it.

Just a quick question. Are you aware of a provincial, national or international association for the kind of charters that you represent and, if so, would you be willing to participate in the group that was named earlier to help give input into the design of a bill?

Mr Taylor: Interestingly enough, I just talked to Randy about that in a meeting last week. In the Kingston area especially, it's very hard. We encompass NAUI, PADI, PDIC, ACUC and even some of the European dive training organizations, with Queen's University, and people coming in from all over the world literally to dive. We are talking about it but, again, I would be open to any direction that can unify everybody in all the agencies toward a good—

Mr Levac: Hybrid bill.

Mr Taylor: —resolution to this problem.

The Chair: Thank you, Mr Taylor. I appreciate your coming all the way.

To all the presenters, we appreciate your taking the time to raise our understanding and awareness of this situation. I look forward to hearing further submissions next week and quite possibly longer than that.

Mr Levac: Mr Chair, can we be notified, if indeed we do get that deluge of other people who want to present, quickly enough so we can contact those people and indicate—is there a process that we have in place for that?

The Chair: The undertaking has been made to people via the parliamentary channel and the Internet to express

their intentions. If their expressions are made to the clerk, we will respond to them. Obviously it's first come, first served for next Wednesday. On next Wednesday, when the deadline will have passed for the submission of requests, we'll be able to consider as a committee how much more time we need to process any other requests that have come in.

Mr Levac: I need to point something out to you. I received an e-mail that indicated that they didn't get any feedback from the clerk when they sent in a request to be presenters.

The Chair: Before this actual invitation went out?

Mr Levac: Maybe that's the problem.

The Chair: I think you'll find from the correspondence we've been receiving over the last year, many people have said, "Let me know when there are hearings." That notice would have gone out just last Friday. If you do in fact hear of anyone who is having problems contacting the clerk, they can contact me, or you can pass the information on. We'll make sure it gets processed.

Mr Levac: I appreciate that.

The Chair: With that, the committee stands adjourned until 3:30 next Wednesday.

The committee adjourned at 1726.

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Mercredi 11 octobre 2000

**Standing committee on
general government**

**Ontario Marine
Heritage Act, 1999**

**Comité permanent des
affaires gouvernementales**

**Loi de 1999 sur le patrimoine
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ASSEMBLÉE LÉGISLATIVE DE L'ONTARIO

STANDING COMMITTEE ON
GENERAL GOVERNMENTCOMITÉ PERMANENT DES
AFFAIRES GOUVERNEMENTALES

Wednesday 11 October 2000

Mercredi 11 octobre 2000

The committee met at 1535 in room 1.

ONTARIO MARINE HERITAGE ACT, 1999

LOI DE 1999 SUR LE PATRIMOINE
MARIN DE L'ONTARIO

Bill 13, An Act to preserve Ontario's marine heritage and promote tourism by protecting heritage wrecks and artifacts / Projet de loi 13, Loi visant à préserver le patrimoine marin de l'Ontario et à promouvoir le tourisme en protégeant les épaves et les artefacts à valeur patrimoniale.

The Chair (Mr Steve Gilchrist): Good afternoon. If I can call the standing committee on general government to order, for the purpose of considering Bill 13. My apologies for the short delay. We were busy planning the next bill to come before committee, starting next week.

SHIPWRECKS/2000

The Chair: Without any further ado, I'd like to call forward the representative from Shipwrecks/2000, Mr David Mekker. Good afternoon. Welcome to the committee. We have 10 minutes for your presentation.

Mr David Mekker: Mr Chairman and members of the committee, first I would like to thank you for the opportunity to express my views today.

Why do I believe that my input is of value to this committee? I have been an active diver for over 10 years, with 1,000 logged dives. I am an avid underwater photographer and have recently begun compiling video documentary footage. I fell in love with shipwrecks from my very first dive, which was on the wreck of the Alice G in Tobermory. As a result of this, I have been part of a group that has worked hard to promote marine heritage in the form of a shipwrecks symposium held annually for the last seven years. This is Ontario's only full-day dive event devoted solely to shipwrecks. I have been the chairperson for the symposium for the past four years and believe that, through this event, we have played a role in advancing diver awareness of the importance of marine heritage preservation.

The shipwrecks symposium brings in speakers from all over North America, who range from members of local clubs to international and renowned professional experts and presenters in the field of underwater marine heritage. The symposium attracts over 500 divers and

non-divers who have a keen interest in shipwrecks from across the province, Quebec and the northeastern United States into the Welland area. This in itself gives a greatly needed injection to the regional economy. Through these symposiums, we have been able to educate many divers.

Two years ago, the symposium showcased one of the original Great Lakes shipwreck hunters, who discovered over 33 wrecks. He commented that 30 years ago, wreck stripping was not considered unusual or wrong. He also commented that there has been a marked change in diver attitude from "Find a wreck and get whatever you can" to "Find a wreck and do the historical research and then preserve it." The ethic today held by shipwreck divers has become "Take nothing but pictures, leave nothing but bubbles."

Diver Magazine once described our show as a "large-scale, must-attend conference for anyone interested in shipwreck diving." The proposed bill would hurt our show since no one would come to make presentations on their explorations, for fear of prosecution. I have included a copy of last year's symposium brochure to demonstrate the type of event we had and the calibre of presenters.

Although Bill 13 is well-intentioned, I believe it contains some major issues of concern. First and foremost, any proposed legislation must contain a guarantee that all wrecks be open to divers. The currently proposed bill does not do this. Restricting access to wrecks is akin to telling everyone the items in the ROM are too valuable and we will thus lock the doors forever and never allow anyone to look at these items.

Wreck diving and protecting marine heritage are not mutually exclusive. The whole issue of maintaining a list of accessible wrecks is unworkable. This will keep the law-abiding citizens away while providing others with a quick list of sites that are rich for the picking and looting. If we require a list, it should be by exception only.

Many questions regarding the formation of a list remain unanswered, such as: Who creates the list? How are wrecks added or removed from the list? What determines whether a wreck should have restricted access? Does the list procedure have provisions for an appeal process?

Some have suggested that we should restrict access to certain wrecks until the money is available to do a full archaeological study. How practical is it to expect that this will ever happen?

1540

Time is also of the essence. Since the zebra mussels invaded in late 1989, wrecks are being covered with these crustaceans. Over time, with the added weight of the mussels, many wrecks have fallen and will fall apart. We should allow the diving community to learn about and document as much as possible of our wrecks and not wait for government funding that is unlikely to ever come.

I do agree that artifacts and pieces of wrecks that are buried in the lake bottom should not be touched or excavated. These can wait for future explorations at a time when Mother Nature decides to reveal them to us or a formal archaeological study is undertaken.

I do not believe it's advantageous for the crown to own the wrecks, and I noticed that Mr Barrett has removed this in the proposed changes to the bill. Clearly, assuming ownership of the wrecks opens up a new area of legal liability that the province may not want.

The wording of section 4, "No person shall engage in any of the following activities unless the person is specifically authorized to do so by the terms of a licence issued under Part VI of the Ontario Heritage Act," does not allow for open access to wrecks. In fact, item 1, restrictions on entering a heritage wreck or causing an object to enter a heritage wreck, will cause many people to go elsewhere to go diving.

The proposed bill is also worded in such a way that it is not clearly understood what activities would be allowed on a marine heritage site. The terms of a licence issued under Part VI of the Ontario Heritage Act are unworkable as applied to marine heritage. The licence deals far more with land-based sites and doing exploration of sites.

Any plan to limit access to a wreck must include a way for groups to visit a wreck for non-research purposes. This would even include wrecks such as the Hamilton and Scourge and could be accomplished through some sort of notification procedure.

The issue of reporting a wreck to the minister should also be given some additional thought, since once it's given, it must become a matter of public record and the wreck is now open to all. The legislation will only keep the honest people away from the wreck.

Where does all this leave us? In my opinion, the proposed Bill 13 will kill sport diving in Ontario, as well as hurt tourism. The few remaining wrecks open for diving will not be the ones people are willing to travel to see. For instance, I would be going to New York state instead of Kingston to do my diving if this bill was to pass.

I do not think we need to start from scratch to develop a framework to preserve and protect our valuable marine heritage. Many good examples of legislation already exist, and some of them may be used as a model should legislation even be required.

Three activities need to be prevented to ensure marine heritage preservation: (1) recovering, altering, destroying, possessing or attempting to recover, destroy, alter or

possess an underwater cultural resource, (2) drilling into, dredging or otherwise altering the lake bottom associated with an underwater cultural resource, and (3) the use of grappling hooks or other anchoring devices on underwater cultural resource sites that are marked with a mooring buoy.

While I would like to take credit for identifying these three issues, I must admit I lifted them directly out of the NOAA Thunder Bay national marine sanctuary report. I have included in my handout part of section 3, the management plan. This is an example of one of the plans we could use to manage resources. In their plan, they do not restrict access to any wreck, but still have a viable plan to protect the marine resources.

As another example, I have included a flyer on shipwreck diving in Michigan put out by the Michigan Underwater Preserves Council. Their law authorizes preserving abandoned property—shipwrecks, etc—on the bottomlands of the Great Lakes, designating underwater preserves, issuing salvage permits where appropriate, and fines and penalties for illegally removing, altering or destroying artifacts. The law does not restrict searching for, diving on or photographing shipwrecks.

I also do not believe the Ontario Heritage Act should be modified for the purpose of covering marine heritage. If we still believe some form of legislation is required, in my opinion the only viable option is to start over with a clean slate, but this time we should consider what other provinces and states have done and use that as a starting point. We then need to include all stakeholders and come up with truly effective legislation. These stakeholders should include not only groups such as charter operators, OUC and SOS but also other groups such as my own and major dive clubs within Ontario. I would be willing to offer my assistance and participation on such a committee.

Thank you. If there's any time, I'll answer questions.

The Chair: It's pretty tight, but we'll start the rotation with the Liberal Party. You've got about a minute and a half.

Mr Dave Levac (Brant): As the legislation presently stands, and I'll say that even if you have had time to review the amendments—could you support the bill as it presently stands?

Mr Mekker: With the amendments? No. I still have some issues with it. Primarily, the whole issue of a list of what wrecks are diveable and not diveable is the main issue.

Mr Levac: One of the things that came out in the hearings so far has been the proper building of moorings for the ships. Do you agree with that analysis?

Mr Mekker: Absolutely. Actually, the club I'm a part of has worked in Lake Erie to install some of those moorings. Part of the document I gave you from the NOAA talks as well about the need to moor them and the program they put in place to address that.

I made one copy of the entire report that I thought I'd leave as well, just in case you want to look at it further.

The Chair: Thank you very much, Mr Mekker. We appreciate your taking the time and your thorough presentation. We appreciate also the handouts you brought from other jurisdictions. I'm sure the clerk would be happy to take the report you've copied there and keep that as a resource for the committee.

SCOTT McWILLIAM

The Chair: Our next presentation will be from Mr Scott McWilliam. Good afternoon. Welcome to the committee.

Mr Scott McWilliam: Good afternoon. It's been 34 years since I did my first dive. I've done 7,387 dives.

This is archaeological licence 2126. There's been a lot of discussion about archaeology. Too bad no one is doing any. There are only 12 licences issued at the present time to study shipwrecks in the Great Lakes by the province of Ontario and half of those are inactive. For an archaeologist, this bill is counterproductive. It does not help me.

In addition to archaeology, I'm an historian and a social anthropologist. As an historian I study marine history. As a social anthropologist I study diving.

Initially I'd just like to say that I respect everybody who runs for public office. It's difficult with today's media. Every time you misspeak or scratch your nose, someone's got a camera in your face. Also, during the time that I've been writing and corresponding with you, I've been recovering from a very serious industrial accident. I had my knee really smashed up and had two reconstructive surgeries. In reviewing my own correspondence to the different MPPs, some of it was a little less than diplomatic, and I'd like to apologize for it. But it was sincere and I do reserve my right to be a passionate Canadian.

All of you were sent a copy, on December 20, of a short videotape entitled *Drowning in Dreams*. It's a film that I wrote. It was produced by the National Film Board of Canada, a 1997 Genie nominee. The lesson to *Drowning in Dreams*, if you have an opportunity to screen it, is a study of divers. Divers and their association with shipwrecks are characterized by particular types of behaviour which we can describe as obsessive.

I've got a real pile of letters here. Thank you very much for writing. The one signed by Mr Barrett, "Thank you for the mutiny," might be a little melodramatic, a token.

As an historian I have some specific concerns with Bill 13. If you read the Ontario Heritage Act, you will find that the word "shipwreck" or "wreck" does not appear anywhere in the act. This is not because they did not realize that shipwrecks were important archaeological entities when that act was penned in 1995 but because there exists a specific legal problem associated with shipwrecks. Unlike Mr Barrett's office, whose researchers drafted the first incarnation of Bill 13 in 11 days, there was a little bit more time spent looking into the Ontario Heritage Act. Essentially the problem with shipwrecks is that the British North America Act, 1867,

the powers of Parliament, section 91, subsection (10), Navigation and Shipping, clearly places all things to do with shipping in the domain of the federal government.

The Canada Shipping Act uses the word "wreck," or a derivative thereof, 205 times. In part VI, "Wrecks, Salvage and Investigations into Shipping Casualties" of the Canada Shipping Act deals specifically with shipwrecks and clearly defines them as the domain of the federal government and defines the role of the research of the wreck.

The BNA act, the same act that gives Canadians the right to two official languages, defines "shipping" as a federal entity, and the Canada Shipping Act deals directly with shipwrecks. Mr Barrett's proposed legislation is unconstitutional and would be just as illegal as a bill dictating that everyone in Ontario must speak French. This is only one of the many problems with this bill, which I believe was ill-conceived.

1550

There is a very real question as to exactly how much of Ontario's bottomlands the province has any claim to at all. Under the Territorial Division Act, I suspect you'll find, if you research it, that the municipalities actually own the bottomlands out to the international border, rather than the province. Bill 13 is an appropriation. Ontario is taking something away from the government of Canada that does not belong to it.

I think you've correctly identified the significance of shipwrecks. They are very important to our understanding of Canadian history. When you all went to school, you probably learned some kind of myth about Gordon Lightfoot and Pierre Berton and a ribbon of steel that was used to put this nation together. There were things that the railroad joined together. Our understanding of the communities, the fabric of nationhood, doesn't lie along the sides of the railroad track that stretches from coast to coast; it lies on the bottom of Ontario's and Canada's lakes and rivers. When people remove artifacts from shipwrecks, it's like pulling words out of a book that tells the story of this country. Ontario is now doing exactly the same thing that divers who remove artifacts from shipwrecks are doing. Instead, you are doing it on a grand scale. You are removing volumes G through M from the archaeological record.

I encourage you to put an end to Bill 13 and move this up a level of government. Let's deal with this in Bill C-35 currently before the federal government.

I find section 6(b) of Mr Barrett's bill particularly offensive. This is essentially a state-sanctioned appropriation of intellectual property.

As I see it, Bill 13 has brought a great number of issues to the foreground.

Ontario is essentially out of the shipwreck business. Any involvement by the province on any shipwrecks involving any divers, as I see it, is interloping in a federal matter, and any diver prosecuted by the province may have a reasonable expectation of a successful legal remedy.

What happened here? Is this about Bill 13? What we have are people who are involved in the Ministry of Citizenship, Culture and Recreation. We have one provincial underwater archaeologist who had a vision, who had a dream. There's a vague line under the Ontario Heritage Act that requires the province to acquire new archaeological sites, and with this mandate he went forward, regardless of the law, to try to get this.

Ontario has been shelling out approximately \$26,000 a year to save Ontario's shipwrecks and has fans. They have people who have been educated toward the conservation ethic. Save Ontario Shipwrecks has been very successful in educating the divers of Ontario toward the conservation ethic.

This has to do with current, ongoing litigation. Strings were pulled; calls were made. Jim Murphy has been mentioned in the House by Mr Barrett. Jim Murphy received \$20,000 from the government of Ontario to go out and look for shipwrecks. You were also sent a copy of my brief in December. It outlines how that was a misexpenditure. They plagiarized. They represented other people's data as their own. The one rule in government, in the civil service, is "Cover your own butt," and everybody up the line, from one end to another, has successfully stepped around this problem. Nobody is prepared to admit that there's any kind of wrongdoing involved here.

Litigation is now pending in the city of Hamilton involving a US diver who would like to go diving on the Hamilton and Scourge shipwrecks. He has applied for archaeological licences for, I believe, three or four years. He has been denied. The only reason anyone can be denied an archaeological licence is competence. Under the act, he is competent. There is no legal mechanism, as I understand it, to prohibit diving on the Hamilton and Scourge. Subsequently, the ministry phoned their fan club at SOS, Port Dover, wrote a letter to Mr Barrett, said they could have Bill 13 brought in and it would intercede and change the law prior to this matter going to court.

I have never seen more obsessed or more manipulative people than the Ministry of Citizenship, Culture and Recreation. They were sanctioned from the bench by Judge Lissaman during the Atlantic trial, they have been sanctioned by the Ontario Human Rights Commission, and I now believe they have perjured themselves in the Hamilton and Scourge matter.

This is not the fault of one particular person. What's happened here is that with all the various governments, all of the various cutbacks, resources dwindled away and away. In the archaeological community I met with friends of mine who are archaeologists in Quebec City, the Society for Historical Archaeology, and we talked about Peter. As far as we know, Peter pretty much snapped around 1987. He was so alone and so stuffed away in his little world in Ottawa, nobody in the ministry even noticed.

I think there are serious problems with this bill. I think the correct thing, the gentlemanly thing, to do is to withdraw it in total. Any questions?

The Chair: Actually, you're bang on your use of time, but I want to thank you, Mr McWilliam. We certainly heard considerable discussion and we asked the legislative researcher to prepare a paper about potential conflicts between provincial and federal legislation. He would suggest a different result of that consideration than you have, but you've raised a number of issues and the researcher will go out and bring back information to the committee.

Mr Toby Barrett (Haldimand-Norfolk-Brant): On a point of order, Mr Chair: I would like to correct the record. I did not write a letter or sign a letter that said, "Thank you for the mutiny." I sent out letters to everyone, the same letter, and I don't think that was in the letter. I just wanted to mention that because there has been an awful lot of misinformation and confusion over the last few months.

Mr McWilliam: Mr Barrett is lying. Thank you.

The Chair: Thank you, Mr McWilliam.

Mrs Marie Bountrogianni (Hamilton Mountain): Could I ask the legislative library to look into other possible provincial—we have that?

The Chair: You've got it on your desk there. It details all the provincial laws that research has ascertained are pertinent to the situation before us.

STEVE YORMAK

The Chair: That takes us to our next presentation, Mr Steve Yormak. Good afternoon, Mr Yormak, and welcome to the committee.

Mr Steven Yormak: Good afternoon. I see we're only allowed 10 minutes. I must confess I usually feel pinched if a judge at a trial gives me half a day, so I'll try to keep this brief.

I should applaud the committee as a whole, to start with. First of all, it's a laudable goal. You've heard this before; it is. What we're trying to do is save the heritage, not only for our own generation but for future generations. I don't think there's anyone in this room or outside this room who would disagree with that. But as often happens in many of these situations, what starts out as a very simple process ends up anything but, and complications and unforeseen developments occur which you just couldn't contemplate. I think that is what has happened to this committee.

I should mention to you before I launch into some of what I have to say to you from a legal perspective that I'm a barrister and solicitor. I've represented varied interests here in Ontario, locally, nationally and internationally. I'm a founding director of an organization called ProSEA, an international group. It stands for Professional Shipwreck Explorers Association. We have representation in Paris under UNESCO for exactly this issue, which is underwater cultural heritage. So I'm well familiar with the problems you're dealing with, not only from your local level but straight up, nationally to the international level.

I can assure you, if you're somewhat confused by what's going on here today, if you were at the plenary in July in Paris, you would have seen entire nations confused by the same issues. It's a very difficult area. You're dealing with colliding interests between archaeologists, management, government, private salvors, explorers, public access and the diving community. Each one has a slightly different view, to say the least, and you're trying to combine all these interests in one piece of legislation. I applaud the effort but I'm afraid you're looking at a Herculean type of effort because you just can't do it. If I could just have you sit in one of the committee meetings that I've sat through in Paris, to hear all the experts who really know this inside out, and they cannot agree—and that's not even to begin to tackle what I'm here today to talk about, briefly I hope, the legal issues. And there are substantial legal issues.

1600

First, I'd be most interested to hear what your legal counsel says about what I'm about to talk about, which is the clash of the federal domain versus the provincial. I am in litigation. Right now I'm in the course of putting forward this view, so perhaps title this "editorial comment" from an advocate, but the fact is I don't think the federal government would disagree. This is their baby, to put it that bluntly. Shipwreck is their domain. Mr McWilliam put a number to it. To put it a little bit more in context, it stems from our founding document, the British North America Act, 1867, section 91. Without getting very detailed, it's very simple, and it says that shipping and navigation are in the federal domain.

If you're wondering what the Supreme Court of Canada has said about that, uniformly through the years, particularly the last 10 years, and as recently as a year ago, they have reaffirmed that anything to do with maritime law is in the domain of the federal government. Specifically, cases of shipwrecks have not come up yet, but because the Supreme Court of Canada has uniformly said that if it relates in any way to maritime law, and of course shipwreck law is maritime law, it will be held to be in the federal domain. That would explain why the federal government is, as we speak, so busy now redrafting their legislation, called Bill C-35, which is the Canada Shipping Act. It's going to be called the Canada Shipping Act, 2000. Under the new proposed part 7, they will specifically address the issues of shipwreck law, ownership, regulation and, oddly enough, exactly what this committee is talking about, heritage wrecks.

What you're doing right now, unintentionally with the greatest of intentions, is asking for a showdown with the federal government. That's what's going to happen, because if their legislation goes through, they are going to regulate the very shipwrecks you're purportedly doing with your Bill 13. No matter how you amend it, no matter what you do with it, you're still dealing with a shipwreck. I have the bill here with me today, if any of the members want to take a glance at it. I'll show you part 7. The beginning of it says, "Wreck" and right in section 165 it refers to "historic shipwreck."

I don't know whether the committee has received some of my main conclusions and recommendations. First and foremost, common sense dictates, for gosh sakes, let's get together with the federal government and see what they're up to because there are liaisons, there are complementary things, in my personal view, that the provincial government needs to do to complement the federal government goals. If they say we need to do regulation of historic shipwrecks, their intention is to do it through the receiver of wrecks, which I happen to agree with. It's a long-standing mechanism we've had in our English jurisprudence for hundreds of years that is used for dealing with shipwrecks, navigation and shipping, and it's done, practically speaking, for anyone who doesn't know, through the Canadian Coast Guard, which makes sense. I've talked to our Canadian Coast Guard receiver of wrecks. They're not entirely enthused about taking on the world of archaeology and historic shipwrecks, but they're willing to do it. It remains to be seen how that will be affected.

But can you imagine, if a bill goes through from provincial environs, what will happen if it doesn't match perfectly with the federal regulations? When a client comes to me or any diver wants to go out, practically speaking, to a historic shipwreck, do you know what he's got to do? He's got to check with who knows how many departments provincially perhaps and then go to the federal government and say, "What do you fellows think? What are your regulations?" This is all just to do a simple dive. What you have here is a clashing.

Whether the provincial Legislature passes this bill remains to be seen. Notwithstanding that, the federal government will almost certainly pass their bill and likely overtake your bill. If that's not enough, what you're asking is for we lawyers to make a better living than we already have and go to court and win yet another case, because someone's going to be wrong in that situation.

All this is really for the best of intentions, and I applaud Mr Barrett. He certainly had the best of intentions in going into this. As I said in my opening, I don't think he ever expected, in such a simple mom-and-apple-pie type of problem, to have this kind of reaction, but I do think it is just strewn with problems.

What I propose to do is, and I told Anne this, I will cut short my time in case anyone has questions, particularly from a legal perspective, and I'll try to keep it brief.

The Chair: Thank you. We have about two minutes left. This time in the rotation we'll start with Mr Marchese.

Mr Marchese: Thank you, Mr Yormak. I'm assuming that your interest is more than constitutional or jurisdictional.

Mr Yormak: It is twofold. I'd like to think I represent—

Mr Marchese: I'd like to hear your other concerns. Let's put aside the fact that there may be some constitutional discussions and that one may override the other and that we might be in a war with each other and you

might make more money as a result of having to take legal work to do this.

Mr Yormak: Or someone might.

Mr Marchese: Let's put that aside.

Mr Yormak: Of course.

Mr Marchese: What is your other either interest or preoccupation with the bill by way of its good aspects, negative aspects, how you would fix it etc?

Mr Yormak: It's self-defeating. What I mean by that is, the intention is to open up public access; it does the opposite. I'm talking from a legal perspective, not necessarily an archaeological one. Your Ontario Heritage Act is an archaeological act. To get a licence, you have to be an archaeologist. I can't get it, I can assure you. I could be retired at 65 and apply 100 times and I will not get an archaeological licence under the Ontario Heritage Act. That's what you're proposing your licensing system be.

I heard some suggestions, amendments, "Look, it's not going to apply"—I've heard this and I don't know if this is a fact—"to 95% of the wrecks." Who's going to decide that? Will it be the industry of people behind me, will it be the divers or will it be archaeologists? This is a very big problem that we have in the international sphere. You're going to run into it, and we're going to run into it federally as well.

Who's making these decisions? You wonder, why is it always archaeologists making these public access decisions? There's a very simple reason for it. Fifteen or 20 years ago when all this came to the forefront it was a very unpopular type of issue. No one wanted it. So who did it fall to? The archaeologists. That's why you hear archaeologists are the ones who give you your opinions today.

I have a friend, Ken Vrana, who's a management expert, a Michigan State PhD. He is very big on what the federal people in the United States are doing, that this is a management issue, not an archaeological issue. Archaeology should be one of many aspects. Tourism is another aspect; access to the diving community is another aspect; charter. There should be a manager who decides this, not an archaeologist. I find no fault with archaeologists. What is it they do? It's like saying to a lawyer, "Don't give me a lawyer's answer." Of course we'll give you a lawyer's answer. Ask an archaeologist and what answer are you going to get? You're going to get an archaeological answer. That's not what we should do, and we're at fault if we give them that authority.

I'm not making archaeologists happy, even those behind me, but that is my view. It should be a management problem. Are there precedents for it? Yes, there are, plenty of them, all over the world. Tobermory is Parks Canada. They have allowed diving on wrecks. It's not the pristine, vintage type. There's a Mr Murphy, who some of the people behind me are well familiar with, a very high-ranking US parks official, who has said, "You know what's wrong with what you're doing up in Canada? You're not dealing with it as a management problem." What you should be doing is, if there's a risk, and we all recognize that we don't want to damage our own history,

then deal with it. Don't prohibit it, deal with it. So you have licences that are not archaeological licences; they're user permits perhaps. There's an enforcement procedure. There's a way of overseeing it. There are many different approaches that could be done, and Bill 13 contemplates none of this. It's prohibitory in nature.

The Chair: Thank you, Mr Yormak. We appreciate very much your perspective and your comments here today.

Mr Yormak: I just feel a little cheated. My half a day is still to go.

The Chair: Thank you.

FÉDÉRATION QUÉBÉCOISE DES ACTIVITÉS SUBAQUATIQUES

The Chair: Our next presentation will be from the Fédération québécoise des activités subaquatiques. Welcome to the committee.

Mr Roger Lacasse: Thank you to the committee for having us here. I'm a member of the administration council, not the president as was stated on the schedule today. I'm here to present to you our position on Bill 13.

I will start by introducing our organization and then, although marine heritage is a laudable cause, we have many concerns concerning the present wording of Bill 13 which I'll express. I'll go over some existing wreck protection we think exists in the Canada Shipping Act, and then we'll proceed to comment on amendments that were proposed by Mr Barrett last spring, and we'll suggest some more that we would like to see. We'll conclude by presenting our recommendations to the committee.

1610

The Fédération québécoise des activités subaquatiques, or the Quebec Federation of Underwater Activities—FQAS for short in French—was founded in 1975. It counts over 1,000 members, 67 clubs and more than 31 dive shops. The FQAS provides a common voice for all the divers of Quebec. Its mandate is to promote safety in diving and defend the interests of scuba divers. We also keep our members informed of events that happen in the diving world through our quarterly publication; I've given a sample in the handouts today. Recently, the FQAS has received a mandate from the Quebec government to help write the regulations that accompany the law that now regulates scuba diving in Quebec. We've also received a mandate to help implement the regulations.

I'll now present the concerns we have regarding Bill 13. One of the biggest concerns we have is the indiscriminate approach to wreck protection that is the main part of Bill 13. By default, every wreck from the start is considered to have heritage value until it is specifically excluded from a list. This means that a licence will be required initially, or until a list is known, to dive any wreck. These licences are essentially archaeological licences, which are really not attuned to the realities of scuba diving. They are delivered to a single person for

exploring a single site for a determined period of time. It's really not what we need in terms of the scuba diving industry.

We find it overly restrictive in many areas, especially the prohibitions. According to the bill, it will be illegal to enter a heritage wreck. A wreck penetration is an essential part of the wreck diving experience. It allows you to get an intimate feeling for the size of the wrecks, the way they were built and the life that inhabited them. Removing this possibility from wreck diving is like cutting half the fun of doing a wreck dive.

We think that the prohibition of moving part of a heritage wreck is not necessary. Especially for exploring larger wrecks, to gain access to the inner parts of a wreck you will sometimes need to open a hatch door or move some wreckage that, in our minds, will not adversely affect the historical content of the wreck, but would allow a better experience from a scuba diving point of view.

Of course the prohibition from removing any silt or naturally occurring substances has been flagged as very controversial, because as soon as you swim over a wreck you're likely to disturb the sediment or the fauna that are around the wreck. FQAS finds that the prohibition from taking any action that would likely alter or adversely affect a wreck is much too broad and leaves too much room for interpretation. Scuba diving will always be likely to eventually cause damage to a wreck. So will activities like fishing or boating over a wreck; you can always drop an anchor on top of a wreck by accident. So we think this prohibition is much too broad.

Unnecessary issues are also introduced, like property of the shipwreck. In the province of Quebec we have a very famous shipwreck, the *Empress of Ireland*, which has been protected for the last two years. In that case, all the government of Quebec had to do was to declare it to have heritage value. There was no need for claiming ownership. All that was done was to say that it had heritage value, and from that point on any modifications that somebody wants to make to that wreck, namely, take souvenirs, have to be approved by the Quebec government, which is sufficient to discourage most people. If people are not respecting this, it is complemented by the Canada Shipping Act, where you have to declare any wreckage that you remove from the water.

Bill 13 also creates some duplication with existing federal legislation, in our opinion. One of them is the obligation to report the finding of a wreck. That's something you already have to do under the Canada Shipping Act. Now you would have to report it to two places. Stiff fines, prison terms and seizures are already present in the Canada Shipping Act, are already present in the Ontario Heritage Act. That would be one more level of fines that we think is unnecessary.

The proposed record of marine heritage sites would be somewhat redundant with the one that is already maintained by the receivers of wrecks. They maintain a record of all known wrecks across Canada. We think a simple agreement between the two levels of government there could ease the process.

We especially have some concerns about the access to wreck sites. In our minds, limiting access to wreck sites is basically limiting the possibilities of enforcement of any conservation act. Contrary to what some people might think, we think that scuba divers nowadays are the best protectors of shipwrecks possible, especially in a context where funding is low. Having people who have at heart the conservation of marine heritage and visit sites regularly will ensure that wreck protection is enforced. Dive charters, particularly, have the highest interest in protecting these sites because their livelihood depends on being able to bring people to sites that are well protected and as interesting as possible.

As tourists, we're also concerned that the availability of the marine heritage site records—if I want to plan a scuba diving outing in Ontario, I will need to consult this heritage site record beforehand to make sure that the wrecks I'm planning to dive and that I used to dive are still accessible, that they're not off limits. We're concerned: is this record going to be accessible on weekends, on holidays?

We also have concerns regarding the regulations that are going to accompany this act. We would like to know who is going to decide what is a heritage wreck and how long this process would take. From the day this bill is implemented, if it takes too long, if it takes even one season before we know which wrecks we can dive, that, in our minds, is probably enough to kill most of the diving industry in Ontario. If you remove one season of diving from all the diving charters, most of them will just quit.

What we would like to see is a committee of people from the government, the archaeological and the scuba diving industries sit together on a redaction committee in order to come up with the regulations accompanying the act that would have a better chance of achieving realistic conservation and sustainable industry development.

In our opinion, the present wording of Bill 13 creates many duplications with existing Canadian legislation, namely, the Canada Shipping Act. Through the Canada Shipping Act, receivers of wrecks—there are 20 of them throughout Canada—are responsible for tracking the findings of wrecks. There's an obligation to report any wreck, be it the entire ship or just a piece that you find out of water. Part of their mandate is also to notify the heritage department if they think there is evidence that some wreckage might belong to a wreck that has heritage value.

1620

Moreover, the Canada Shipping Act, as was said before, is presently in the process of being completely reformed. Instead of just implicit measures, it will now include explicit measures for the protection of marine heritage. It is also going to apply to all Canadian waters, not just federal waters. We think that any legislation at the provincial level should be made so it's complementary with what is going to exist at the federal level, and not duplicate what is going to be CSA 2000.

Last spring, Mr Barrett proposed a few amendments that essentially consisted of deleting three paragraphs:

4(1)1, 4(1)3 and 4(1)7. Although these amendments would remove some of the more controversial aspects of Bill 13, they would leave intact the need for permits for visiting heritage sites. They would prevent people from diving the most sensitive sites, monitoring their state and preventing looting.

If completely rewriting Bill 13 is not an option, at the minimum we would like to see a deletion of section 3 to remove the ownership issue, deletion of paragraph 4(1)2, moving part of a heritage wreck, and paragraph 4(1)6, taking any other action that may alter or adversely affect a marine heritage site, heritage wreck or a protected artifact. These amendments would not remove the duplication the bill creates with the federal legislation, but at least they would minimize its impact on the diving industry.

We would also like to see guaranteed access for the scuba diving public on all sites. This would allow a constant monitoring of the sites and it would be compatible with diving industry development.

All of these amendments are not small changes. The fact that they have to be done at this point in the process is symptomatic of a bill that is ill-designed and not fitted for the proper development of the diving industry. For all of these reasons, we recommend that Bill 13 be put aside until proper consultation of the diving community can be held.

The Chair: Thank you very much. You timed yourself perfectly there. I appreciate the perspective you brought from another jurisdiction. It certainly has been very interesting for us. So far today we've heard facts from Michigan and now from Quebec. Thank you very much for coming this way and making your presentation.

ONTARIO UNDERWATER COUNCIL

The Chair: Our next presenters will be the Ontario Underwater Council. Good afternoon and welcome to the committee.

Mr Julien LeBourdais: Thank you, Mr Chairman. We appreciate the opportunity to be here before you. We are representing the Ontario Underwater Council.

First of all, I'll give you a little bit of an overview of what the OUC is. The Ontario Underwater Council is the largest voluntary underwater council in Canada. With a membership base of about 2,500, the OUC represents scuba clubs and their members, retail dive stores, dive charter operators, members of the travel industry, training agencies and individual divers across Ontario. A number of the individuals and groups making their own presentations to this committee are also OUC members and supporters.

Early perceptions: the second reading passage of MPP Toby Barrett's private member's Bill 13 in November, 1999, certainly caught the scuba diving community by surprise. Hurried meetings were held. Letters were written. A flurry of e-mails were dispatched; I'm sure you all got lots of them. The perception was that scuba diving as we knew it would soon become severely

restricted. Retail and charter operators were concerned about losing their livelihoods. Many of us were concerned about an increase in bureaucratic red tape. There were rumours flying around last fall in the diving community that Bill 13 would be quickly passed into law before Christmas. Fortunately, this did not occur.

A year of consultation and discussion: It is quite possible that neither Mr Barrett nor the other members of this committee fully anticipated the uproar caused by the introduction of this bill. To his credit, Mr Barrett took the time to meet personally with many of the groups and individuals who were concerned about losing the right to dive on Ontario's many shipwrecks. Many of the groups making presentations to this committee have consulted with Mr Barrett over the past year.

In March of this year, Mr Barrett accepted the invitation of OUC President Beth Cornwell, seated beside me, to visit Underwater Canada, the largest consumer scuba show in Canada, produced each year by the OUC. While touring the show, Mr Barrett had the opportunity of speaking personally with many of the individuals—sport divers, dive store owners, charter boat operators and instructors—who had expressed concerns about the proposed legislation.

During his visit to Underwater Canada, Mr Barrett supplied us with some proposed amendments to Bill 13. Earlier this month, Mr Barrett produced some additional proposed amendments. Together, these amendments went a long way toward satisfying many of our concerns.

Where do we go from here? The Ontario Underwater Council feels that a fully researched and comprehensive marine heritage act would be of benefit to all citizens of Ontario. Scuba divers are also citizens and we share their concerns about protecting our natural resources, history and marine heritage. We believe it is possible to establish policies and regulations that would not only encourage responsible sport diving but also ensure that future generations can continue to travel back in time by viewing historic shipwrecks that remain undisturbed.

We believe that marine heritage should not be limited to shipwrecks. Submerged locks, villages, railways, fur trade portage routes and underwater construction sites might also be historically significant.

We believe this bill was a good place to start but that it needs to be more encompassing to adequately protect the interests of all Ontarians, not only scuba divers.

There are four recommendations here:

1. Notwithstanding that Bill 13 was drafted with good intentions and that the proposed amendments are an improvement on the original, the OUC recommends that it not be passed in its present form.

2. Recognizing that the bill needs to be further encompassing to protect the interests of all Ontarians, the OUC recommends the bill be significantly altered and expanded before it is again presented to the Legislature.

3. Recognizing that the sport diving community will be significantly affected by any legislation in this area, the OUC recommends that a dialogue be maintained between government and major stakeholders in the sport diving community.

4. Recognizing the OUC's role within the dive community, we would be prepared to assume a leadership role in helping the major stakeholders reach a consensus. Our goal would be to provide information and assistance to the ministry, helping them draw up a fully comprehensive marine heritage act of which we could all be proud.

It's a relatively short brief which we've gone through quickly just to allow some time for questions. I didn't identify myself. My name is Julien LeBourdais. I am the director of special events for the OUC. I identified Beth, who is the president. We would be happy to take any questions.

The Chair: Thank you very much for your presentation. You have afforded us some time. We will start the questioning with the government caucus. Mr Barrett, you have about two and a half to three minutes.

Mr Barrett: I wish to thank the Ontario Underwater Council for coming forward as a delegation. I haven't had an opportunity to thank the other delegations as well.

You mentioned amendments that I distributed to 200 or so people I have been in touch with in the spring. I yet again received more feedback on those amendments. You may be aware that, just in the last few days, there is yet a second series of worked-over amendments to address some of the feedback that I received. The purpose of this committee is, with the assistance of the dive community and the heritage community, to continue to fine-tune this.

Under your recommendations, I'm not sure whether you make any specific amendments. In light of several of the previous concerns from Quebec and Mr Yormak about Bill C-35, the federal legislation, 11 months ago we knew that was being looked at and it's still being looked at.

For that reason, I am proposing an amendment to section 10, which originally states that the act come into force on the day it receives royal assent, to have some flexibility for the province to wait on the federal government with the Canada Shipping Act amendments that may come forward. We've changed that to state that this act comes into force on a day to be fixed by proclamation by the Lieutenant Governor. This allows the time frame to be extended until other issues get resolved, like ongoing litigation perhaps, or possible effects on Ontario's or Quebec's interests with respect to any changes that may be forthcoming with Bill C-35.

Chair, do I have time for another issue?

The Chair: Very quickly.

Mr Barrett: You may have received the latest round of amendments in the last few days. They address two main areas. There is the issue of access. The limited access is merely for 15 or 20 of these heritage wrecks, not the 400 or 500 wrecks and other yet-to-be-discovered wrecks out there. Second, they address the issue of lists and how lists should be put together.

1630

Mrs Bountrogianni: My question is related to Mr Barrett's question. How do you marry the two, Bill C-35 and this potential bill? With all due respect to Mr Barrett,

amending section 10 to say until you see the implications of what the federal government is doing, what if they are contradictory? Wouldn't it make more sense just to table this until the federal government looks into it? What is your opinion of the federal-provincial?

Mr LeBourdais: I can't claim to know much about the federal bill. We'd have to look at it. That's almost another issue. If it's a jurisdictional thing, the two jurisdictions have to figure out who is in charge here. Our overriding concern was that there are so many things that need to be addressed that if this committee did it, with all due respect, they could meet every week for the next year before they went through it—things having to do with the exact list. People have talked earlier about a debris field. What exactly is a debris field? That kind of thing can be debated at great length.

The reason we're suggesting it could be moved elsewhere is that we think it's important for the overall marine heritage of the province, which, as I said, is more than just shipwrecks, and perhaps it's something better done by the ministry or some method like that. Does that answer your question?

Mrs Bountrogianni: It adds to my concern.

Mr Rosario Marchese (Trinity-Spadina): Given that Mr Barrett has raised this whole issue of literally passing the bill and then waiting for it to be proclaimed until the federal bill, I'm not sure that's an appropriate way to go. I wouldn't pass it and simply hold up proclamation until we see that bill, because that will present its own problems, in my view. If we're going to do that, we should discuss that. I hope Mr Barrett and his committee and his government are willing to talk about how we deal with the constitutional issue and the jurisdictional issue.

I've got to admit I was very pro marine heritage when we debated this bill. I don't even know how to swim, and that's perhaps one of the reasons I don't relate very much to you scuba divers.

Mr LeBourdais: There are a few people in the room who could teach you.

Mr Marchese: Since the flurry of letters we got, we realize that the problem is bigger than I obviously anticipated, and now we've got a problem in terms of how to address the issues that all of you seem to be raising with marine heritage. I'm interested in doing that; obviously we're all interested in doing that. How we do that before we proceed toward passing the bill is, I hope, something we can manage, but I'm not sure how we're going to do it.

You were consulted on the amendments. You supported the amendments by way of saying they've gone a long way, but not entirely.

Mr LeBourdais: Yes, they go a long way. They don't do everything. They're going in the right direction, but there are still some other things which will take some time to be resolved.

Mr Marchese: But you've never sat together, yourselves with the archaeologists or heritage people and the government people. You've never done that, is that correct?

Mr LeBourdais: I haven't personally. When you say "you," I can't speak for other people.

Mr Marchese: I meant the organization, sorry.

Mrs Beth Cornwell: What we have done so far is we have initially had meetings with a lot of the people who are in the room here now, but it was based at that time more on Bill 13 and what was going to happen with it. Then in the future we would like to move toward working together for a consensus. But right now we haven't actually sat down as a group and said, "OK, we're going to do this and this." What we want to do right now is make sure that the bill is fair and that, if it's passed, it's passed with the stakeholders consulted.

The Chair: Thank you, Mr Marchese. I realize now if you'd only had a life preserver in 1995 and 1999, maybe things would have been different.

Mr Marchese: You're too kind. They like me.

The Chair: I had no choice.

Thank you both. I'm grateful for your offer and for the fact that you are an umbrella group that represents many of the individuals and organizations we have heard from, and will continue to hear from.

Loath as I am to participate in the debate, I would offer for the opinion of all those in attendance the fact that if a federal election is called and their House prorogues, those bills will all die. I think that's something the committee will want to take into account when dealing with whatever sense of urgency the presenters have.

Mr Marchese: Does that mean we don't get to proclaim the bill, given that it should pass in this form, until the next election?

The Chair: I leave it up to the committee to decide.

Thank you both very much for coming before us here today.

Mr Levac: A point of information—

The Chair: Mr Levac, there's no such thing, but feel free to—

Mr Levac: A point of order, Mr Chair, on information: Just so the members know, the same offer was made by the group in the previous presentation, that there was a meeting of the minds. Five groups said they were getting together. Just to be refreshed on that, I believe one person spoke on behalf of five groups, and that they said they'd let it out of the bag that they were going to be meeting and making recommendations and wanted to get together collectively. I would suggest strongly that all of the groups that are hearing this—it's not just one group that should be consulted; it should be the entire community that makes that offer. I put it out there as information, to let it be known it isn't just one group that's making that offer.

The Chair: There you go, and you got your extra time there. Thank you, Mr Levac. We appreciate that.

STEPHEN WEIR

The Chair: Our next presentation will be from Mr Stephen Weir. Good afternoon and welcome to the committee.

Mr Stephen Weir: Thanks very much. Hopefully you all have one of these. I put this together last night and it's in point form, just in case I don't make it all the way through. I am a writer, a journalist. I'm involved in a lot of organizations. I've given you background on who I am. I make a lot of my living from diving. For the most part I write about shipwrecks for television and radio. This bill has some concerns for me because it affects not my hobby but my livelihood.

I'm very supportive of any move by the government to bring in legislation that will protect our shipwrecks. I wrote a book about a shipwreck about 10 years ago, and most of the shipwreck was in divers' garages and in their rec rooms, so I feel a sense of urgency that we protect the shipwrecks. I also recognize that over the last 23 years since I've been diving, our shipwrecks are under attack from a lot more serious things than just divers. Zebra mussels are causing the wrecks to implode. We are seeing wrecks damaged because of fishing nets, oil dredging and prop wash from tour boats. What divers do is very small compared to what the rest of the world is doing to our shipwrecks. I was part of a team with the Canadian navy about two years ago doing some deep-water exploration for wrecks in Lake Erie. We found that even at a depth of 200 feet zebra mussels or their morphed cousins were covering the bottom. So it's difficult to know how long our shipwrecks are going to be around.

Diver attitudes have changed since I've been diving. I think our province leads the way in terms of respect for the shipwrecks and for the study of shipwrecks.

I've attached some clippings of stories I've written for a variety of magazines and newspapers about some of the things people in our province are doing, and they're doing it without the support of the government. Most of the shipwrecks in the province are being found by sport divers. Most of the research and publishing are being by people like me and by TV shows and by concerned dive groups. Very little research is being done by the province. You don't have a boat; you don't have divers. We're probably better equipped and better skilled than anyone on the staff of the Ontario government.

1640

I think that any move to put some of the shipwrecks off limits is going to stifle research. It's going to hurt us from exploring wrecks and it's going to affect the dive industry.

As I mentioned at the outset, my livelihood is threatened by this, although I can go to other jurisdictions to find wrecks to write about.

Specifically, the wording of the bill causes me some trouble. You make reference in the bill to a marine heritage site and there's also reference to a debris field. Although I do a lot of my work in the Great Lakes, I also do a lot of work in rivers. Following the definition that I saw in the bill, it could be to the point where I couldn't even get into a river because the debris field could go from one side of the river to the other.

As a writer, I tend to spend a lot of my time not inside a wreck but outside a wreck. There are shipwrecks that

I'd like to see, such as the Hamilton Scourge that I don't even want to go in. Yet under the definitions that I see, I'm not sure that I'm allowed to swim over it or beside it or stand 10 feet off of it and take pictures. Maybe it's my lack of ability to read bills, but it seemed to be a concern for me.

It also calls for a list to be given of shipwrecks. I've tried to find out what shipwrecks are on the list and I've not been able to.

Because I dive a lot in the Great Lakes, I often come upon things that could be part of a shipwreck or might not be. The bill calls for me to report anything that I think might be a wreck. It's really difficult to live with that part of the bill because when you're under water it's really hard to tell what's an artifact and what's garbage.

The act also calls for licensing divers to visit certain wrecks. In the past, any time I've had any dealings with the government marine archaeologist, I've had such difficulty trying to get information or anything close to a licence that I just simply avoid it. We've been writing for 25 years and I think the magazine that I write for has probably written about more Ontario shipwrecks than anybody else in the world. I guess I resent the fact that I'd have to get a licence to continue what we've been doing without the assistance of the province.

In the past, the marine archaeologist and the whole realm of shipwreck preservation within the government have not been responsive. As a journalist, I don't get phone calls returned, I don't get the information that I need. I've had unpleasant dealings with the ministry and I see that if this bill goes into law, that's probably going to get worse. I cite in here a few incidents where I have had problems and I could go into those later, if you'd like.

In conclusion, I would like to see Bill 13 go ahead but I'd like to see it amended. We have a lot of groups in the province—the Ontario Underwater Council, the SOS, the Niagara Divers' Association—that are way ahead of the province in what they're doing in terms of wreck conservation, wreck exploration, publication, education. I'd hate to see us being shut out of the process. We have had meetings, but they've been without the participation of the government.

That is my presentation.

The Chair: Thank you, Mr Weir. That leaves us a couple of minutes. This time the rotation starts with the Liberals.

Mr Levac: Do you concur with some of the comments made today, that federal Bill C-35 will impact and this particular type of legislation should be referred to the federal government?

Mr Weir: I don't have a comment. That's really out of my realm.

Mr Levac: Then I'll ask you a "what if" question. If it is found that this type of legislation that we're proposing, that's before us, is federal jurisdiction, would you then lobby the federal government to protect the same things that you're trying to protect in your presentation today?

Mr Weir: Certainly, yes.

Mr Levac: So it's not so much the legislation in itself; it's the idea that you're after, the type of protection that your group is after, or you as an individual.

Mr Weir: As an individual, I want to be able to continue what I'm doing. I'm in a sport where we are probably the best people to look after the shipwrecks. Whether it be federal or provincial law, I feel threatened in what I do both as a sport and as a livelihood.

Mr Levac: In any of your TV programs or your articles that you've written, have you ever dealt with the types of problems that we're talking about today?

Mr Weir: Yes, although because a lot of the things I do go for almost edu-entertainment—articles and TV shows—the bulk, no. But yes, in a number of TV shows we've looked at what's happening in the shipwrecks. Certainly there are other countries and other provinces that have more liberal laws, but there are also places I've dived that are more restrictive. It's something that's addressed, yes.

The Chair: Thank you very much, Mr Weir. We appreciate your taking the time to come before us. I'm always struck by the thoroughness with which many of these presentations are put together and yours is certainly no exception.

JULIAN COLMAN

The Chair: Our next presentation will be from Julian Colman. Welcome to the committee.

Mr Julian Colman: First of all, I'd like to compliment you on your desire and intent to preserve the marine heritage of Ontario and promote tourism. They are laudable objectives, to be certain. I thank you for taking the time to truly listen to the public on this issue. I hope that the consensus of what you hear today will be reflected in your ultimate actions.

You may have heard from many representatives of the heritage and the diving communities. They've given you their opinions and suggestions in copious detail. As an individual heritage enthusiast and scuba diver, I cannot hope to replicate that detail, so I'm not going to do so today. I'd like to take a step back for a moment and review some of the key issues with you from a common sense perspective rather than a technical perspective, because I'm not a technician.

I understand that it is the primary intent of this bill to reduce the amount of future damage to shipwrecks so that all—divers and historians—can enjoy them for many years to come. I heartily support this principle but have the following conundrums on the issue of protecting shipwrecks from damage. The following may sound a little bit simplistic but it's painfully obvious. Shipwrecks are, by definition, already badly damaged by collision, fire, sinking etc. It's fairly simple but obvious. Many shipwrecks are subsequently salvaged, resulting in substantial damage and destruction. Winds, waves, currents, zebra mussels and the natural process of degradation have and continue to do damage, as do fishermen's anchors and nets.

I also observe that there are 15,000 shipwrecks in the Great Lakes, with only 4,000 identified. The average diver only knows of and dives a limited number of these. To put this in perspective, the impact on the marine heritage inventory by the few divers who purposely damage or pilfer from wrecks is very minimal.

Yet Bill 13, as presently envisaged, targets scuba divers as the primary villains in the supposedly wanton destruction of shipwrecks. A variety of forces can cause the vast majority of damage. Divers in reality have very little impact, yet they are the prime targets of Bill 13. Does this make common sense? I'll come back to that in a moment.

Once again, we all want to preserve our heritage. Heritage sites on land are protected from vandalism or pilfering through the imposition of criminal penalties. The public at large is permitted to visit all heritage sites, inside and out, on land. Yet Bill 13 proposes, even with the amendments that I've seen to date, to very severely limit the rights of the public to visit the exterior and interior of heritage sites that are underwater. So we can visit sites above water, but not below. Does this make common sense?

Let's get back to the issue of vandalism and theft. We deal with vandalism and theft on public property and heritage sites in a very straightforward way: we pass laws that prohibit the above. Anybody caught vandalizing or stealing from crown property is prosecuted. This seems to be an effective deterrent. Yet for heritage sites that are below water, Bill 13 proposes that we take a very different approach. It is suggested that we should, rather, put a legal fence around all dive sites and let the public through the gate one at a time, after an arduous application process. And it's proposed that a bureaucrat both build the gates and keep the keys, without direction from or accountability to stakeholders.

1650

By the way, the bill as it stands now uses the term "enter" a heritage wreck, which is a very broad word and can be used to bar law-abiding divers from even being in the vicinity. The definition of a heritage wreck is hugely encompassing. So above water we prosecute vandals and thieves to deter damage to historic sites, but below water we prefer to label all law-abiding citizens as potential criminals and lock them out. Does this make common sense?

I know that the honourable MPP Barrett has indicated that this is not the bill's intent. However, the bill as presently written and amended does just that. Moreover, I'm not so sure what the intent of the bureaucracy is, as the province's marine archaeologist is on record that in his opinion divers disturb wrecks by their very presence. In addition, MPP Barrett's office has stated that "any wrecks containing significant artifacts and new wrecks would be closed to diving."

By the way, my wife, who is not a diver, observed, "Why would they want to keep divers away from wrecks? The only people who can see and enjoy these wrecks are divers. Isn't that strange?" Wouldn't it be more effective to simply strengthen the existing laws

against vandalism or theft of heritage property? Wouldn't it be better to work harder on enforcement?

That leads me back to enforcement. The enforcement of this act would be a very arduous and expensive task. The OPP has a very limited number of police divers and patrol boats. They simply cannot enforce this act alone; they'll need help. Moreover, help is available in the form of the very law-abiding, heritage-conscious divers this bill proposes to discourage.

Divers and dive charter boats can and do informally police wrecks. They educate and exert peer influence over their fellow divers. The prevention of the removal of an anchor from the Ohio in Long Point is a very good example. These kinds of incidents are few and far between, but the theft was effectively deterred by divers. The theft would not have been prevented if they, as honest divers, had not been allowed access to the site in the first place. Theft and vandalism do occur in the dead of night when no one is looking. The best way to prevent them is through public access and education, backed by strong laws and penalties.

All of these issues that we have discussed will prevent or preclude divers, tourists and residents from diving wrecks. It will place impossible operational constraints on dive charter operators and on dive training shops. It will be, as many have told you, the death knell of the diving industry in Ontario.

I know that we all, you and I, want to protect and add to our marine heritage. The diving community should be encouraged to research, explore and discover new wrecks. Divers have and are willing to spend time and money on these endeavours. They should not be discouraged.

This is not, as you have seen from the public response, a harmless bill. It is very well meaning in its intent and objectives, and I compliment you, but it is harmful in its language and its implementation.

I urge you to retract this bill. I would suggest that you then engage in a series of consultations and workshops with all stakeholders and the public to come up with a better and more effective solution that protects the interests of all concerned.

I thank you for your time and for your consideration.

The Chair: Thank you, Mr Colman. This time the questioning will start with Mr Marchese.

Mr Marchese: How much time do I have?

The Chair: You've got about three minutes.

Mr Marchese: Thank you, Mr Colman. You mentioned something about enforcement where you state, "The enforcement of this act would be a very arduous and expensive task. The OPP has a very limited number of police divers and patrol boats." You don't have to worry; they're not going to put any money into enforcement. You can do what you always did, so it's not going to be a problem.

Mr Colman: I question then why you're passing the act.

Mr Marchese: That's a good question he's about to ask you on the issue of enforcement, Toby. Sometimes

we work together on these issues, but sometimes we do it alone, right?

On the last point you make about the whole notion of putting stakeholders together, do you really think that if we could put the stakeholders together we might come up with some workable solution, or do you think not?

Mr Colman: Most definitely. I think we have umbrella groups in place, both in the heritage realm and in the diving realm, that we can get together and we can talk about what some of our key objectives are and gain a consensus. I think most of us in the diving community, with the exception of a few people who are involved at the executive level of the odd organization like the OUC, have only learned about this bill as of late, and I really don't think that the public has been fully heard, or heard very much at all. I think that if we publicize this and have an open consultation and hearings, we'll achieve a consensus.

Mr Marchese: Julian, have you seen the amendments that Mr Barrett has put out?

Mr Colman: Actually I've seen two series of amendments. I saw the first, which was about three. I do traverse the Net and various discussions groups and I saw a set of about six or seven further amendments, a second set of amendments. Is that the set we're talking about?

Mr Barrett: This is the last witness.

Mr Colman: Yes. I just saw that on the Net. I penned those in in the act. I'm not a lawyer so you should perhaps be consulting with a maritime lawyer. I think you've had some representations from a lawyer today. I penned those in and they really do not in any way change the intent or the operation of the bill, and none of the issues I've brought forward now, or that I've heard today, is going to go away as a result of this bill.

The Chair: Thank you, Mr Colman. I appreciate your taking the time to make your presentation.

Somewhere in these hearings I hope someone would suggest to the scuba diving members on the committee what some good wrecks would be to go to look at. We've heard a lot of discussion about this. I for one would be interested.

I'm not going to enter into any kind of debate or discussion on the matter, but I have a copy of the letter that was the source of the disagreement between one of the presenters and Mr Barrett earlier. Without any prompting, the word to me very clearly looks like "meeting." I'm sorry the witness read that as something else. I think it's quite typical for any of us as members to end our letters with a signed acknowledgement, and something like thanking for the meeting is quite appropriate. I think there might have been some miscommunication there. It's regrettable.

NIAGARA DIVERS' ASSOCIATION

The Chair: Our next presentation will be from the Niagara Divers' Association, Barb Marshall. Good afternoon and welcome to the committee.

Mrs Barb Marshall: Thank you. Last summer I was asked to speak to a children's library group about diving

in Lake Erie. I showed them a video of different Lake Erie wrecks, my dive gear and publications on diving and spoke to them about the wonders of diving on shipwrecks. I should have anticipated what was to come, because when I walked in the door they were making treasure chests. During an animated question and answer period, a small voice from the audience asked me, "Have you ever found any treasure when you were diving?" My answer to that child was, "Divers believe that our greatest treasure is being able to look at and photograph these wonderful and mysterious wrecks."

I'm Barb Marshall and I am past president of the Niagara Divers' Association. I'd like to thank you for the opportunity to speak to you today. I was president of NDA when news of Bill 13 became public and throughout the firestorm which accompanied its proposed introduction. I'm here today to represent the Niagara Divers' Association and, in a larger sense, all divers who would be affected by this proposed bill, not only Ontario divers but all divers who visit our waters.

As a bit of background, our club consists of just under 50 members, mostly from the Niagara region of Ontario, but our membership ranges from the US to north of Toronto, with one member from Ottawa.

We became more involved early and vocally. Back in November 1999, the first e-mail notices of the bill hit the Internet, with controversy building over the next two months. In early December, the club membership unanimously supported efforts to fight this bill. By the end of December, we had not only sent an e-mail protesting this bill to every MPP in the province, but had mailed Bill 13 information to over 1,000 Ontario divers, dive shops, clubs and operators in the province.

We were joined by another local club in early January and financially supported to send this information to over 600 US divers, dive shops, clubs and operators. We also produced a Bill 13 Website, which was continuously updated, and submitted information to various news groups over the Internet. We continue to be actively and formally opposed to this legislation.

Our club is active in shipwreck conservation, as well as in education of divers via not only example, but in learning forums such as our annual shipwrecks symposium, previously covered by Dave Mekker. As well, our club has taken the lead in a mooring project for eastern Lake Erie and has put in many hours and dollars toward sinking blocks and setting up mooring systems.

Our club and its members are firmly committed to the preservation of the marine environment and our heritage. Then why would such a group be so opposed to the passage of Bill 13 when it is purported to be an act to preserve Ontario's marine heritage and promote tourism by protecting heritage wrecks and artifacts? It's pretty simple, actually. We read it and started to explore its implications.

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What are just a few of these implications? (1) It gives the Ontario government the ownership and the authority to close any wreck site it sees fit. (2) It requires that

wreck sites be reported to the government, and failure to do so can result in fines greater than serious criminal offenses. (3) It also allows for these fines if a diver visits a wreck site, along with seizure of property. (4) It requires a licence to dive listed heritage sites.

In very simple terms, what is the likely scenario if we pass this bill? Law-abiding divers and the charter operators, who in reality act as custodians of these wreck sites, will not visit these sites. Because law enforcement has virtually no ability to police these sites, it becomes much easier for those who would harm our wrecks to gain access.

No new shipwreck discoveries would be made, as there would be no incentive to explore, research, investigate or educate. Access would be denied and the main source of public education about our underwater heritage would be lost. No books would be written, no videos produced, no presentations made and no television shows aired.

The licence quoted in the bill is not an acceptable form of admission to a wreck site. As one who holds one of these licences, I can attest that it is a licence to conduct an archaeological survey, an extremely involved process. The requirements to obtain a licence include participation in a survey course, a detailed application and specific reporting, recording and documentation. This licence is issued to only one individual for a site, with option to renew for an additional year. This is the same licence referred to in Bill 13 and is not readily available to divers.

Let's take a look at the divers themselves and their reaction to this bill. Diving cuts through the whole spectrum of society. Divers come from every profession, education and geographic area. The one thing they share is their passion for diving and a keen spirit of adventure and independence. Their reaction will be swift and telling: they will make their feelings known by their absence.

Their absence will have a telling effect not only on the dive industry, but the local economies of current dive destinations—the dive shops, charter operators, hotels, restaurants and stores. I estimate that over this past dive season I have personally spent nearly \$5,000 on diving. Multiply that by many thousands and you may have some idea of the potential impact of this legislation.

Do I want to dive in Ontario? Yes. Do I want to spend my money in Ontario? Yes. Will I go outside the province to indulge my passion? I will if I have to.

I am not alone. I will be spending my dollars in New York state, Michigan, the eastern United States, Quebec and Florida. Our legacy of Great Lakes shipwreck diving, in my belief the best in the world, will come to an end as far as the province of Ontario is concerned.

The solution is not in barring access, listing wrecks which divers may visit or declaring ownership of wreck sites. The confusion and ill feeling brought by this bill would be untenable. This bill is seen to punish the many for the sins of the few. The overwhelming majority of divers are law-abiding, responsible divers. The few who

break the law will not be deterred, but the many will suffer.

The solution is to increase diver education, one that we have been working toward for the past few years and one that has proven itself effective. The change in diver attitude toward our underwater heritage has been both marked and profound. By example, by peer pressure and by diver forums the message has been spread that carelessness with our environment will not be tolerated and is no longer acceptable to the dive community.

Over the past 10 years, the most startling change has been in the attitudes of the old-time divers, the ones who started diving when the norm was to take souvenirs, and care with dive techniques and wreck sites was not regarded as a vital and essential skill.

I submit that we take this a step further and that it be stressed at every level of diver training, starting with the basic level and continuing through the advanced and technical levels. Training agencies, the dive community and even the charter operators need to drive home the necessity of care of our wrecks for the benefit of future generations.

No wreck site should be closed to the diving public. Public access must be guaranteed to all wrecks in Ontario waters. We are not asking for no rules to govern these sites. What we are asking for is legislation which does not restrict access, but which will allow for penalties for removal of artifacts and willful, intentional or frivolous damage to our wrecks and wreck sites. Put in place an effective law which would do this.

Bill 13 cannot be salvaged. The damage has been done and diver attitudes firmly entrenched. Bill 13 is now synonymous with the stripping away of divers' rights and freedoms. To be effective, marine heritage legislation must receive the buy-in of all stakeholders, and divers have the most at stake. I urge you to work with all stakeholders to come up with an effective and simple bill to accomplish this. The participation of the dive clubs, training agencies, shops, operators and organizations such as SOS, Preserve Our Wrecks Kingston, and the OUC is vital.

I cannot stress enough the importance of the participation of the dive clubs in this process. While the OUC includes divers as part of their membership base, the vast majority of divers in the province are not represented by the OUC. To this end, I would guarantee a representative in this process from the Niagara Divers' Association. We can provide the commitment, the network and a willing audience to help make this work. Let's use this opportunity to do the right thing and to do it the right way.

Last summer I told those children we were working to make sure our shipwrecks would be there for them to see. What do I go back and tell them next year?

The Chair: Thank you very much, Mrs Marshall. I'll bet you primed that in advance because you timed that perfectly.

Mrs Marshall: I did.

The Chair: Almost to the second. Excellent presentation. Thank you very much and congratulations on the

good works you're doing down in your part of the province.

ADVANCED/TECH DIVING INSTRUCTION

The Chair: Our next presentation will be from Advanced/Tech Diving Instruction, Mr Ian Marshall.

Mr Ian Marshall: My wife is a hard act to follow. Before I start, I would just like to comment that Mr Barrett alluded to the fact that Bill C-35 is coming in the future, that it's out there somewhere. It has in fact gone through first reading. I wasn't sure if you were clear on that or not.

The Chair: Actually, first reading is simply tabling the bill. You do nothing more than read the title into the record. But it's at least a first reading. I just want to inform you that any time a government rises for an election, all bills die.

Mr Marshall: I have a handout of a couple of newspaper articles that I've clipped and some photographs as well.

I have been scuba diving since the mid-1960s. I got my first instructor rating in 1967, and in the 33 years since I have certified in excess of 3,000 students. In the 22 years I was part-owner and manager of a dive shop, most of those students were to the basic and advanced open water levels. Since then, through my company, Advanced/Tech Diving Instruction, almost all my instruction has been to the far more involved technical and trimix levels.

Although I enjoy and have experience in most types of diving, including everything from warm saltwater reef, cave, ice and even commercial, my passion has always been the freshwater shipwreck diving for which Ontario is famous.

For the last several years, technical diving has been the fastest-growing section of our sport. Technical diving requires a lot more dedication in all aspects, from time, training, number of dives performed, equipment, maintenance and, most importantly, money. To put this in perspective, the typical recreational diver requires a single tank and regulator system, wetsuit and a time-depth device. The technical diver will wear four to five tanks and regulator systems, one primary and two backup lights, redundant time-depth devices, and always the more expensive dry suit.

Over the last couple of days, I've called several of the local area dive shops to check on current pricing. I've been told that the average price to outfit a recreational diver for diving in Ontario waters is about \$1,800 to \$2,000, while the technical diver averages between \$6,000 to \$9,000 for his basic equipment. The recreational diver spends \$5 for a tank of air, while the technical diver can spend \$45 to \$90 for the gas he needs to perform just one dive. These prices do not include things like underwater cameras or video systems that many of the tech divers carry. Between my wife and myself, we have an easy \$45,000 to \$50,000 tied up in equipment.

When people invest that kind of money, they tend to use it and use it a lot.

A week ago last Saturday, we were diving the Cracker in 200 feet off Port Dover. Besides our group of six Canadians on board, there were two from New York, one from Pennsylvania and five who had made the 10-hour drive up from New Jersey.

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I guess the point I'm trying to make is that the only real reason we have to dive in this province is shipwrecks, and the only real reason we have to technical dive in this province is good-quality shipwrecks. If you restrict access to these shipwrecks, you are going to take a lot of money out of the economy. It's not just the charter boat fees but the gas, food, lodging and equipment sales that must be considered. I can easily invest \$300 or more just on one overnight dive trip.

As far as my business is concerned, if you take away the better-quality wrecks, my prospective students have no incentive to dive or train here, and instead of drawing students into the province as I do now, local divers will be forced to go stateside instead. This would spell dire consequences for my business.

Mr Barrett's statement to the Kingston Whig-Standard that, "Most dive sites would be exempt from restrictions, especially if they have been stripped clean, or if they are not an ancient hull" is like telling a typical land tourist, "Come to beautiful Kingston. Although we have historic forts, buildings and museums, we are going to let you take a tour of the local landfill site instead."

When I posed the question to Mr Barrett's office, "Under the new Bill 13, will all shipwrecks be diveable or will some be restricted?" I received the following reply, "All commonly dived sites that are stripped of artifacts would continue to be open, but any sites that had significant artifacts remaining and all new sites would be closed." Well, I'll tell you, allowing divers to dive on a bunch of old boards is not going to promote tourism in any way.

Tobermory was for years given the title "Fresh Water Diving Capital of the World," but was experiencing a decline in numbers in recent years to areas such as Kingston, Leamington and Port Dover as more and more new sites opened in these areas. The sinking of one ship, the Niagara II, last year was a shot in the arm for Tobermory and the numbers started to climb back to what they were years ago. These new wrecks with artifacts are the things for which divers thrive, travel and spend money. Divers get into technical diving because the deeper wrecks are more protected by the environment and therefore more intact and have more artifacts to see. Restricting them in any way would kill the sport and related business in the province.

I've included a photo of some artifacts on the Munson, which is one of the most visited shipwrecks in the province over the last decade—coveted artifacts, great artifacts. Is this one of the shipwrecks that's going to be restricted?

I should point out that the brass number plate on the generator in the top picture was stolen Labour Day weekend last year, but because the site is popular and open to the public, we know it was someone from a group outside the province who were on the site in their own Zodiac inflatable boats. Divers on the charter boat immediately before had photographed the plate and it was gone when the boat immediately after arrived. When the same group visited Kingston last Labour Day, it was made quite clear to them that the removal of artifacts would not be tolerated and, more importantly, I don't think they were left alone long enough on a ship that they could have taken anything if they had wanted to. They were not left alone.

Likewise, it was the arrival of a charter boat that scared off a small boat attempting to remove an anchor from a Port Dover area wreck, which was mentioned a couple of talks ago. If the charter boat had not been there, that anchor would have been gone. They were also able to give the registration numbers to the authorities.

Could you imagine what would happen if these sites were restricted? If it were not for the charter boats and the preservation-conscious divers, who would protect these sites? In my area of the province, the local police, natural resources and customs are all sharing the same boats, just trying to keep up some presence in the lake while dealing with budgets and cutbacks. They certainly can't do it.

Kingston and Tobermory have sunk shipwrecks to attract diving tourists. Oshawa plans to sink a Canadian destroyer. Port Colborne was working on plans to sink the *Canadiana*. Those plans have now been quashed because the Ontario Ministry of Natural Resources is refusing to issue permits. The deal to obtain the *Canadiana* was very time-sensitive, and it now looks like her steam engine is being removed and is going to Sweden. The rest of her is being scrapped. Mr Doug Unsworth from the Ministry of Natural Resources, a regional lands specialist, explained, "We have received legal advice that warns us that the province could be held responsible for any accidents resulting from divers visiting the wreck. We are not approving any sinkings until we have investigated what our legal position is." I ask you, if the province is stopping the sinking of wrecks because of possible liability, what will their liability position be if they own the wrecks?

Bill 13 should be scrapped. I see nothing in it worth salvaging. If a future bill is considered, it must be done with all stakeholders taking part. Groups like the OUC and SOS are good, but in reality they represent a very small portion of the divers involved. Other preservation groups include POW, dive clubs and organizations such as the NDA and Shipwrecks Symposium, dive shops, charter operators and associations, as well as the 8 to 10 different training agencies. You should also consult the cities and townships that stand to lose from poor legislation. Had that been done, perhaps we would be here praising this bill instead of condemning it.

Any future bills must be kept simple, perhaps something along the lines of British Columbia's, where

all wrecks over two years of age are considered protected—not owned, just protected. Heavy fines should be in place for anyone caught removing artifacts or intentionally damaging the wreck or protected site. For the newer ones, if they don't have the permission of the owner or the receiver of wrecks, there should be heavy fines in place as well.

Terminology is also very important. Mr. Barrett has stated numerous times that the removal of silt was meant to cover such things as dredging and not a diver's stray fin kick, yet in the current ongoing litigation between Gary Gentile and the province, that is exactly what the underwater archeologist for the province is claiming. Likewise, the term "to enter a heritage wreck" is being interpreted into "to enter the area of" which, depending on the day, seems to be anywhere from 100 meters to a mile away.

Above all, access to the shipwrecks must be guaranteed. What good is there to have a heritage site if the people of Ontario can't see it?

I'd just like to leave you with this question or thought. Can you imagine being a land tourist out in front of Fort George in Niagara-on-the-Lake? After listening to the tour guide describing the fort, the history and importance, he ends his talk with this comment: "Unfortunately, this has been declared an Ontario heritage site so we cannot allow you inside. If you would like to see what the inside is like, please take the ferry across to Fort Niagara on the US side".

The Chair: Thank you very much, Mr Marshall. I think your wife has a slight edge; you went slightly over your presentation. Thank you very much for a different perspective and for adding to our deliberations here today.

DONALD MACINTYRE

The Chair: Our next presentation is from Mr Donald Macintyre. Good afternoon, Mr Macintyre.

Mr Donald Macintyre: Good afternoon, Mr Chairman. I'll be very brief, because most of what I had planned to say was contingent on what others had said and it's already been said.

I think it bears repeating that Mr Barrett should get substantial credit for bringing this issue to the fore, leading to discussion. There seems to be consensus that some improvements and industry-wide consultations are necessary, but I think Mr Barrett deserves the pioneer status.

About the only other thing I want to say is a little aside to Mr Marchese. His earlier comment was that he wasn't really into diving. I have one piece of advice: that this, Mr Marchese, may be one of the very few thrills left to a man of your age.

If any of you have Maltese Canadians in your constituency, I'd be glad to talk to you after the conclusion of these remarks. I had the thrill once of discovering an historically significant shipwreck that was built by one Louis Schicluna. Schicluna was a great Canadian pioneer

of Maltese origin who built about 150 ships, starting in the 1840s, around the Welland Canal area. There's only one remaining of his wrecks and that's the Sligo in Toronto harbour which is visited by divers. Mr Schicluna has received some local recognition from the Maltese community about his great contributions, but he was certainly, in my opinion, a great Canadian pioneer. He built 150 ships that were of an era when there were no transport trucks, very few rails, and he was made a big contribution to the opening up of the continent.

I have nothing else to say, unless there are questions.

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The Chair: Thank you. The questions in this round would start with the government benches.

Mr Barrett: Thank you. In fact, the last—

Mr Macintyre: Excuse me, Mr Barrett. I should mention that I am rather hard of hearing; I'm 78 years old.

Mr Barrett: Still diving.

Mr Macintyre: Still diving, yes.

Mr Barrett: Mr Macintyre, the last several presentations raised the issue of access and also ownership. There have been two rounds of amendments suggested for this legislation, the most recent round just in the last week or so, and through this consultation that will go on for a period of time there will be further amendments. One issue that was raised quite recently in the original draft of the bill itself about giving the Ontario government ownership—I just wanted to mention, if people weren't aware, that section has been deleted in my proposal.

Mr Macintyre: I noted that.

Mr Barrett: These are my amendments, the most recent amendments. Again, it was the issue of the concern on the part of government, and from my discussions and what I've been reading, their concern about liability. That may have been a factor. I think it's been mentioned today, the issue of the reluctance of MNR around the sinking of hulls and the concern that diving, no matter how old you are, still has a risk. There was a concern, I suppose, of government creating a risk and being held liable.

The BC legislation was mentioned and this approach, as I understand it, has been—

Mr Marchese: Time.

Mr Barrett: How much time do I have?

The Chair: About another 45 seconds.

Mr Barrett: My understanding is that in BC, under their heritage conservation act, the province does not feel they have ownership of these wrecks or the artifacts. However, we know from the Atlantic court case, yet another wreck off Long Point in Lake Erie, there was quite a battle there as to who owned it, California or Ontario.

Mr Macintyre: Mr Barrett, I'm unable to comment on that weighty legal subject.

The Chair: For the Liberals, Mr Levac. I think we may have some quick questions, about a minute and a half each.

Mr Levac: Mr Macintyre, just your best guess on this situation: the Ontario Heritage Act has been mentioned in previous presentations, maybe not today, but in the October 4th presentation, as possibly receiving amendments to take care of the concerns that are raised by Bill 13. Do you have any kind of comment or opinion on whether or not the Ontario Heritage Act could be amended? Do we necessarily need a Bill 13?

Mr Macintyre: I don't have any particular expertise on that. I was impressed by the comments last week from, I believe, SOS and others to the effect that it deserved separate legislation. I was also impressed with the suggestions that whatever group is convened to study these questions should have a close look at the US federal legislation on historical artifacts in federal waters, and also the BC act and probably the Michigan act.

Mr Levac: To push just a little further then regarding your comment that Mr Barrett was a pioneer. I think around the table we've acknowledged that he's brought attention to the issue. Do you believe that the bill should be passed in its present form, even amended?

Mr Macintyre: I think I and most of the other presenters would rather see grassroots legislation.

Mr Levac: Thank you for that.

Mr Marchese: Mr Macintyre, I thank you for your advice. I also wanted to agree with you and suggest that Mr Barrett deserves a great deal of credit for introducing the bill because it introduced a debate that I think we all wanted to have and are having. I also wanted to tell you that this has really been very non-partisan, to the extent that there is no ideological kind of fight we're all having, and that's a good thing.

I'm hoping the government members will do what most of you have suggested, and that is, before we pass the bill, speak with a number of you who have the various interests and perspectives and come forth with suggestions that will bring forth the goodwill all of you seem to have. That's what I'm hoping will happen, because most of the amendments come from Mr Barrett. We haven't consulted on that, and you are our consultation group. I want to simply say to Mr Barrett that we're interested in making sure that the goodwill some of you have toward the preservation of marine heritage, but also addressing the interest you have as divers, is integrated in a bill we can all support.

The Chair: Thank you, Mr Macintyre. I'm sure Mr Marchese would get a thrill, particularly as a non-swimmer. It might be putting the cart before the horse, but we appreciate your presentation.

Mr Marchese: One can still have a thrill.

The Chair: Oh, you would have a thrill all right.

TECHNICAL DIVING INTERNATIONAL (CANADA)

The Chair: Our next presentation is from Technical Diving International. Mr Guérin, good afternoon.

Mr Michel Guérin: Just one point before I start, to let you know that the first eight pages include my creden-

tials, information based on that. My thoughts start on page 9. That's what I will be reading.

To give you a little bit of background on my experience, I've been an instructor-trainer for technical diving agencies for many years. I've trained over 2,000 sport divers and I've had the privilege to work with Stephen Weir and other people to film shipwrecks around the world for an underwater television series. This is not my real life but what I want to spend my time on after working at the bank.

I'd like to start by saying that every sport diver and technical diver is well aware of the thrill of exploring the underwater world. In an earlier generation, pioneers such as Hans Haas and Captain Jacques Yves Cousteau inspired a wave of diving devotees. Today that mantle has passed to divers the likes of whom you see here today.

My dream of becoming an underwater explorer started when, as a little boy, I watched their films on television. This was in the 1960s and early 1970s, when diving as a hobby was in its infancy in Canada.

My first scuba diving experience in inner space occurred in 1975. Needless to say, I was hooked. However, after certifying and diving the same shipwrecks over and over during the early 1980s, I realized that if I could dive the deeper wrecks, the better chances I would have to discover shipwrecks in a better state of preservation. During this period, technical diving technology and trimix was not readily available, so the dives were made on air to depths approaching 200 feet. To break this barrier, technical diving agencies were created in the early 1990s to educate the potential technical divers in the use of specialized diving equipment and associated skills in a very safe way.

Technical diving is safe, it is fascinating and it gives greater rewards to lively human curiosity than any other venture we know, other than space travel. Since 1991 the diving public with an active interest in deeper diving and more advanced technical applications has been nurtured by the Star Trek syndrome: to go where no one has gone before; to discover new underwater sites and share this information for others to share in its beauty. We at TDI believe that knowledge and learning are best nurtured in an open forum of intellectual exchange.

Most technical divers are certified by environmentally conscious agencies such as TDI and IANTD. There are a whole bunch of them out there now. From these, technical divers have spawned underwater organizations such as the Cambrian Foundation in the United States and the MAREX group in Canada. These different groups are ready to help new technical divers explore our underwater heritage while promoting the conservation of these sites by the use of minimal impact diving and exchanging information on the methods to perform these explorations safely.

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As part of their code of ethics, TDI divers must agree to the following code of conduct, "The TDI instructor and diver recognizes that he or she has access to a new dimension and depth of underwater exploration, and

strives to encourage and practise an awareness of conservation of the underwater environment at all times."

TDI teaches its students that with increased knowledge and exploration capability comes increased responsibility for our underwater heritage.

We are living in a technically advanced society. We must strive to take advantage of the new diving technologies while creating a spirit of respect and co-operation between the technical diving community and government organizations such as the Ministry of Citizenship, Culture and Recreation. Both parties can make a significant contribution to all Canadians by assisting in the documentation and conservation of our underwater resources, without restricting the rights of divers who wish to invest in the right training and the right diving equipment to discover and explore our underwater heritage.

Moving into the new millennium, evolution in diving technology will allow us to dive deeper, stay longer, give us more flexibility with less weight and bulk than the open-circuit equipment we've been using for the past 10 years. Rebreather technology with the proper training will take us where we will want to go safely. Furthermore, the use of closed-circuit rebreathers has been recognized around the world as the way to significantly reduce diver impact during any wreck penetration due to the lack of bubbles. There's some documentation which states that people had the right to explore the Britannic, which is the sister ship of the Titanic, in Greece, as long as they had a rebreather system to go in. These units are extremely efficient, allowing dive times greater than six hours. Some units can even go deeper than 300 feet.

Recently, this type of diving technology, usually accessible mainly to national defense and military groups, is now making its way in the technical diving arena. As an avid user of this technology, I would welcome the opportunity to help any marine heritage agencies to gather information on some of our great underwater resources.

Bill 13 in its current state is too restrictive and will not nurture a spirit of co-operation between the marine heritage agencies and the diving community. In fact, I would like this committee to think of what might have happened if our earlier underwater explorers and pioneers had not had the right to explore and discover some of the very wrecks the bill is trying to protect.

Instead of restricting a diver's freedom to discover and explore, this bill should be cancelled and a new bill should be drafted to encourage and celebrate our discoveries and explorations of our marine heritage.

In 1998 the NOAA, which is the National Oceanic and Atmospheric Administration in the States, and the US Navy worked in cooperation with technical divers, certified under the umbrella of TDI and IANTD, on a joint expedition to gather data and recover artifacts from the USS Monitor, sunk in 240 feet off the North Carolina coast.

The end result was a group of civilian-trained technical divers working next to government-trained hardhat

divers. The ultimate goal was to preserve one of America's great shipwrecks. From this positive experience, an agreement is being drafted between the civilian group and the government agencies to allow them to work and dive off navy and NOAA ships for dozens of research projects around the globe. We should learn from this example of co-operation and strive to achieve similar agreements between the federal and provincial agencies and the technical diving agencies or progressive technical divers such as the MAREX group in Canada.

All shipwrecks in Canadian waters fall under the protection of the Canada Shipping Act. The Canada Shipping Act is under the jurisdiction of the Canadian Coast Guard receiver of wrecks. All technical divers trained under the TDI wreck diving course are made aware of the function and authority of the receiver of wrecks prior to being taught skills which will assist them in protecting our underwater heritage by minimizing or eliminating any impact to our underwater historical resources. They are also taught to respect our marine heritage, the expected code of conduct on or in these shipwrecks and the consequences of their actions if they remove or disturb artifacts on shipwrecks.

TDI feels that the best way to protect our marine heritage is by educating all divers on the importance to protect our marine heritage and instigate joint exploration programs similar to the one successfully implemented between the NOAA and the Cambrian Foundation to promote co-operation.

The Chair: Thank you very much, Mr Guérin. You've left us about two minutes for questioning. It will go to the Liberal Party.

Mr Levac: This question just popped into my head as you finished: is there any time when you would recommend that divers do not enter any shipwreck?

Mr Guérin: Where they should not go into any shipwrecks. That's a good question. A lot of this work is essentially being done between archaeologists, and we have to study what the potential restrictions are to preserve the area.

A lot of the techniques that you see for wreck penetration stems from a lot of people diving in caves, so their top antislitting techniques minimize the impact, not touching anything and so on and so forth. They've pushed this a step further with the technology that is coming now, which is the closed-circuit rebreather. If you put all of the technology and the skills together, I don't think there is any restriction unless there is a grave issue about safety at that point, if the wreck is unstable. But there are some practices and some skills to essentially identify if something is stable or not.

Mr Levac: Thank you. I didn't mean that to be an obstructionist kind of question. It was just something that popped into my head. I thought about that. For the second quick question I'll move away from that and move into the area you mentioned about the Canadian jurisdiction. Do you believe that C-35 is something we need to take a look at before we worry about what we're going to do here in Ontario?

Mr Guérin: One of the things I do for the community is I'm a searchmaster for the Canadian Coast Guard units. We know the Canada Shipping Act. As a technical diver, I've always been following the regiment around the receiver of shipwrecks. In fact, a lot of times I feel personally and professionally that where the authority is right now is the right one. If we're not sure, like the instance that happened with the Empress of Ireland, for example, when it became a heritage site—we wanted to go dive the shipwreck, so we came in contact with the receiver of wrecks and we asked for counsel at that point. We said, "What is the best procedure to go with this?" He said to us, "If you want to go, send us a letter in advance," because of all the controversy that was surrounding the Empress at that point. There was a salvage vessel on it. There was some issue because it was considered one of the greatest marine disasters in Canadian history as well at that point.

I personally feel that, from my upbringing and my experience, the receiver of wrecks in Bill C-35 is the cornerstone in the infrastructure for this. If we can essentially enhance it somehow, so be it. That's why I'm saying we should get the people who are the subject matter experts in these things, and I think a lot of the technical diving agencies as well. A lot of the wrecks that are coming into contention right now are the deep ones, the ones that have not been visited or salvaged. A lot of us are desirous of seeing something that's intact, take pictures, film it, show it to other people, promote it. Now it's kind of curtailing us big time.

The Chair: Thank you very much for taking the time to come and give us a presentation today. We appreciate your professional perspective.

JONATHAN MOORE

The Chair: Our final presentation this afternoon will be from Mr Jonathan Moore. Good afternoon and welcome to the committee.

Mr Jonathan Moore: I've got a brief that I'm going to be making some minor changes to through the course of my presentation. I'm grateful for this opportunity to speak on the Ontario Marine Heritage Act. I am a marine archaeologist based in Ottawa, but the roots of my archaeology and diving experience are in Kingston, Ontario. Throughout my professional career, which has taken me across Canada and overseas over the last eight years, I have had the opportunity and pleasure of working with and getting to know a full range of members of the diving community. I would have to say that the vast majority of any jurisdiction I've worked in has been heritage-preservation-minded.

News of the proposed Ontario Marine Heritage Act flashed across the Internet in late 1999 and caught most divers, myself included, by surprise. I therefore feel compelled to talk to you today on some of the sections of the act from the personal perspective of an active diver and practising marine archaeologist.

I'm going to be taking a decidedly non-legalistic point of view and speak to the spirit of some of the act's provisions. In framing my submission for the committee and considering the merits of the act, I have worked from the following two premises: (1) that marine heritage sites are public resources which possess and present multiple benefits to different user groups, and (2) that in theory marine heritage sites should be accorded the same consideration for protection, interpretation, funding and promotion as historic buildings and sites, archaeological sites and even parks situated on dry land.

1740

With the general adoption of the preservation ethic by the dive community in Ontario over the last 20 years or so, deliberate damage to wrecks and artifact theft has diminished. But they still occur, and it is for this reason that section 4, in particular, of the act is warranted. Despite the best efforts of the marine heritage preservation organization, Preserve Our Wrecks Kingston, which I've worked with on and off for a number of years, artifacts continue to trickle away from the Kingston-area wrecks every year.

The proposed prohibitions should serve as a key element of strengthening the hand of marine heritage preservation in those very rare cases of intentional vandalism, theft, damage, unauthorized excavation or looting by anyone, whether or not they are a diver. That said, I don't believe that the intent of this act should be to restrict unduly access to sites. Nor do I believe it should be applied to punish unintentional damage to wreck sites, some of which is the result of lack of dive experience and buoyancy skills by divers. I think these are problems which are best corrected by further training and the perfection of low-impact diving techniques.

Despite the advances made in the preservation ethic, there are some systemic problems which have not been corrected adequately over the last 20 years. Management deficiencies often come to light, for example, with the discovery of new sites and the way in which, in some cases, they are opened to the general diving community.

Last month in Kingston the George T Davie, a barge sunk in 1945, was relocated and hastily opened up with little forward planning or thought for the site. A fundamental dilemma that resource managers face is that there is little incentive for an individual to disclose the location of a site, especially those well-preserved sites with numerous associated artifacts, whose location he or she may have been guarding. There is the fear that if the cat gets out of the bag, so to speak, there will be no way of stopping a free-for-all rush by divers to the site.

This is a question which goes to the heart of sections 5 and 6 of the proposed act. As it stands today, many divers are reluctant to report sites to the ministry. My feeling is that some would still hesitate to disclose the location of sites, especially given the minister's reporting obligations under section 5, notwithstanding the offence outlined in section 7. Publishing a record of marine sites which had previously been kept secret would be totally counter-productive to the aims of site protection. The reporting

obligation, in my view, would meet with only limited success.

When examining the preservation of marine heritage sites, we should not consider legislation in isolation. Rather, we should also look at the wider picture of how marine heritage sites are managed for the benefit of the public, something this act does not address. I think it is fair to say that the stewardship and management of the hundreds of known sites in Ontario is largely fragmentary and varies in its quality and application across the province. I think, as an aside, in large measure the quality of marine heritage preservation depends on the activities of volunteer sport divers. I think this problem needs to be corrected.

We should also look seriously at the level of resources and programs the provincial government devotes to marine heritage preservation versus the amount of time and money donated by volunteers. When speaking of volunteers, I can think of no better example than Ken Mullings—some of you in the audience may know Ken—who has devoted over 10 years' worth of summers and weekends maintaining mooring sites and maintaining access to sites in the Kingston area.

It is my suspicion that public funding devoted to visitor services, archaeology, heritage interpretation, monitoring, promotion and indeed law enforcement at marine heritage sites is disproportionately low, given the heritage and economic benefits they generate. This is a question that I believe warrants exploration by this government if it has not already done so. I for one would like to know whether underwater heritage sites are getting a fair deal compared with their dry land cousins.

Prohibitions and deterrents laid down by legislation are not a panacea, but they are in my opinion an important and necessary part of marine heritage preservation. Legislation is appropriate to deter and punish the type of person or persons who last summer took the maker's plate from the generator on the dredge Munson, which has been referred to by Mr Marshall.

In future the cornerstone of marine heritage preservation will be diver education and responsible behaviour on the part of all those who interact with underwater heritage sites, whether or not they are divers. In the final analysis, it is up to all interested parties to co-operate and provide the best possible policy, planning and management for these fragile and non-renewable resources.

I think the next step forward for the Ontario Marine Heritage Act is to bring together all possible stakeholders, including archaeologists, to frame the desired and appropriate legislation.

I would like to say to Mr Marchese that when I started diving 12 years, I could barely swim, so there's hope for all of us.

The Chair: Thank you very much. I'm going to allow Mr Marchese a very quick question.

Mr Marchese: What do you mean? He only spoke seven minutes or so.

The Chair: You must have a different watch than I do, Mr Marchese. He started at 5:41, so you've got about a minute and a half.

Mr Marchese: Mr Moore, thanks for your presentation. It's very reasonable. In fact, I found most of the presentations very reasonable.

Mr Moore: So did I.

Mr Marchese: On your point, "I for one would like to know whether underwater heritage sites are getting a fair deal compared with their dry land cousins," they're not.

In terms of your other point, "We should also look seriously at the level of resources and programs the provincial government devotes to marine heritage preservation," they're not spending a cent that I'm aware of. Maybe they're spending a couple of bucks, but this ministry is the least valued of all the ministries we've got. When it comes to heritage, we don't value it and we don't defend it very well or very strongly and we don't spend much money at it. It would be nice if you had an opportunity to disagree with me. That's the kind of reality we've got.

You've raised other questions that I wish we had time to talk about because they're important questions in terms of how we value our heritage.

With respect to this bill, do you think we can fix the bill or do you think we need to go back to the drawing board and start all over? What is your sense?

Mr Moore: Speaking as an archaeologist who would have had a lot to say about this act, I think there are some

things in it that are valuable. I think it has to be rebuilt, personally.

Mr Marchese: But we can solve it, is your point.

Mr Moore: As you said, there is not an ideological problem here. It's a matter of what is the best way to manage the resource, and legislation is an important part of management and stewardship and so forth. It's framing the best possible legislation to meet the desired ends that is what's needed.

Mr Marchese: When did you start swimming, again?

Mr Moore: About five minutes before the open water test for my scuba dive.

Mr Marchese: I'm learning, by the way.

The Chair: Thank you, Mr Marchese, for an interesting perspective from a former minister of this ministry. Thank you, Mr Moore, for that presentation.

Mr Marchese: Through me they got more money.

The Chair: Good try.

Thank you to all the presenters. We've certainly had two very informative days, giving the committee members and Mr Barrett much to think about. Particularly those who have come longer distances, I very much appreciate your coming down for a private member's bill and being part of the process.

This committee stands adjourned until next Monday at 3:30, for the purpose of considering Bill 112.

The committee adjourned at 1748.

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Official Report of Debates (Hansard)

Monday 16 October 2000

Journal des débats (Hansard)

Lundi 16 octobre 2000

Standing committee on general government

Subcommittee report

McMichael Canadian
Art Collection
Amendment Act, 2000

Comité permanent des affaires gouvernementales

Rapport du sous-comité

Loi de 2000 modifiant la Loi
sur la collection McMichael
d'art Canadien



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LEGISLATIVE ASSEMBLY OF ONTARIO

ASSEMBLÉE LÉGISLATIVE DE L'ONTARIO

STANDING COMMITTEE ON
GENERAL GOVERNMENTCOMITÉ PERMANENT DES
AFFAIRES GOUVERNEMENTALES

Monday 16 October 2000

Lundi 16 octobre 2000

The committee met at 1531 in committee room 1.

SUBCOMMITTEE REPORT

The Chair (Mr Steve Gilchrist): Good afternoon. I call the committee to order and welcome the members and guests. Our first item of business will be to simply put the minutes of the subcommittee report on the record.

Mr Dave Levac (Brant): The standing committee on general government subcommittee on committee business, report of the subcommittee.

Your subcommittee met on Wednesday, October 11, 2000, to consider business before the committee and recommends the following:

(1) That the committee meet on Monday, October 16, 2000, and Wednesday, October 18, 2000, in Toronto to hold public hearings into Bill 112, An Act to amend the McMichael Canadian Art Collection Act.

(2) That the Chair be authorized to request from the House leaders permission for the committee to meet until 7:00 pm on October 16 and 18, 2000.

(3) That, if required, a further one and a half hours of public hearings be held on Wednesday, October 25, 2000, to accommodate scheduling witnesses and that clause-by-clause consideration of the bill be undertaken after scheduled witnesses on October 25, 2000.

(4) That an advertisement be placed on the Ont.Parl channel and the Legislative Assembly Web site. The clerk is authorized to place the ads immediately.

(5) That each of the three caucuses provide a list of witnesses to the clerk by noon on Thursday, October 12, 2000, to schedule. Once the three lists are scheduled, the clerk will schedule those interested parties who have called into the clerk's office until the scheduled time is full.

(6) That witnesses be given a deadline of Wednesday, October 18, 2000, at 5:00 pm to make their request to appear before the committee.

(7) That witnesses be given a deadline of Wednesday, October 25, 2000, at 5:00 pm for written submissions.

(8) That witnesses be allotted 10 minutes for each presentation.

(9) That amendments should be received by the clerk of the committee by Thursday, October 19, 2000, at 3:00 pm for distribution to the members of the committee by 5:00 pm that day.

(10) That the clerk of the committee, in consultation with the Chair, be authorized prior to the passage of the report of the subcommittee to commence making any preliminary arrangements necessary to facilitate the committee's proceedings.

The Chair: Is there any debate on the subcommittee report? Seeing none, I'll put the question.

All those in favour of the adoption of the report? Carried.

McMICHAEL CANADIAN ART
COLLECTION AMENDMENT ACT, 2000LOI DE 2000 MODIFIANT LA LOI
SUR LA COLLECTION McMICHAEL
D'ART CANADIEN

Consideration of Bill 112, An Act to amend the McMichael Canadian Art Collection Act / Projet de loi 112, Loi modifiant la Loi sur la Collection McMichael d'art canadien.

PIERRE BERTON

The Chair: That takes us to the business at hand. Our first presenter has already joined us: Mr Pierre Berton, no stranger to anyone here. Thank you very much for kicking off our hearings here today. I apologize that we have a relatively short period of time for each presentation. It may limit questions back from the committee, but hopefully it will give each of our presenters time to express their views. The floor is yours, sir.

Mr Pierre Berton: Thank you, Mr Chairman. I'll do my best. I'm supporting, as you know, the legislation which would maintain the terms of the original 1965 agreement between the McMichael family and, at that time, the conservation authority. It's become very controversial recently, which is interesting because there was a time when all three major political parties, Conservatives, Liberals and NDP, supported unanimously the idea of the McMichael conservation collection in its original form.

As you know, James Renwick of the NDP as early as 1972 tried to get the legislation passed; he tried again in 1982. In fact, at that time he had the NDP caucus and the Liberal caucus on his side unanimously. It was rejected by Premier Davis, not because he didn't like it. He didn't think there was any need for it. He was a very strong supporter, as was John Robarts, of the McMichael

agreement and he wrote to one of my neighbours who complained, "The government does not intend to break the agreement," and the government didn't at that time.

But in 1989, as you remember, the agreement was nullified, and I think that was a mistake. We had then a period of what I would call empire-building at the McMichael gallery, in which all sorts of ideas were tossed about. I remember interviewing Barbara Tyler, the then curator of the gallery, and she told me, somewhat to my astonishment, that they intended, if they could, to empty the present log building, reserve it as staff quarters and move all the paintings into a new glass and steel gallery which would go down the side of the Humber Valley right to the trees, which would have to be torn down to maintain it. I thought that was unnecessary and I think I wrote about it at the time and caused a lot of trouble.

Premier Harris, with whom I do not always agree, has been vilified by some of the art critics for what they say is "superimposing his tastes on the art world." That is just a silly remark, if you ask me. What he is trying to do is go back to square one, where we began, and rectify what I think was a major error on the part of the previous government, the Liberal government.

You see, I see the McMichael gallery as much more than just another art gallery. It's unique. It represents to me a memorial, just like a war memorial does, to a time in our history, a shining period, when we stood on our own feet as Canadians and decided to be ourselves. We had the memory of Vimy behind us and the whole of the Great War, where we got international accolades. We were rejecting British titles, I think sensibly. We were coming to the end of the imperialist regime. We were standing on our own feet, insisting on getting a place of our own in the League of Nations and our own vote in the League of Nations, to which American opposition was very great. We went into the Balfour Declaration, which led to the Statute of Westminster, which insisted that we were the same, not under the coverlet of the British Empire but equal, and in no way subordinate one to another with the other Commonwealth nations.

In the forefront of this nationalistic revolution were the writers and the artists, especially the artists, this group of painters who came together and formed the Group of Seven in 1921 but who knew each other very well and had worked together before. They decided to show Canadians something about their country that they did not understand because they looked at it with different eyes. They showed them that the time had been passed to copy the brown oaks of Constable and instead replace them with the scarlet maple leaves of Ontario, and that's what happened. They were in the forefront of this nationalistic movement, they and a few of their contemporaries; people like Emily Carr, David Milne and several others who are mentioned in this original document.

It's important, I think, that they have their own gallery and that that gallery not be watered down by works which have nothing to do with what we are talking about. I am very fond of modern abstract art, I hang a lot of it in

my house, but I don't think there's a place for that art of the 1950s and the 1960s and the 1970s in a gallery which is devoted to, really, the period I'm talking about, which is the post-war period up to the Depression, when the Group of Seven were an entity in this country. They should have their own museum and it should be for them. It's a silly idea that flies in the face all our knowledge of Europe, where many galleries bear the name of one group of artists or one artist, such as the Matisse gallery in southern France, which I have seen and which I very much like.

The Group of Seven turned their backs on Europe and became the first national art movement in this country. They deserve not only to be remembered for that but they deserve to be there in a place where the students of the future can see what they did, because it was a remarkable achievement. This gallery cannot be all things to all people, as some people would like. It is not just another art gallery—it's not the AGO, it's not the National Gallery of Canada—it is a gallery which pays tribute to one group of artists and it should continue to do so, and we should be proud that it does.

That's all I have to say, Mr Chairman. I don't represent anybody here but myself, but I know the gallery well. I've had two daughters who worked there as guides; one of my daughters was married there. I've seen it grow over the years to the present time and I hope it continues. Thank you very much.

1540

The Chair: Thank you very much, Mr Berton. I again appreciate your kicking off our debate. Obviously, someone with your historical perspective is very appropriate and I appreciate you taking the time to come and make a presentation before us.

Mr Berton: No questions?

The Chair: Well, I don't trust any of my colleagues to do something in a minute and a half. We have a hard time saying hello in that amount of time, Mr Berton.

Mr Berton: Thank you.

ONTARIO ASSOCIATION OF ART GALLERIES

The Chair: The next presentation will be from the Ontario Association of Art Galleries. Good afternoon, Professor Zemans. Welcome to the committee.

Ms Joyce Zemans: I was interested to hear what Mr Berton said. Is Mr Berton still here? He seems to have left. I have a somewhat different take on the subject. I'm an art historian by profession. I've written about most of the members of the Group of Seven in one way or another, in books or articles, and I've spent a long time studying their work. I've distributed to you an article that appeared in the *Globe* last week, and a copy of a longer article, from which that was excerpted, which appeared on the *Globe* and Mail Web site as well.

I'm speaking on behalf of the Ontario Association of Art Galleries, and I know this view is also shared by the Ontario Museums Association, whom you will be hearing from later.

It is true that the gallery had, as its original mandate, a requirement to respect and to present the work of the Group of Seven and to focus on the work of the Group of Seven, but I would suggest that any of you who knows the gallery in any way, shape or form would associate the Group of Seven with the McMichael collection of Canadian art. Indeed, it is world-renowned because of its focus on this group, and what it has done. I know the McMichaels are here, and I would like to pay tribute to the McMichaels, because as the director of the gallery, Robert McMichael himself added to the collection. He collected over 270 different artists, some of them Inuit, some of them First Nations artists, other artists who were predecessors of the group; some who were contemporaries of the group; and some who were, for that period, contemporary artists.

Indeed, in the 1970s Mr McMichael wrote in the annual report of the McMichael gallery, on several occasions, about how important it was to exhibit contemporary art. So in fact if we are looking for an evolution of the gallery and the way in which it respected the role, or has and continues to respect the importance of the Group of Seven, I think all we have to do is look at the gallery today. It reflects not only the work of the group, the archival material that's associated with it, but it also reflects the spirit of the group—because most members of the Group of Seven were adamant that the Group of Seven could not be frozen in time, could not only be a landscape school.

If any of you had the opportunity to see the exhibition called *Art for a Nation*, which reproduced the Group of Seven's own exhibitions in their own lifetime, the ones they mounted and curated, you will know that the Group of Seven included artists from Quebec, they included an artist from BC and from Manitoba, they included artists who painted portraits—Fred Varley was a great portraitist—and they included artists who painted abstractly. Kathleen Munn, who was a very difficult artist, was first presented in a very strong way by the Group of Seven. So was Bertram Brooker. These are the artists who now we're talking about removing from the context of the group, when their whole spirit was about the idea of creating Canadian art, of looking to what was unique about the Canadian experience, not only in representation of the landscape.

So I'll leave that point, but I do think that we have a lot to think about when Robert and Signe McMichael themselves broadened the collection, built on the work of the group, understood what the focus of a gallery dedicated to the Group of Seven and Canadian artists could be. Again, with great foresight, they collected the work of First Nations and Inuit art. Those collections appear in earlier incarnations in the bills that reflect the responsibility of the McMichael gallery. There's no reflection of the work of Inuit or First Nations artists in the current bill.

Indeed, even the work of the Group of Seven seems to be mocked in some way by the current bill, when it says that the McMichaels' goal was to reflect the beauty of Ontario in the first half of this century, when we know

the Group of Seven made a point of going far beyond Ontario and of representing the whole of Canada, the north. When you think of the work of Lawren Harris, when you think of any of these artists, you don't only think of a scene of Algonquin Park or northern Ontario, as spectacular as those were. They made a point of inclusiveness in terms of what Canada was about, what its country was like, what its people were like and what its artists were doing.

So I think, again, it's very important to reconsider what this bill stands for and the narrowness of the interpretation—much, much narrower than the 1965 agreement, which left the opportunity for the gallery itself, for the curatorial staff and the board and the art acquisitions committee, the art advisory committee, to determine which artists had made contributions to the Canadian experience, to Canadian art.

It seems to me that this bill undermines this whole philosophy entirely and will in fact undo the great work that has been done at this gallery, not only by recent boards, but by the McMichaels themselves, if I may say so.

I'd also like to say that I think the government should be very much aware of the fact that in this bill, and in the idea of removing significant portions of the collection in order to remain true to what is apparently, or perceived to be, the original mandate, there is a real question about what will happen in terms of government responsibility for this gallery. In the 1965 bill, the government agreed to pay 85% of the costs of this collection. Today the government pays 40% or less of the costs.

Now, if the collection is narrowed, if it doesn't have its focus, as it currently does, not only on the Group of Seven but on Inuit and First Nations artists, the question will be, once the group of school children has come, will they continue to come? Will they come back if there isn't more and growing opportunities to see this work in context? Will the Europeans who visit, in large measure because of the Inuit and the First Nations collection, continue to come? What will be the financial base on which this gallery will operate in the future? It's not a private gallery, and there's been a lot of confusion about this. This is a public gallery, and the question today is how, in the public realm, galleries are able to maintain themselves. They do it through earned revenue.

I've read the report that Deloitte & Touche did that was commissioned by the government. They don't talk about changing the mandate at all. What they talk about is the necessity for a clean external image, an understanding of the purpose of this gallery, of the breadth of this gallery and the importance of being able to attract new works to this collection and to have donors, both of money and works of art.

I have a question for you: what is going to happen to those donors, who in the past have given major collections and major works of art to the gallery? What will happen to their successors? Are they going to be prepared to give work to the gallery when it's clear that there is no respect for their work?

The argument has been that the McMichaels' collection has not been respected, but I would argue that it has been fully respected. However, the idea of deaccession in work that has been given by collectors since the gallery was established and to pay no attention to the responsibility that public galleries have to those collectors is extremely problematic.

You've given me a very short period of time and you've said, would I make specific recommendations? If I'm asked to do so, I would say this: one, I think the bill is unnecessary. I think that as it stands now the original mandate is well respected in the existing legislation. Secondly, were you to go forward with the bill, I think it must remove paragraph 3 of section 1.1, the statement about collecting pre-1950s work that reflects the beauty of Ontario.

1550

There should be a re-introduction of the role of the gallery in collecting First Nations and Inuit art. It is an outstanding collection and it is known for this. It parallels the interest in the Group of Seven; it is not in any way antithetical to it.

I think we have to make sure in terms of the art advisory committee, as it's discussed in this bill, where there's no place for professionals, where it is only government-appointed members of the board and the McMichaels who are the art advisory committee—I've served on that art advisory committee. I've served on the board of the Art Gallery of Ontario. I've served on the board of the art gallery of York University. I've served on a number of boards. I have never seen such a restrictive clause. I don't know how professionals could operate in the environment that will be created by this bill. I think someone had better sit down and really figure out how to manage this collection and this public gallery in a publicly responsible way, because it will be very difficult to do, given the terms of the current legislation.

I'm very conscious of my time. I see Mr Gilchrist looking at me and I'm thinking, oh, I'm running over. But if you have any questions, I'd be very happy to answer.

The Chair: Actually, Professor, you were bang on your 10 minutes. You did a very good job of following the schedule, and I do appreciate the perspective you've brought to us here today. That's the whole point of the hearings, to hear the different points of view. Thank you for taking the time and thank you for bringing copies of your articles as well.

ROBERT SALTER

The Chair: Our next presentation is by Dr Robert Salter. Good afternoon, Doctor. Welcome to the committee.

Dr Robert Salter: Thank you, Mr Chairman. I wish to present a personal brief, and Anne Stokes has very graciously given each of you a copy of the five-minute presentation. I am an orthopaedic surgeon, semi-retired from the Hospital for Sick Children.

The main conclusions that I've come to from studying this subject are, first, that the incredibly generous gift from Robert and Signe McMichael of an enormous collection of paintings by Canada's famous Group of Seven artists to the people of Ontario through the provincial government in 1965 represents one of the largest such gifts in the history of Canada. This gift also included the McMichaels' splendid log residence, Tapawingo—an aboriginal word, by the way, meaning "a place of joy"—and 14 acres of land in Kleinburg, Ontario.

The 1965 agreement which was signed by the Hon John Robarts, the then Premier of Ontario, and by Robert and Signe McMichael clearly stated that the McMichaels would be life members of a five-member advisory committee, and as such would have a major say in advising and assisting the crown in "establishing, developing and maintaining in perpetuity at Tapawingo a collection of art reflecting the cultural heritage of Canada."

In 1972, the collection was established as a crown corporation. At that time, Bill 216 included the following statement: "8(b) The corporation may expand, administer, or dispose of any money or property in furtherance of its object, subject to the terms, if any, upon which such money or property was given, granted, bequeathed, leased, or otherwise acquired by the corporation."

In 1982, the Hon William Davis, the then Premier of Ontario, stated in a letter to Mr Beevor that, "The government does not intend to break the agreement with the McMichaels, or to destroy the character of the collection." A copy of this letter is attached.

In 1988, in a letter to Robert McMichael, Barbara Tyler, the then director of the collection, stated that the aforementioned clause 8(b) of the 1972 Bill 216 would be retained in the new legislation. A copy of that letter is attached. However, the Liberal government subsequently removed this clause without the permission of Robert and Signe McMichael.

On September 30, 1999, I wrote a personal letter to the Hon Michael Harris, the current Premier of Ontario. I would like to quote from that letter, a copy of which is attached.

"Dear Premier Harris:

"Re: The McMichael Canadian Art Collection

"It has been a distinct privilege for my wife, Robina, and me to know Robert and Signe McMichael as good friends since 1962, that is, even prior to their making the most generous gift of their Group of Seven paintings to the government of Ontario. This was the exciting beginning of the now world-renowned McMichael Canadian Art Collection.

"You will be aware that the terms of the original '1965 agreement' enabled the McMichaels to have considerable control over the artistic content of the collection in keeping with their original concept. As you know, that agreement was later replaced by nefarious legislation that took the essential decisions out of their hands. Understandably, they have subsequently struggled steadfastly to have the '1965 agreement' reinstated. In the meantime, the quality and nature of the acquisitions have changed significantly—and not for the better.

"I have profound respect and admiration for Robert and Signe McMichael and I agree completely with what I consider to be their justifiable rights. Consequently, I implore you and your colleagues to correct this lamentable and shameful injustice to the most generous donors to the field of art in the history of Canada. Indeed, your actions taken now to honour our outstanding benefactors, the McMichaels, will be carefully observed by historians for the future." Perhaps I should have added "voters" as well.

On October 5, 1999, the Honourable Michael Harris responded to my letter and stated that he had "taken the liberty of forwarding a copy of your letter to the Honourable Helen Johns, Minister of Citizenship, Culture and Recreation, for her consideration." I have attached a copy of this letter.

In a personal letter to me dated November 17, 1999, the Honourable Helen Johns stated that, "Ontarians are very appreciative of the gift from Mr and Mrs McMichael and other donors whose contributions have created a wonderful art collection in a unique gallery setting."

In the current year, 2000, Bill 112 is being proposed as An Act to amend the McMichael Canadian Art Collection Act. In essence, the amendments involve revising the act back to the original 1965 agreement with Robert and Signe McMichael.

Recommendation: The only decent, just, and honourable action for the current government of Ontario to take is to enact Bill 112, which in essence returns the act to the original 1965 agreement of the government with Robert and Signe McMichael. Consequently, I so recommend with much enthusiasm.

I might summarize very briefly what I take of Bill 112 from the explanatory note.

The bill recognizes the gift of the McMichaels and their vision. It also recognizes that there have been unwanted changes and that now it is appropriate to return the collection and to maintain it in the spirit of its original form in 1965.

The bill ensures that Robert and Signe McMichael will be life members of the board of trustees. The bill also ensures that Robert and Signe McMichael will be members of the five-member art advisory committee that will make recommendations to the board with respect to the acquisition and disposal of artworks and also will be empowered to designate the artists who have made contributions to the development of Canadian art.

The precise nature of the collection has been re-defined.

The bill states that Robert and Signe McMichael should continue to have significant roles in matters related to the collection.

The functions of the art advisory committee, which includes Robert and Signe McMichael, have been clearly stated.

Finally, I applaud the current government of Ontario for creating this legislation that will return the collection to the original spirit and vision of its founders, Robert

and Signe McMichael. All of which is respectfully submitted, sir.

The Chair: Thank you very much, Doctor. You've actually left us about three minutes, and if you wish to take a question or two—

Dr Salter: I would be pleased to do so.

The Chair: The rotation starts with the Liberals. We just have time for one caucus in this go-round.

Ms Caroline Di Cocco (Sarnia-Lambton): I'd like to ask about the 1982 agreement that was signed. I believe at that time the 1982 agreement, in conjunction with legal opinion, changed the role and even the management at the McMichael gallery. Do you have any comments to make about the 1982 agreement? That was when the McMichaels were moved from their home and they had a home purchased for them.

Dr Salter: I was aware of that, yes, but I'm not aware of all the details of that 1982 agreement. The one comment I made in 1982 was that the Honourable Mr Davis had been questioned about whether he really supported the gallery or not. He unequivocally did in that letter to Mr Beevor that I quoted, a copy of which is with you. I think it's at the bottom of page 1 of that letter. I don't know all the details about the arrangement of leaving the house. As a physician and surgeon, I felt the family could have been treated with more compassion than they were.

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Ms Di Cocco: But did you realize that in 1982 they did sign away the advisory capacity—not the advisory capacity but the whole governance? Their role was reduced in that 1982 agreement and they became founders emeritus, whereby they were now advisors. That was stated in the Court of Appeal decision in 1997. That meant that was also an agreement the McMichaels signed that obviously upheld the position of the government in 1997 when they went into the Court of Appeal.

Dr Salter: That is what is being changed now. Being emeritus myself, I recognize the Latin origin of that term, "e" meaning "out" as in "exit" or "emission," and "merit" meaning you merit being out. But the point is that as emeritus or whatever they were called, these two people, these wonderful Canadians, have been the most generous of all donors of art in this country. They may have signed a document. I don't know. I'm not aware of that and I'm not a lawyer. But I think they deserve to be treated with great kindness and compassion and with generosity of spirit.

The Chair: Thank you very much, Doctor. I appreciate your taking the time to come and make a presentation here today.

Dr Salter: You're welcome.

KLEINBURG BUSINESS IMPROVEMENT ASSOCIATION

The Chair: Our next presenter will be Mr Paul Reinhardt from the business improvement association of Kleinburg. Welcome to the committee.

Mr Paul Reinhardt: Thank you very much for inviting our views. I'd like to address myself strictly to the economics of Bill 112. The business community is extremely concerned that we will be badly hurt by this bill. The reason is that, as business people, we know that if you restrict choice to the public it will make an offering much less attractive.

This bill will restrict the gallery again to the original mandate. We look to the Art Gallery of Ontario and the ROM, and we see that these two institutions have had enormous success in tailoring their offerings to the marketplace. They have long strayed from their original mandates, and that's why they have been so successful. They're offering from Chinese vase-making to witchcraft and things of this sort. We're stunned that this market principle is not allowed to prevail in the case of the McMichael. We predict that the revenues to the McMichael will go down as a result. Also the revenues to the business improvement association will go down substantially.

We also want to point out to you that although there would be initial savings to the government in terms of cuts to the McMichael budget, on a per-visitor basis the subsidy that will be paid to the McMichael will definitely increase.

The reason I'm here is to point out to you that the damage that will be done by this bill is not restricted to a smaller art offering at the McMichael, but there is a spillover of the McMichael into the Kleinburg business community. Let me elaborate.

The village of Kleinburg has an authentic 19th-century streetscape. It is still in marvellous shape. We are a drawing card for the city of Toronto's tourism industry, the wedding business and the movie business. We have them all out there because apparently we are so attractive to them.

It is a country escape. Every big city has a country escape. Kleinburg is to Toronto what Seven Oaks is to London, if you like. It is also an asset to Toronto to have Kleinburg in its current state for the 2008 Olympic bid.

I will stay within my 10 minutes, but I just want to get to this important point. The village is splendidly preserved, while historical buildings elsewhere are going under. The reason is that we have the McMichael pursuing very successful market strategies. They have drawn the critical number of visitors to Kleinburg that we need in order to generate sufficient revenues to operate profitably from very expensively maintained historical houses. This spillover into heritage preservation is not something that will show up explicitly in any books in an accounting sense. It is just something that happens. It is a so-called externality. But we're very much a beneficiary, and everybody who comes to Kleinburg benefits from it. So you hit a very large number of people if you hurt the McMichael, but unfortunately they cannot show these dollar figures.

Let me try to further substantiate the claim that there's big money involved that the McMichael spills over into the cultural community. We point to the horrendous

subsidies that are paid by governments everywhere to maintain the dwindling stock of historical houses in their care. We point to the huge sum of money that was required to restore the Grange, for example, at the Art Gallery of Ontario. These are large sums of money that the McMichael did not have to pay to create a heritage component. The McMichael gallery is part and parcel of a living historical community, and we are very much appreciative of their presence.

One final point: I find it puzzling that this government does not respect the contribution the McMichael makes through the market. The McMichael gallery is harnessing the market to channel funds into historical houses.

We respectfully ask that this bill be withdrawn.

I have 25 copies. I don't know who gets them.

The Chair: Thank you, Mr Reinhardt. If you would like, we've got time for questions from one caucus. This time it will be the NDP.

Mr Rosario Marchese (Trinity-Spadina): Mr Reinhardt, I've got to tell you that I'm sure your business case has moved the Conservative members. As you know, they're very concerned about business, generally speaking, most of them being businesspeople. I'm happy that you came to bring this case to them, because I know it will be part of their consideration. But obviously your case is not purely business.

This bill says they should go back to the original mandate, where, "The board shall ensure that the collection reflects the cultural heritage of Canada and is comprised of artworks and objects and related documentary materials created by or about," and it lists the people. Then it says, "other artists who have been designated by the art advisory committee," under a certain clause, "for their contributions to the development of Canadian art," will be determined by the committee of five.

1610

Frankly, I'm concerned about what happens to those artworks, as Professor Zemans made the case, and I'm assuming that you respect the fact that the McMichaels are a central key component of the gallery. I'm also assuming that the progress that it has made in terms of the other artworks it has acquired is a good thing too, for the gallery, for the community and for Canadian art in general.

Mr Reinhardt: That's precisely what I tried to say.

Mr Marchese: You're worried that if we shift back to that narrow focus, we will lose some of the people who might otherwise come. We might even lose some donors to the gallery; the financial contributions might be diminished. Is that the case?

Mr Reinhardt: Yes, very much so. I've lived in Kleinburg for 30 years. We in the business community in Kleinburg have been able to tell, year after year over the last 20 years, that business and the amount of traffic we're getting in the village core has been increasing constantly. I run a bookstore in Kleinburg. I know in talking to people that we get a lot of their overflow. I just worry. It's a very classy type of person who comes, and we have a wonderful relationship with the McMichael. It

is a kind of symbiotic relationship. We advertise each other.

I could not see that the government really would want to scuttle this efficient kind of arrangement that has benefited historical preservation in the arts community.

The Chair: Thank you very much, Mr Reinhardt. We appreciate your taking the time to come before us here today.

Our next presentation will be from Mr Dave Bernstein. Is Mr Bernstein in attendance?

Mr Robert McMichael: We've just learned today, as a matter of fact, that Mr Bernstein has been admitted to the Toronto General Hospital in serious condition. I don't have any more details about it.

The Chair: Thank you very much, Mr McMichael. That will put us back on schedule. I'm sorry to hear the circumstances, though, around that.

CANADIAN MUSEUMS ASSOCIATION

The Chair: Our next presentation will be from the Canadian Museums Association. Is Janet Brooke in attendance?

Ms Brooke, good afternoon. Your timing is perfect. I'll give you a second to collect your thoughts and your notes. Welcome to the committee.

Ms Janet Brooke: Thank you for the opportunity to express our views regarding Bill 112.

The Canadian Museums Association is a national organization dedicated to promoting the interests of museums and museum professionals at a national level. We represent some 2,000 individuals and institutions across Canada. Our membership includes all of Canada's prominent arts institutions. We are closely aligned with other national organizations seized with this issue, including the Canadian Art Museum Directors' Association.

We believe that Bill 112 is unnecessary, inappropriate and potentially hazardous to the health of the cultural community in Ontario and beyond.

Why unnecessary? The government argues that it has been prompted to act in light of certain financial difficulties at the institution. We understand the government's view that it is obliged to act in the interests of Ontario taxpayers, but we believe that this is not the way to go. We believe that the institution itself, and the government of Ontario as the principal shareholder, have the administrative and regulatory tools already in place to resolve those difficulties, without resorting to legislation.

The implied assumption here is that, somehow, the institution's curatorial direction is to blame for the difficulties and that those problems will go away by retrenching the mandate. Where is the evidence of this link between mandate and the problems that the bill purports to resolve? We have found none; the government has certainly offered none to this point. In the absence of such evidence, we challenge the premise of this extraordinary measure.

Why inappropriate? Because it represents a serious breach of the long-accepted principle in Canada that cultural institutions should operate at arm's length from government. It is highly inappropriate that the state should step in to substantially alter the curatorial direction of any cultural institution. Where does such intervention stop? Are we to believe that this or any future government will not step in to alter the course of another institution through the same means, should it not be pleased with its curatorial policy?

The government states that this is not a precedent and that it is responding to a unique and special set of circumstances. What does this mean? One can find something unique and special about many cultural institutions in Ontario, and throughout Canada for that matter. They are all special in their own way. What does it matter to claim that this is not a precedent? In six months, who will remember those comforting words?

Furthermore, the bill raises the prospect of a massive deaccessioning of thousands of works currently in the collection, with attendant impact on the gallery's relationship with the donors, not to mention the potentially disastrous impact on the art market.

Decisions regarding the acquisition and deaccessioning of artworks entail important aesthetic, ethical and legal considerations that require considerable knowledge and expertise on the part of those responsible for running the institution. We believe that such decisions should rest with the board of trustees of such institutions, acting on the advice of the professionals who are daily seized with the practical issues.

The creation of an arts advisory committee with wide discretion in regard to the acquisition and disposal of works of art, with no provision for participation by experienced professionals, is alarming. Can anyone seriously believe that this advisory committee will not profoundly influence the thinking of the board of trustees when its chairman is a member? We believe that it undermines the fiduciary responsibility of the board of trustees, who are accountable first-hand for keeping and developing the institution in the public trust.

The government contends that it is not dictating what is art and that it is merely restoring the collection to its original course. We regard this as sophistic. The net effect is that the government is striking directly at curatorial practices. Has the institution varied from its original course? The courts have recently confirmed that the original terms of the agreement remain valid; in other words, they have been respected. There is no objective evidence that the institution has blindly and willfully ignored its mandate. Many would in fact argue that the collection has evolved in its original spirit into a highly respected, indeed admired, voice for Canadian art.

Finally, why is this bill hazardous to the health of the cultural community? The bill would place inordinate influence on the running of an institution in the hands of one donor. No one questions the important contribution the McMichaels have made. Nevertheless, this bill will stir considerable uncertainty, even anxiety, among other

patrons and donors to the institution, who will justifiably wonder if their original covenants with it can or will be respected. It represents a breach of trust with the many supporters of the collection since the McMichaels' notable contribution. It sends a strong signal as well to present and future patrons, who might equally like to have such long strings attached to their contributions, and to other institutions that must daily negotiate agreements for donations that are the backbone of their collections. In other words, it raises both ethical and legal considerations that should be investigated carefully before this bill moves forward.

In fact, the Canadian Museums Association strongly recommends that the government undertake an independent review of the entire matter before proceeding. There are too many unanswered questions: questions concerning the link between the institution's mandate and its financial situation; questions concerning the role of the arts advisory committee in relation to the board of trustees; questions concerning the legal implications of deaccessioning; questions concerning a clear definition of roles between donors and professional staff; and fundamental questions concerning the relationship between government and cultural institutions.

The CMA would be pleased to participate in such a review, which we believe would enable a full and objective airing of all views on an important question whose impact extends far beyond the walls of the McMichael collection.

Thank you for your attention.

The Chair: Thank you very much. That leaves us time, again, for questioning by one caucus. This time it will be the government.

Mrs Elliott: I can't disagree more with a number of the comments you've made. There are a number of things that I think need to be addressed in your points.

First of all, I think it's very important to understand right at the outset that this is a very unique institution. This is a gallery that is owned by the government of Ontario in a very specific arrangement for the people of Ontario, to be managed by the people of Ontario.

You mentioned a massive decommissioning. The new chair of the board has stated very clearly that this would be inappropriate, given the ramifications for not only the gallery itself but for the art community as a whole. Surely you must understand that the ongoing controversy over the role of the board, over the nature of the collection itself, has resulted in a number of court challenges which are threatening the viability of the gallery.

You mentioned the issue of art professionals and you mentioned undue influence in the hands of one donor. I think it's important to recognize that, under this proposed legislation, the art advisory committee is to have five members, two obviously the McMichaels and others appointed. Surely you're not suggesting that committee of five would make decisions, would make recommendations to the board on acquisitions, on various pieces of art for the gallery, without consulting professionals in the field. This legislation simply says—

Mr Marchese: Give her a chance to answer, Brenda.

Mrs Elliott: Yes. This legislation simply says that professionals in fact would be non-voting members.

Ms Brooke: What is your question?

Mrs Elliott: Do you not think there is an opportunity here for professional advice from staff to be given to this art advisory committee?

Ms Brooke: Certainly in any of the documentation that was sent to the CMA, that is not mentioned in any way. There is no rule spelled out for professional staff in the provisions as I see them. If it's at the discretion of the art advisory board to seek expert advice from its staff, I would have to say that in normal museum practice—at least museum practice that I'm aware of as a museum professional, as a professional curator myself—usually things work a little bit in the other direction. That is to say, it is the professional staff that brings appropriate acquisitions to the attention of the board for their approval, or not.

Mrs Elliott: Or in this case an art advisory committee.

Ms Brooke: Or in this case an art advisory committee, the relation to the board being, to our mind, somewhat vaguely defined in the documentation we have on hand.

The Chair: Time for a very brief question, about a minute and a quarter.

Mrs Elliott: The financial situation at the McMichael is of serious concern to the government and spurred us to take action to try and find ways to solve this problem once and for all. Are you aware that since January an anticipated deficit of \$300,000 has increased to well over \$1.6 million in less than 10 months?

Ms Brooke: I am not specifically aware of that. But I would also say, sadly, in the larger context of museum work in this country, that's hardly an unusual situation. I'm sorry, but I can't think of many major institutions in this country that haven't had serious deficit problems at one stage of the game or another in their history, in their recent history, particularly during and immediately following our recent recession.

Whereas I don't in any way dismiss the importance of such news, I don't quite get the link between practices in programming and acquisitions and deficits. I don't see the direct link, the cause and effect that seem to be spelled out here.

The Chair: Thank you very much for taking the time to come and make a presentation before us here today.

PAUL DUVAL

The Chair: Our next presentation will be from Mr Paul Duval. Good afternoon, sir. Welcome to the committee. The floor is yours.

Mr Paul Duval: Good afternoon, ladies and gentlemen. I should like first of all to let you know where I'm coming from. I first knew the Group of Seven in 1930, when as a boy I studied under Arthur Lismer at the Art Gallery of Toronto, in the Saturday morning classes which were so significant for people of my generation. Among the people who attended there was the future head of the Art Gallery of Ontario, William Withrow. We

were permitted to paint on the marble floor of the Fuller gallery in the institution, freely to paint with our poster paints as we wished, not directed by Arthur Lismer but inspired by him.

As an eight-year-old, this was my first opportunity to enter such a palatial institution. It was a magical place, partly because when we raised our heads from our painting, we could see Tom Thomson's masterpiece, J.E.H. MacDonald's masterpiece, Lawren Harris's masterpiece. For someone who lived in a house without electricity and no running water—we had an outhouse—and with a number of children, namely eight, this was a miraculous discovery for me. In subject, they might just as well have been space objects, but they were wonderful and for me they still are.

The contribution made by the group is equal, I think, to that when Lord Strathcona made the last spike into the railroad that bound this country in a physical way. The Group of Seven bound this country in an emotional and spiritual way that can hardly be rivalled by anything else. It's difficult to go to Georgian Bay or Algonquin Park and not think of Tom Thomson, an associate of the group, who unfortunately died too soon to be one of them. It's difficult to go to Lake Superior or the Rocky Mountains or the Arctic without thinking of Lawren Harris or to be in the upper reaches of the St Lawrence or the upper reaches of the Mackenzie River without thinking of A.Y. Jackson. They are part and parcel of ourselves in a way that we all learn from childhood.

Now it's been said that the McMichael collection—and I must confess I have known it since its beginnings; I wrote the early catalogues—is a mausoleum. This has been mentioned many times. The reason for this is, it was, and I think should be, an unchanging collection devoted to this magnificent group of painters. If indeed the McMichael collection is thus a mausoleum, then so is the National Gallery of England, the Courtauld collection in London, and so many other institutions including the Louvre itself. In Paris there are the various museums devoted to individual artists: to Rodin for one, the Muséum Romantique, which is devoted to Ary Scheffer, the court painter to Napoleon III. These institutions have a particular value because when you go there, you get a total concentration of that particular artist or movement. These are common places in the United States as well as in Europe. You go to see the Chagall museum in Nice or the Matisse Museum in Nice or the Renoir museum in Cagnes-sur-Mer or the Picasso Museum in Paris. Any of these places could be called mausoleums.

There is a significant place for institutions which show, unchanging, a collection of paintings where people can go and know they will find them there. One would be very unhappy to go to the Louvre and not see the Mona Lisa. It may be an overrated picture but it's a significant item in most people's lives. You would not go to the Uffizi and not see Botticelli's *Rise of Venus* or *Primavera*. There is a place for museums that are steady and staying as they have been for all time. They can make significant changes in the collection only by adding to it

as the Frick has, for instance. But among the museums which are most revered, believe it or not, by major curators of the world are those such as the Frick. The Frick is usually considered number one, the National Museum of Anthropology in Mexico City number two, but of the museums that are considered the most significant, they are the ones that have a permanent and unchanging collection where you can go and be sure of what you are going to see.

When I was very young, as I say, I lived in a house without water and so on; my father was a great admirer of the fledgling CCF and Dr Wordsworth. I myself had the privilege, having left home at 16, of being given refuge by the Canadian Forum magazine which had a small office on Wellington Street, Toronto, and they allowed me to sleep on their floor while I looked for a job. Those two weeks were very important to me and the socialists were practising what they preached. I do not bring to this any capitalist or other prejudice, I hope, but I do want to see this particular treasure saved as it is.

1630

I know that things have been added to it more recently. Where should they go? I think the people who have been attacking—and it's been rather vicious. It's rather sad, that a place that was originally called and is still referred to as Tapawingo, a native name for happiness, should have brought forward so much bitterness, so much spleen, so much unhappiness, some of it inexplicable, that people who have been so attacking the mausoleum, for what it was and what it was intended to remain and still should be, should do this.

I am speaking as someone who in 1946 wrote articles about Bourgeois, Riopelle and the Automatists that the Ontario establishment wanted me fired for. I was the art editor of *Saturday Night* and my explanation of the value of these new artists was not accepted. Only in Montreal, in recent years, in all of the catalogues is it referred to as the young man in Toronto who first, including Montreal critics, supported and saw the future for Bourgeois, Riopelle, Pellán and the rest. I say that to have the balance of the picture with the Group of Seven here.

Then in the late 1950s, when the break came in Toronto for modern art, through Painters Eleven, I helped hang those shows. I wrote the forewords for the Toronto and New York exhibitions. I do not apologize for any disaffection with modern art but I do suggest very strongly that those who have been so bitterly opposed to the existence of a museum which has its counterparts all over the world should do this: work as I did for some time—unsuccessfully at the time—for the establishment of a museum of contemporary art in Toronto. Montreal has had a museum of contemporary art for almost 40 years. Its establishment today is one of the most admired buildings for art anywhere in the world. Critics from all over have said so and it has received a number of awards for its design. It has been able to show its contemporary art regularly with marvellous one-man shows of the major painters like Bourgeois and Riopelle. Regrettably, none of those shows, not one, was ever accepted for

exhibition in Toronto. Toronto has never seen a one-man show of Pellan, a one-man show of Bourgeois, a one-man show of Riopelle, a one-man show of Dallaire, and this the museum directors in Ontario should have their arms up about because these are among the finest painters we have ever, ever produced.

I suggest that they go forward, as I say, and try to get support for a museum of modern art. The reason I say this in part is even if I was totally sympathetic with shoe-horning contemporary painting into the Group of Seven building, the building itself is not fit for it. Contemporary painting has a lot to do with giantism: 10-by-12 foot paintings are not uncommon, they are very common. They cannot be shown there. Number two, the building itself is not fitted for major works of contemporary art. The Art Gallery of Ontario does its bit, but it is a multi-faceted place and does not show Morrisces beside Riopelles—not within 50 feet, not within 100 feet, not within two galleries.

The idea of juxtaposing a work by a contemporary painter and some of the works in the McMichael is a mistake. I regret to say that. I would like to say the McMichael gallery is large enough and designed well enough to accommodate both. But I do believe that Toronto has reneged in not supporting the development of a gallery which can truly show contemporary painters. God knows, there are thousands of them across this country at this very moment, producing works that reflect their ideas and their impressions of the world today. We should get to know that as soon as we can from their hands. This can only happen with a contemporary museum, and I would so much like to see this happen some time soon so I can enjoy it.

The Chair: With that, Mr Duval, actually we've gone a little bit over our 10 minutes.

Mr Duval: I'm sorry about that.

The Chair: No, I appreciated your perspective and the submissions you have made to the committee—thank you very much—as someone who's actually met some of the people whose works of art we're talking about.

MARY MASTIN

The Chair: Our next presentation will be from Ms Mary Mastin. Good afternoon. Welcome to the committee.

Ms Mary Mastin: To begin with, my comments will be brief. I am the daughter of Franklin Carmichael. As you know, he is very well represented at the McMichael gallery. My focus is donor legislation that will protect the donors.

From a personal perspective, my husband and I have donated a great number of paintings to the McMichael gallery. In fact, we have been major donors. Over the years we have donated several hundred paintings, oil sketches, water colours, the Antwerp drawings that my father did in his student years, various memorabilia—for example, exhibition catalogues, pamphlets, magazines, magazine articles, wood blocks for various books that he

illustrated, wood-engraving tools, and his palette. We recognized that the foregoing were part of the Group of Seven history and as a result are part of the history of Canada.

From a broader perspective, other Group of Seven estates also have made contributions to the gallery's collection of paintings and memorabilia. Just to mention a few: the Tom Thomson estate, the Lismer estate, the Harris estate, the Casson estate and the Johnston estate. Among the legion of donors who did not belong to the Group of Seven, Colonel R.S. McLaughlin's gift to the gallery of the entire collection of Clarence Gagnon's 54 mixed-media illustrations for Maria Chapdelaine—the novel was written by Louis Hémon—makes a high point in the McMichael acquisitions. It took Gagnon seven years to produce these gems of Quebec pioneer life, and although they are derived from French-Canadian farm life, they have a universality in which, in general, Canadian history is represented and they also represent the pioneer tenacity which built Canada. At least one half of the present acquisitions at the McMichael gallery have been acquired by or through donations, donations which were made in good faith that they would remain in their present setting in perpetuity.

1640

I believe that the Ontario government has the responsibility to respect and protect the generosity of the donors who have helped to build one of the most unique art collections in Canada.

I will conclude my remarks with a quotation from the 1979 McMichael catalogue: "The wealth of Canadian art treasures that form the McMichael Canadian collection is due largely to those who have generously given their cherished works of art. They were willing to share these with all Canadians and, in so doing, have placed this wider interest above their own personal pride and pleasure of ownership."

Finally, in closing, let me leave you with a question: Is it ethical to sell, auction or give away artifacts for which people have received tax benefits in the expectation that they would remain at the McMichael gallery forever?

The Chair: You've actually left us about six minutes, so we have time for three two-minute segments, starting with the Liberals.

Ms Di Cocco: Ms Mastin, thank you for your presentation. I have two questions for you. One is, do you believe that this bill is in keeping—in my submission, I have stated that I believe this bill is a breach of trust to the donors in Ontario. That's been my position. I am just asking you, do you think that it is ethical to go back and say "Well, the collection was of 150 plus 38 pieces"—to return and kind of discount this whole issue of the donors who have been contributing to that gallery over the last 35 years?

Ms Mastin: No, I don't think it is ethical to return or to sell to auction paintings that have been given to the gallery. I think it is absolutely necessary that the donors should be consulted as to whether or not they are agreeable to that process.

Ms Di Cocco: For the record, there were 327 individual donors and 15 organizational donors that have donated over \$13.5 million over the last 35 years, just as a point of reference.

I have a letter from a donor who wrote to me and she has said that, because of this bill, she is not going to renew her membership and she is going to change her will, in which she was going to donate to the gallery. Again, this whole issue of trust is, I think, what this bill is about. I believe it's eroding the trust of the art donors in this province—and the Gardiner legacy, a private legacy that was left to this government of Ontario. He provided a \$16-million gift plus endowments, millions of dollars of endowments, and it was turned over to the province of Ontario.

I guess what I am asking you is, should the McMichael Canadian art collection, in your estimation, remain in the public domain as is? Is that your view? Or should it be returned, or change the whole process of governance, the way this bill is doing?

Ms Mastin: That's a very difficult question to answer on the spur of the moment. I think that the collection is absolutely and positively unique. I think that the original gift to the province which the McMichaels made set a ball rolling, you might say, that would perpetuate that generosity of spirit.

I also think that you have to consider a gallery's objectives and also the attendance, which is part of a gallery's process. You just cannot say—certainly I can't say off the top of my head—whether it should remain or it shouldn't remain intact. But I do think there are two sides to the story. I can certainly see the the McMichaels' position. I think the whole process has strayed from the intent of the original bill, but I also think that the province—I mean we have this responsibility to the donors. You have to put yourself in the position of the donors. How would you feel if you had donated literally thousands of dollars worth of paintings to the gallery? I cannot answer your question.

The Chair: In your attempt to answer, we have unfortunately used up all of the time. So to the other parties, we'll have to make it up in the next go-round. Thank you very much for taking the time to come down and make a presentation. We appreciate it very much.

JOHN MacEACHERN

The Chair: The next presentation will be from Mr John MacEachern. Good afternoon and welcome to the committee.

Mr John A. MacEachern: Good afternoon, Mr Chairman, honourable members. I have known Robert and Signe McMichael since I was a young boy, as my parents and the McMichaels were friends. I was raised in Kleinburg when it was a farming community and attended the village's two-room school. My parents occasionally socialized with the McMichaels and, as I tagged along, I would wander about their home and look at all the paintings. I was thrilled, as I recognized so

many of the scenes since I went to summer camp on Canoe Lake in Algonquin Park.

My mother and Janet Berton started a tearoom called the Doctor's House in 1967 to serve the increasing number of visitors to Kleinburg and the McMichael Canadian Art Collection. I took it over in 1973, expanded it into a full-service restaurant and operated it until I sold it in 1992. I talked to literally tens of thousands of guests from Austria, Australia, Russia, Japan and from all over the world. For some reason, it seemed to me the Dutch came in more numbers than any other country. We were just inundated with people from the Netherlands. Premiers, Prime Ministers and dignitaries from all walks of life, whether it was the entertainment field, politics or sports, and even royalty, crossed my doorstep. I would have loved to have thought they came to the restaurant for our great cuisine, but let's face it, as good as our food was, the McMichael was the big draw to Kleinburg.

We were on the spouses' program for almost every convention that came to Toronto: a visit to the McMichael collection and lunch at the Doctor's House, or vice versa. Our record was nine bus tours in one day, and it was not uncommon to have four or five a day. The comments re the McMichaels flowed daily about the magnificent grounds, the beautiful log buildings and how they were situated, the views from the massive windows and how they rivalled the paintings. People got a true picture of Canada and what a magnificent country we have through the eyes of a handful of artists known as the Group of Seven and their contemporaries.

These were collected by a man and woman who had a dream to preserve these paintings for generations to come as part of Canada's heritage as they gave their land and beloved Tapawingo and their prize collection to the province. I kid you not when I tell you that people from all over the world were in awe of this couple. I would have people come into the restaurant and say, "We actually met Mr McMichael. He was out picking up some paper off the grounds. What a wonderful man he is." They were just in awe.

I myself was so totally impressed by what the McMichaels created and so believed in their dream that I persuaded my mother-in-law, the late Mrs Patricia Sims, to donate an original Lawren Harris which she had just inherited from her recently deceased sister, Helen O'Reilly. By the way, since the renovations in 1982, this painting, to my knowledge, has never been shown publicly. I've asked many times and have had answers like, "We have too many of the Group of Seven here. It's in the vault."

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Then it was announced in 1980 or so that the gallery would be closed for two years for renovations and the McMichaels would have to leave. Staff at the McMichael started taking sides and most were hedging their bets that the government would win. Innuendoes, lies and slurs on the McMichaels' characters were whispered about the village and used by government bureaucrats in the press as excuses for their actions.

For the past 20 years, senior management at the collection were never generous nor kind with their praise of the McMichaels. I recall having numerous discussions with Michael Bell and Barbara Tyler, both past directors of the collection, as I personally had to defend the McMichaels and their gift. I have also written a number of letters to the editor decrying the direction the collection has taken.

Three days after the announcement of the closing, I received 26 registered letters from my bank calling in my loan. Within two weeks, I had over \$160,000 worth of cancellations from bus tours. I cut my staff from 24 to eight, but we survived. However, the people never returned to Kleinburg in the same numbers as in previous years. I have been told that the McMichael Canadian Art Collection was one of the leading galleries in the country in attendance, with the lowest operating cost. I doubt this can be said today.

I say to my friends Paul Reinhardt and Mr Marchese, if you restore that gallery back to what it was, hordes and hordes of people will come back to Kleinburg. I understand it's losing a lot of money now and its attendance is down, and that's because of the direction it's taking now. The collection has changed. It has allowed pieces which are not at all representative of the gift, the terms and conditions of the gift or the spirit of the gift which Robert and Signe McMichael gave to the province and the people of Ontario.

What does a rusted piece of sculpture spelling out the word "Babylon," with a hyena standing on top of one of those letters, greeting people at the entrance have to do with Canoe Lake, Algoma, Lake Superior or Emily Carr's haunting collection of northwest Indian totem poles? Nor do I know how three bases from a Cleveland Indians' baseball game and a New York Yankees' hat fit in with the magnificent scenes from Quebec's North Shore or Harris's Mount Lefroy.

The insidious innuendoes are starting all over again. Before you, there is a letter sent out by the McMichael volunteer committee to all of the art sale participants which accompanied a copy of Bill 112. You will see the demeaning little handwritten comments trying to degrade the value of the McMichaels' original gift: "197 paintings," "less than 200 paintings," "only 14 acres" etc. They have stated falsehoods in their letter by saying, "The amended legislation does not include the First Nations, Inuit or any living artist." In fact, Bill 112 clearly states in section 4.1 that the advisory committee may make recommendations for acquisitions and does not restrict them from choosing First Nations, Inuit or any living artist. In fact, section 4.1(2)(e) of the bill states that the function of the art advisory committee is "to designate artists who have made contributions to the development of Canadian art for the purpose of including their artworks and objects and related documentary material in the collection."

These volunteers were originally named Friends of McMichael, but as they say, with friends like these, who needs enemies? And how is one of Canada's most philan-

thropic couples supposed to fight such small-minded people? Will they never stop until they have totally destroyed the McMichaels? I will never understand the mean-spiritedness of some people and what these volunteers hope to gain by their actions. I don't know.

I should mention here that I am also an artist; not a great artist, but I have sold work at the McMichael autumn art sale, so I know a little bit of what I speak.

Almost every city around the world has a gallery showing the art of today, modern art: Jello in the bathtub, rotting steaks on a dress form, dirty underwear on a bedpost, paintings by monkeys etc. Canada is well served by many galleries in this area, such as the National Gallery in Ottawa or the AGO, but no one has the McMichael. The experience, the feel, the art of our magnificent country is totally captured in this collection.

I respectfully request that you pass this bill, which will bring the McMichaels and their vision and the people back to Kleinburg to share and rejoice in our art and our land. Thank you for allowing me to appear before you.

The Chair: That leaves us about two minutes. This time, Mr Marchese.

Mr Marchese: Mr MacEachern, thanks for your presentation. I have two quick questions, at least one quicker than the other. Do you really believe that by introducing Bill 112 we will solve the deficit problems the McMichael has? That's the claim the government makes.

Mr MacEachern: It will certainly go a long, long way toward that, because the visitors who come to Toronto want to see something Canadian.

Mr Marchese: I understand that.

Mr MacEachern: They will come out to Kleinburg. The people themselves coming there will increase the attendance.

Mr Marchese: Well, I'm doubtful. But I want to raise another point with you. I looked at the mandate from 1965 on. The mandate in 1965 is limited to the Group of Seven and three other named artists plus others designated by the advisory committee "who have made a contribution to the development of Canadian art."

In 1972, Mr McMichael becomes a trustee for life and is also named the director and is on salary, and the mandate is changed while he's there to specify that all artworks must not be inconsistent with the general character of the collection when the gallery was created in 1965.

In 1982, the mandate changes again but Mr McMichael is still here. It says "and work by other artists who have made a contribution to the development of Canadian art and whose work and objects will be consistent with the general character of the collection."

The point I'm making with all of these mandate changes is that the McMichaels have always been there, agreeing with these changes, and I am assuming that much of what we have there since the beginning has evolved and they have agreed to that, and so we have now the McMichael gallery, which represents a whole lot of other people, which I think has been good for the gallery.

Mr MacEachern: I disagree with you. I think the McMichaels were moved out of their home. They were fighting. They had directors there that were putting their own views forward and not the views of the McMichaels. What was your other point?

Mr Marchese: That the mandate has, yes, changed but—

Mr MacEachern: Totally changed.

Mr Marchese: Right. But the McMichaels have been on that board from the beginning.

Mr MacEachern: Sure they've been on the board, but how can you fight eight other members or whoever is on there, when there's only two of them?

The Chair: With that, Mr MacEachern—

Mr MacEachern: There's a lot of politicking going on there, sir, and a lot of empire-building. Now you know where your money is going. It's the empire-building that has happened in that gallery. I remember the days when if a receptionist had to take a lunch break, Mrs McMichael would fill in and take over the telephones. I know that security in that gallery was two Labrador retrievers with the intercom system on at night, and nothing was stolen. The dogs would bark and wake up the McMichaels.

The Chair: Mr MacEachern, thank you very much for coming down and bringing that local perspective.

Mr MacEachern: Thank you for having me.

ONTARIO MUSEUM ASSOCIATION

The Chair: Our next presentation will be from the Ontario Museum Association. Good afternoon. Welcome to the committee. Perhaps you could introduce yourselves for the purpose of Hansard.

Ms Marie Lalonde: Yes, thank you, Mr Chairman. Our thanks to the committee for allowing us to appear before the committee this afternoon and express our concerns. I'm Marie Lalonde. I'm the executive director of the Ontario Museum Association, l'Association des musées de l'Ontario, and with me is Barry Lord, a corporate member of the OMA, an internationally recognized authority on museum standards and professional practice.

The Ontario Museum Association has more than 1,000 members that span across the province in communities large and small. Collectively, Ontario museums spend about \$376 million contributing significantly to community life and tourism in this province. Our success is due in large part to the constructive relationships that we have had with governments at all levels.

Upon the introduction of Bill 112, the OMA made its concerns known to the Ontario government and requested an open dialogue with the Minister of Citizenship, Culture and Recreation. I am pleased to report that our president, Marilyn Havelka, and I did meet with Minister Johns earlier this month to engage in an open dialogue on Bill 112. At this time, I would like to table the OMA's follow-up letter to Minister Johns. As we stated at that meeting, the health and well-being of the

McMichael Canadian Art Collection is our common goal. Our concerns with Bill 112 stem from our goal of ensuring that internationally recognized museum standards, which Ontario has played a key role in advancing, are followed for this nationally treasured art collection.

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Because the OMA believes that this legislation needs to be considered in the light of international museum standards of governance and collections policy, we have asked one of our corporate members, Barry Lord, who is vice-president of Lord Cultural Resources Planning and Management, to speak briefly to you today. Lord Cultural Resources Planning and Management is the world's leading museum planning company, which is also the world's largest, with its international headquarters in Toronto and offices in London, England, Washington, DC, San Francisco and Hong Kong.

With about 40 museum professionals, mostly here in Ontario, Lord has completed over 900 museum planning projects in 15 countries on four continents. Much of their work is also done and carried out in Ontario, I'd like to add. Their clients include such major museums worldwide as the National Gallery in London, England, the Victoria and Albert Museum, the Tate Gallery, the Art Institute of Chicago, the Los Angeles County Museum of Art, the Asian Art Museum of San Francisco, the Cleveland Museum of Art—and I can go on but I won't. Barry and his wife, Gail, who is the president of the company, are also well-known for their books such as the *Manual of Museum Management* and the *Manual of Museum Planning*, which are published by the Stationery Office in London, England, and by Altamira Press in California and are used in museum studies programs in graduate schools at universities around the world.

We have asked Barry, who brings 50 years of experience in the museum field—

Mr Barry Lord: Forty.

Ms Lalonde: Forty?—to join us here today on a pro bono basis to contribute the viewpoint of an internationally established Canadian private sector firm that is familiar with museum standards and best practice in governance and policies around the world.

Mr Lord: That's a marvellous introduction, except it's 40 years, not 50. I hasten to say that I started as an undergraduate, so I got started early. I have a written presentation here if the clerk wants to distribute it, perhaps; sorry to bother you.

Good afternoon, Mr Chairman, Madam Vice-Chair, members of the standing committee and Minister. In these few minutes, I thought it would be useful to review Bill 112 in terms of its ability to realize the government's aims in introducing it. Briefly, I appreciate the government's objectives, but I do not think that Bill 112 is going to be either efficient or particularly effective in achieving them.

The first objective is the government's concern with a cumulative \$1.6-million deficit. This is certainly a concern that we can all appreciate and share. However, from our international experience as a company dealing

with that kind of problem, we would have to say that this legislation will not help, and is likely to be counter-productive. Our firm has been involved in successful resolutions of comparable problems, for example, at the Philadelphia Museum of Art, where our recommendations several years ago projected the level of government support at about halfway between the level that was proposed by the city of Philadelphia and the level that the museum felt it needed, but only because we put the emphasis on enabling the museum to strengthen its revenue-generating methods. Unfortunately, Bill 112 does not free up the McMichael collection to be more entrepreneurial but binds it tighter to government oversight of its operations. So the legislation appears to be heading in the wrong direction, based on our experience.

In particular, I would suggest that there is no evidence that returning the mandate to the original focus on the Group of Seven and their contemporaries will help the McMichael to overcome its deficit. On the contrary, the whole direction of international museum practice at present is to develop exhibitions that relate art history to the present day. Even London's National Gallery, for instance, which has been a client of ours, whose collecting mandate ends in the 19th century, has recently had great success in commissioning contemporary British artists to create contemporary works of art inspired by its Old Masters collection. The Tate Gallery in London has now become two separate museums, Tate Britain and Tate Modern—both have been our clients—precisely in order to be able to mix and match the contemporary with the historical in thematic displays that are based on the content of the works of art. This is in fact the contemporary international direction, to focus on the content of works of art rather than their art historical period. So there is plenty of opportunity for that.

The government's other objective, to honour previous commitments to the original donor, is also understandable, but again based on our experience I would suggest that Bill 112 is likely to prove problematic, for several good reasons.

First, it sets a precedent of placing donors on the boards of institutions and gives them direct control of the cultural content of the institution. I know the minister has said that this is an exceptional case, and I appreciate that, but the precedent is one that other donors may wish to emulate at other institutions, so the government may be inviting future difficulties of that kind. Needless to say, this role for donors does not accord with international practice, where "no strings attached" is the standing rule that most donors accept, and problems in this area might not be confined to individuals but might also be involved with sponsoring corporations as well.

Second, in making the board subject to ministerial approval for either three years or until the collection is rationalized, another precedent is established which violates the arm's-length relationship and replaces it with direct government supervision. Again, I appreciate that this is seen to be temporary and specific to this case only, but it is contrary to international museum practice and in

our experience is likely to discourage private donors, who will have the impression that this is an entirely government-funded institution and therefore does not need their support.

Third, the legislation establishes a non-professional committee, called the art advisory committee, that would actually have direct responsibility for acquisitions, deaccessioning, exhibitions and display—not only collections but also exhibitions—and it's direct responsibility. It's not advisory but it's governing, as we would make the distinction. This of course is completely opposed to professional practice elsewhere.

One of its most serious disadvantages would be the very great difficulty it would present for the McMichael to be able to recruit or keep good professional staff. Museum directors and curators of the stature that the McMichael requires will not be attracted to an institution in which collection development and exhibitions are in the hands of non-professionals. Nor will other museums be attracted to lend individual works or exhibitions to such an institution. It is a vicious world, the world of lending exhibitions and lending works of art. Curators, directors and so on will look for any reason not to give, and this will be a very good one. They will expect decision-making to be done by professionals of equivalent stature to themselves.

This is especially serious for the McMichael deficit, since it means that the institution will have greater difficulty in participating in the national and international world of exhibitions, which depend on close co-operation among professionals. It's through such exhibitions that some kind of progress on the deficit could be made.

Fourth, we have to observe that the proposed disposal of collections, or deaccessioning as it's called in the museum field, is a highly challenging process. We have been involved in advising professional museums on the deaccessioning process. It is very difficult, not merely in terms of professional museum standards but also legally and even ethically. The museums associations of Great Britain, the United States, Canada and Ontario all have policies cautioning against it and require that if it is done at all, it must be done by professionals following a highly explicit code of conduct. One of the very serious reasons for this, quite aside from those of the museum profession, is the concern with the legal ramifications of both federal and provincial tax forgiveness that has been extended to donors in the past. This tax forgiveness was at a value established at the time of the donation. Legally, giving or trading it away can only be done within the public sector since sales will necessarily be at a higher or lower value, in either case creating legal and financial problems.

The safest procedure with all donated works of art is simply to transfer them to other institutions. I speak as somebody who tried to work out a deaccessioning policy for an institution and it was extremely difficult. However, I caution that the operating costs associated with their upkeep will go with them, so that there is no net saving if they are transferred to other institutions that are recipients of provincial support. Even then there is a risk of

violating the original donors' intentions, since they or their heirs may not wish their gifts to go to other institutions.

One of the most serious results of deaccessions in our experience is their effect on donor confidence. Donors have given works of art to the McMichael as a public institution on the understanding they would remain there. Some are bequests or given in honour of persons no longer living. If donors lose confidence in such arrangements, they are likely to be unwilling to entrust future donations to the institution. So it's a Catch-22: the government's wish to honour one set of commitments to a donor in the past will result in dishonouring many others.

In practice, the only deaccessioned items that could be sold, in our experience, having gone through deaccessioning policies with institutions, are those that were purchased by the McMichael collection. But here we encounter the very serious implications for living Canadian artists and/or their dealers, whose prices will be devalued when it is learned that a major public institution is selling off their works as if they were unworthy. This would expose the institution, and the government, since the board and its deaccessioning is to be approved by the minister, to possible legal action by the affected artists and their dealers for devaluation of their works.

This is, I would say, an almost unavoidable result, even if the works are sold slowly and in small numbers. If they're sold in large numbers at once, the result would be even more catastrophic. Therefore, the government would be at risk of that kind of legal action. I don't know how it work out legally, but it would be a problem.

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Finally, I should point out, as our book *The Manual of Museum Management* does, that museum boards should be concerned with policy, not the actual selection or disposal of works of art or the choice of exhibitions. One of the things we have learned again and again throughout the world in this kind of institution is that when boards are not doing policy, because they're doing something else, because they're actually operating, nobody is doing policy. Where boards violate this principle, policy is neglected, and the result is that without policy to steer by, the institution becomes more and more dependent, not less, on its governing authority, which in this case will be the provincial government.

Our experience would therefore suggest that Bill 112 will result in making the McMichael collection more and more dependent on government, not more independent. This is contrary to the direction of the present government, as I understand it, and it's also contrary to the entire international trend of museum management.

For all these reasons I would urge that the government reconsider Bill 112, since it appears to us, by our experience, to be very likely to be counterproductive in achieving the government's own aims. Thank you for your attention.

The Chair: Thank you very much, both of you. We've been a little indulgent, recognizing, with the typed

presentation, the end was coming. But we've gone over time. I want to thank you very much for making your presentation before us here today. We appreciate it.

GEORGE McLEAN

The Chair: Our next presentation will be from Mr George McLean. Good afternoon, Mr McLean. Welcome to the committee.

Mr George McLean: Thank you for having me. I'm a member of the McMichael board and have been for over three years now. I'm a professional artist, a freelancer. I have never made my living from government grants. The fact is, I've made more money than I ever thought was in this whole wide world as a freelancer.

The reason I agreed to sit on the board of the McMichael was because I always thought that the McMichael was the one public visual art institution that featured representational art. I would never have agreed to sit on the board at the AGO, because I think a lot of the stuff they buy isn't worth the time of day.

The public galleries tend to buy works as if they were putting these collections together for themselves and not for the public. A great number of the well-known contemporary artists not only never receive grants, are not eligible for them, could never get a grant; they can't even get a show at the big galleries in the country. Bob Bateman—I've used this before—is the most famous artist that Canada has ever produced. There's not one single major institution in this country that has any of his work. Artists tend to become well-known in their lifetimes, not after they're dead. Van Gogh was maybe an exception to the rule, but it's a rare exception.

Before I came on the board I knew no one on the board. I didn't even know the McMichaels, never met them. I sat on the art acquisitions committee, often abstaining from a vote because I thought the stuff was so inappropriate, and yet I felt somewhat intimidated because I'd never sat on a board before. I didn't know what the right protocol was. But all the while I noticed that the McMichaels were treated like pariahs. "They're old folks now." It just ain't polite. Not only that, but the other consideration I've had is that if it weren't for the McMichaels, there wouldn't be a McMichael gallery. It's that elementary. If you want to know what the focus of that gallery was intended to be, just ask them. It's that easy. I can't understand—well, I can, sort of, and I'll get into that. It looks to me like all the public institutions want to look the same. We have a contemporary wing at the Art Gallery of Ontario. You could fire a cannon through that thing and never hit a work of art or a visitor either, this space that has been put together by the Canadian arts council or whatever they call themselves. Without those councils, none of these artists could survive—and at the McMichael.

I heard the gentleman who ran the restaurant in Kleinburg. I totally agree with him that if you bring shows to the McMichael that people want to see, people will come to that gallery. I absolutely believe it and I can

prove it by some of the galleries I show in myself. I could name a bunch, but we just don't have time. It seems to me that this McMichael dispute is really not about art or artists. It's about who is going to control the money that the government spends; that's what it is all about. These people from these museum associations have enormous clout, because they're a group. They are far stronger than the likes of me, because I'm just one guy and, frankly, I'm a freelancer and couldn't care less what they think. I don't need them to make a living. I don't care if I'm in the museum. Posterity is for dead people. All I want to do is keep making my paintings.

I can tell you that on several occasions I finally spoke up. First of all, someone just said that you shouldn't have people on the board who are donors. That was commonplace at the McMichael gallery, including the ex-CEO. She received a tax credit for a piece she donated. They were buying pieces from someone who sat on the art acquisitions committee. Is that what they mean by, "You shouldn't have these people on the board"? I agree with that totally. If somebody had asked me if they could buy one of my paintings, I would have said, "Sure, if I'm not on the board. I'd be glad to resign, by the way, so you can buy a piece."

We heard time and time again the projections for the future, and time and time again those projections were way off the money, and the deficit started to grow. I keep hearing about this deficit of \$1.6 million; it's \$2.3 million.

They talk about government intervention in the museums. Governments do intervene in the visual arts museums. They give public grants to individual artists. I don't know of any representational painter who receives grants. There may be some, but I don't know them. The direction that those grants have taken is that they fund only non-objective art, and in that way the government is absolutely determining which way the art is going to go. If they're not supposed to interfere, then they should remove the sales tax, say, from fine art, and give every artist the same opportunity. They should stop giving these outrageous grants to individuals who are not really professionals at all.

I could go on with some of the shows that the gallery had proposed. One was Hockey and the Art of being Canadian, a whole lot of hockey artifacts. I said, "There's a Hockey Hall of Fame. Why would we have hockey artifacts in an art gallery?" Then there was a hell of a hue and cry about that. They bought an installation of three wolves. It cost over \$50,000. There was a bus stop that went with it with a picture of a raven in it. By the way, I paint animals; that's my specialty. That's what I do for my livelihood. This wolf installation: they didn't look like wolves. It was badly done. I said that. Again, I could never make a point.

What I'm saying is, these people who say they know how to run the gallery—this gallery has been run by the very people who are now putting up all the fuss. This gallery has been run for 11 years by those same people. The McMichaels have had very little hand in that, let me

tell you that, because I've been on the board. They've always been shut up, just brushed aside. But they took 11 years to get themselves into \$2.3 million worth of debt. Talk about government interference—I think there wasn't enough of it. Thank you.

The Chair: Thank you, Mr McLean. That gives us about two minutes. This time the questioning would be the government.

1720

Mrs Elliott: Thank you, Mr McLean. You've raised some very interesting points, particularly that the deficit is now \$2.3 million.

In the proposed bill we say, "The board shall ensure that the collection reflects the cultural heritage of Canada and is comprised of artworks and objects and related documentary materials created by or about" the Group of Seven "and other artists who have been designated by the art advisory committee ... for their contributions to the development of Canada art."

We have heard from the previous speaker that a specific collection mandate in fact would not work and we would see revenues fall at the McMichael. We heard from an earlier speaker who said exactly the opposite: that returning, as you're suggesting, the McMichael to the spirit of its original intent and focus on the Group of Seven would cause it to thrive.

Do you think, if the bill passes as we are proposing, where its focus will be again on the Group of Seven and the Canadian art heritage, that this gallery would thrive?

Mr McLean: Let me put it this way: I've been to two shows this summer. One was in Wausau, Wisconsin, and another one was out in Jackson Hole, Wyoming. Both of these galleries specialize in the sort of work I do. They pack those places. In Teton county, the richest county in the United States, believe me, they pack that place. People fly in there from far and wide, pay huge high prices for the hotels and all the facilities around there. They have huge donations, because people like to give their money to organizations that they relate to.

The other thing is, we just had the annual ball, the Woodchoppers' Ball. A lot of the people who used to come to it weren't at it this time. So what? There are other people around who have other ideas about how galleries should be run, and they've got money too. My clients all have a lot of money. I don't think it would hurt the gallery in the slightest.

The Chair: Thank you very much, Mr McLean. We appreciate the perspective that you brought here today.

PAT FAIRHEAD

The Chair: Our next presentation will be from Pat Fairhead. Good afternoon, Ms Fairhead. Welcome to the committee. The floor is yours.

Ms Pat Fairhead: Thank you, ladies and gentlemen. As you don't know me and I don't see any of my work in this room, I'd better introduce myself. I'm a full-time painter. I've been making my living from the sale of my work for something like 30 years, at least.

My education is at the Ontario College of Art. I have a master's degree in education and in the arts. I am a member of the Royal Canadian Academy, the Ontario Society of Artists, the Canadian Society of Painters in Watercolour, and the renowned Arts and Letters Club—the original eighters and the time that the group spent there.

The passion for my work stemmed in part from the Group of Seven. I too have paddled, kayaked, and climbed this country and the Arctic many times. My work is very large and is inspired by the Canadian wilderness.

I went to Tapawingo years ago, on the very first AGO tour of Canadian art in country houses, and there I met the McMichaels before they started to build. I was thrilled. The dining room was full of David Milne and some enormous pieces of Inuit sculpture. I enjoyed myself and their very gracious hospitality. I went often, and as Bob and Signe enlarged and expanded the gallery space over the years, the collection has grown to show the work of contemporary Canadians. It is vital for the collection to keep up with and show what is being done by Canadian painters. It is so exciting to go in and see where we have been, where we are now, and where we're going.

The McMichael collection of Canadian art is the only public gallery dedicated exclusively to Canadian art in all this country. It must be kept up to date for all of us who gain inspiration and education, and to show the world our Canadian art. It is absolutely unique.

I remember Carmichael, a member of the Group of Seven; his daughter just spoke. He was my teacher at the Ontario College of Art. Again and again he said to us, "Above all, be original." He inspired us to think, to analyze, and to invent new ways of making art, and all the group did that. They showed us our country for the first time through their eyes: strong, vibrant and alive—and we were shocked. The critics and everyone absolutely said it was trash, it was junk and no one would look at it, and the public screamed blue bloody murder.

So, here we are. Bob and Signe, years ago, saw the significance of the group and started to buy when they themselves were just struggling along. They were truly inspired and built the nucleus of this extremely important place, then gave it to the Ontario people and were handsomely rewarded.

Now we are experiencing the same damned shock of the new art of contemporary work, and the very same response as to the Group of Seven 70 years ago. It happens every time. We learn by seeing, we learn by familiarity and also the educational component the gallery provides. Without this gallery moving with and ahead of its time, it will become a morgue and a museum. It will be dead.

The group is and always will be the hot core that still vibrates. It is our responsibility—all of us—to continue their heritage. We must keep this showplace of Canadian art in the hands of professional administrators and curators. To return it to the helm of the McMichaels,

pursuant to draft Bill 112, it becomes a personal collection and will, in fact, not reflect what has happened and is now happening in exciting and contemporary painting.

Ladies and gentlemen, I feel betrayed by what this draft act imposes on what has been a magnificent and highly regarded Ontario gallery. We are all famous for it.

The Chair: Thank you very much. That affords us time for questioning. This time it will be the Liberals.

Mr Levac: As a young student going to high school I visited the McMichael, and probably one of the most important things our art teacher instilled in us was the concept of the Canadian identity. Even then, when I was looking at some of the pieces, I couldn't see the relationship between what Harris did in some of his latter works and the landscape. Having said that, I've visited other art galleries since that time, in my continued studies in art, and I've always found your statement about the shock or the comment of artworks.

In your opinion would this bill, in effect, take us backwards in terms of we as a people understanding art and its challenge to us to think outside the box?

Ms Fairhead: Absolutely true. I agree with you entirely.

Mr Levac: Thank you.

The Chair: Ms Di Cocco.

Ms Di Cocco: My biggest concern is that this is a public gallery. We seem to be forgetting this. We seem to forget that this is a crown corporation, and I thank you for your insight.

What would you suggest to this committee that we should do with regard to this gallery?

Ms Fairhead: Thank you; I'm flattered. I would absolutely like to see it continue and also keep showing contemporary art. I think it's absolutely a necessity. This is the only Canadian art gallery.

As far as the deficit is concerned, art galleries have never made money. They've usually been free. People will pay \$150 for a hockey ticket. If you charge them \$10 for a gallery—art is part of our education; we learned some in school, although it is going now, unfortunately. When we go to a gallery, we don't expect to pay anything. Galleries, mostly on the initiative of Europe, are supported mostly by government and by private donations. This is our culture. We expect to have them there and we don't expect to pay very much for them.

Ms Di Cocco: I see this bill as very aggressive, so you're talking to the converted here. When it comes to the background, the court case and the struggles, do you think that if we just stabilized—we went through a court action in 1997, I think, and there's always been conflict on the board. Do you think the cause of the financial problems—I agree with you that it's sort of innate in art galleries, etc. Do you think that if we could stop that struggle of who is controlling what and move forward in the governance model that's been set out by international standards and keep it that way, maybe that might help to solve the crisis?

Ms Fairhead: Apparently the infighting has been extremely damaging. But boards have to learn how to operate. They have to have a clear mandate and they have to have support, otherwise they don't work.

The Chair: Thank you very much for bringing your professional perspective before us here today.

1730

MARY McARTHUR

The Chair: Our next presentation will be from Ms Mary McArthur. Welcome to the committee.

Ms Mary McArthur: My name is Mary McArthur. I am 34 years old, and although I am probably the youngest person in this room, I have lived my entire life in Ontario.

I became aware of the situation at the McMichael collection, and of Bill 112, through discussions with the McMichaels, who had been our neighbours in Belfountain until recently when my husband and I moved to Toronto.

The goal of my presentation today is to present my feelings, which I believe are representative of regular Ontarians. Like most people living in this province, I am neither an art critic nor an avid collector. Like most Ontarians, I have visited and enjoyed the McMichael collection on numerous occasions.

Quite frankly, I support Bill 112 for three reasons. First, the province should respect the terms and conditions of the deal it made with the McMichaels in 1965. We need to remember the McMichaels gave as a gift this extremely valuable collection of Canadian art, their home and 14 acres of land to the province of Ontario. In return, the province made an agreement with the McMichaels.

I believe, very simply, that a deal is a deal. Can any of you put yourselves in their shoes for a moment and imagine giving your entire life's work to the province? Can you then imagine having the agreement that underpinned that gift disregarded in years to come? It is only right and logical that the original agreement be respected.

If this original agreement is not respected, then every Ontarian should rightly question the integrity of the province in any other agreement it strikes with its residents.

The second reason I support Bill 112 is that the province must restore the confidence of future benefactors, thus ensuring that future gifts will be given. What will inspire me and other Ontarians to be as generous with our assets in future years as the McMichaels have been? The province must be willing to respect the agreements it makes with its benefactors, or why will anyone give anything to the province in the future? In this state of affairs, the residents of the province will be the losers.

The third reason I support Bill 112 is that it will allow the collection to be returned to its original focus. When I visit the McMichael gallery, I see a gallery that lacks focus. When I read about the financial affairs of the

gallery, I see a gallery that isn't effectively marketing or administering itself.

Bill 112 is a wonderful opportunity for the gallery to rededicate itself to a clear, focused mission and for the gallery to excel in that mission. It is time for the gallery to put its lacklustre and unfocused recent past behind it.

The original agreement in 1965, which created the McMichael collection, promised that the collection would be made up of works by Canada's Group of Seven artists and their contemporaries. Seven years later, in 1972, Bill 216 came into effect. It included a very important section, that being section 8(b), which stated the following:

"The corporation may expend, administer or dispose of any such money or property in furtherance of its objects subject to the terms, if any, upon which such money or property was given, granted, bequeathed, leased or otherwise acquired by the corporation."

In 1989, the then Liberal government threw out this entire section. It was the removal of this section which led the gallery to become unfocused. It is time for the gallery to become focused again. The gallery must be managed with a clear focus and a clear mandate, and Bill 112 will allow this to happen.

If appropriately mandated and led, the McMichael gallery can be a world leader and a major asset for the people of Ontario. My challenge to this committee is that it ensure that this opportunity is seized and a focused, energized McMichael gallery returns to what it does well: exhibiting the work of the Group of Seven and associated artists, and other art that is relevant to that mission, which was envisaged in the 1965 agreement between the province and the McMichaels.

The Chair: That leaves us time for questioning. In this rotation, we'll start with Mr Marchese.

Mr Marchese: Thank you for your presentation. A couple of questions. Did you have the chance to listen to the presentation made by the Ontario Museum Association, including Ms Fairhead and possibly Professor Joyce Zemans?

Ms McArthur: Yes, I did.

Mr Marchese: Do you have any reaction to what they said?

Ms McArthur: In terms of what? Can you be more specific with your question?

Mr Marchese: There are so many questions they've all raised. Pick one.

Ms McArthur: Let me make a couple points that I tried to make in my presentation.

Mr Marchese: In terms of your sense of what they said and your reaction to them. If not, I'll go to other questions, because I have a few others.

Ms McArthur: I have a couple of reactions. I'm not sure if it was stated by them or the lady that came after them, but they're basically saying that Canadian art must continue to be displayed. My comment to that is: why at the McMichael? Modern contemporary art isn't best shown in a log cabin in the woods; the Group of Seven is

best shown there. Modern contemporary art can easily be shown at the AGO.

Mr Marchese: I understand that, too. They said a lot more than that.

Ms McArthur: Sorry. There's too much.

Mr Marchese: I don't want to encapsulate what they said because I've only got two minutes.

A lot has happened since 1965, and as much as you want to return to the original focus, I'm not sure how we deal with a lot of the questions that have been raised about decommissioning and whether such a committee should be able to do that. It's an advisory committee, but they have the power to be able to sell, to decide what gets disposed of and so on. That presents a whole lot of problems in terms of the other people who have donated since 1965. As much as you might have a problem about the original deal as you understand it versus what all the others have done, are you not worried about the other donors and their contribution and what it means or its implications?

Ms McArthur: No, I'm not worried, quite honestly. It might be difficult to do, to dispose of some of the recent gifts that have been given. Fine, it might be a logistical hassle, but you know what? The thing is off focus, plain and simple. If I were an operator of a store that was focused on selling clothing, for example, and I started to sell hardware, do you think I'd be in business for long? Do you think I'd be profitable? I don't think so.

Mr Marchese: I hear where you're going. The 1965 mandate is limited to the Group of Seven and three other named artists plus others designated by the advisory committee who have made contributions to the development of Canadian art. That was the deal they had in 1965, which clearly suggests to me that in addition to the Group of Seven, it includes others who have made contributions to the development of Canadian art. That's part of the original deal. What do we do about that?

Ms McArthur: As I told you in the beginning, I am not an art historian or an art critic. I'm just a regular Ontarian and I know that thing is off focus. My whole point is, let's get the thing back in focus and deal with the hassle of disposing the things that don't fit the mandate.

The Chair: Thank you very much, Ms McArthur. I appreciate your coming before us here this afternoon.

Mrs Elliott: Don't we get a chance to ask a question?

The Chair: You're the next round.

ROBERT McMICHAEL

The Chair: Speaking of the next round, up next we have Mr McMichael himself. Mr McMichael, feel free to join us at the witness table. Good afternoon. Welcome to the committee. Much has been said about you and now you have an opportunity to put the straight goods on the record.

1740

Mr Robert McMichael: After listening to these good words of several friends of the McMichael collection, there is little left for me to say except possibly to counter

some of the questions that have been raised by Mr Marchese that are simply off base. They're just not correct and I would challenge them on any point.

One of the last points you made, and you attempted to embarrass Ms McArthur, was the fact that all these works were promised by the people to stay in the collection and all that kind of thing. Every gift ever given to the McMichael collection through its 35 years has had the clause that works can be disposed of as seen fit by the board of trustees. If you don't know this, then you'd better read the act and you'd better read the gift agreements that apply in that act.

Anyway, I didn't come to debate this; I want to discuss our position on it. In earlier years, most of the great artists in the collection could barely make a living. With the passage of time, their works have become nothing less than national icons. During the past year or so, paintings by Lawren Harris and Emily Carr have been sold at auction for more than \$1 million each. No contemporary artist before them or since them has ever reached this point. It is an example of the quality of the work of the Group of Seven and their contemporaries, and I stress "their contemporaries."

The advisory committee selected, in addition to 10 artists originally named, seven other artists, for a grand total of 17. Through the years, the collection has stayed within that mandate. Our chairman, Mr J. Allyn Taylor, and the board agreed completely that this was the right direction it should be going.

I want to point out here, too, that in those years, we had the highest attendance by far—in fact, double the present attendance—at Kleinburg. One year, in the last year of my reign, as they say, we had 286,000 people come to the gallery. It is about half that amount now. I'm afraid a good part of that has gone because the works that people came to see, the great works—and I mention they were not all \$1-million works, but all of the Group of Seven works have gone into the hundreds of thousands of dollars now. They're not cheap things, but they've stood the test of time. That's what the whole story is about.

They've been the greatest artists that Canada has ever produced and, as such, we wanted to create a collection dedicated to them, along with their friends, Albert Robinson, J.W. Morrice, Clarence Gagnon, Thoreau MacDonald—seven people beyond those actually named. That was allowed for in the agreement, that the advisory committee would select other artists who have made major contributions to Canadian art.

The advisory committee, through those years up to 1982 when I stepped down, selected the works, and everything that is in that collection by those artists has skyrocketed in value, where a great number of the things that were accepted were largely given because people wanted tax receipts for them. I hate to be blunt about it, but that's exactly what it amounted to.

When we gave the collection—and I don't mind being very frank about this—Mr Robarts said to us, "Bob, is there a tax deal in here? I wanted to tell you about it. I know of no way that you could possibly get any benefit

by giving this collection, this gallery and these lands to the province of Ontario." I said, "Thank you very much, Mr Robarts, but we'll go ahead anyway. We don't expect any tax relief." We never did.

Three years later, the government of Canada changed the rules and started giving donations to collectors as a deduction from their income tax. In our case, and I was just recently reviewing the thing, we received a grand total of approximately \$85,000 in tax relief for a gift by that time—and I must stress again, the number keeps coming up as \$195,000 or some such odd number. We kept on giving pictures through almost every year, certainly a majority of the years, from 1965 right through to the present, and we still gave this year. Those gifts have been valued at well over the \$1-million mark, but we didn't do this for taxes, believe me, in the first case or in the later cases. I just wanted to stress this. I've broken away completely from what I had planned to say, but I simply had to express this.

I must also say that the deficit that has occurred in the gallery is a terrible embarrassment, simply because it was created by a management, and particularly a director, who just knew no end to the amount of expenditures. In fact, I must say, and I hate doing this but I must put it on the record, she drove her own salary up to a point higher than a cabinet minister. I can't make it any clearer than that. Is it any wonder we've got a deficit with that kind of management?

Fortunately, the present staff are starting to trim it back and cut back on costs, but it has been a terrible embarrassment to know that we could be so overspent by one or two people who called the shots, and even when they first gave us the estimates, they never broke it down by who exactly was getting what. They broke it down by departments, for example, the collections department, or the director's office, and so on. We never knew precisely what any of the salaries were, and I had asked for that many times at board, as had Mr McLean, but we never received that. To this date, we still haven't received a list of what the salaries are; we don't care about names, just the specific positions. I'm just pointing out that it has been a very sad embarrassment to us that this kind of money could be spent. In the years that we directed the collection, we never had a deficit of 10 cents. It was absolutely within the bounds of exactly what was allocated by the government and we lived within those bounds, and the collection, in spite of that, drew the highest attendance it has ever had.

Coming back to some of my other points here—sorry, I don't mean to be so carried away—in the earlier years most of the great artists in our collection could barely make a living. But with the passage of time, their works have become nothing less than national icons, as I said. During the past year or so, paintings by Harris and Carr have passed the \$1-million mark.

I recall one day when A.Y. Jackson was living with us in our apartment at the McMichael collection. One of our attractive young lady guides who worked at the gallery spoke to A.Y. Jackson. She asked him, "How come a

handsome man like you never married?" He responded, "When I had the inclination, I couldn't earn the money. By the time I had the money, I had lost the inclination." I think that says a lot about what the famous Group of Seven is now; but in their early days they had a very hard time.

Some of the most interesting family-founded art collections in the world have been born of a compelling enthusiasm for a particular period or kind of art. Material for such collections may be the work of one painter, one nation or one school of artists. The enthusiasm that founded the McMichael art collection was triggered by the art of a legendary Canadian, Tom Thomson, and his fellow painters in the Group of Seven, but there are a host of galleries that have been founded on this base, and they are enormously successful throughout the world. All of these galleries place an absolute limit on exactly what artists, in fact exactly what pictures—not just the artists, but exactly what pictures—will be in their collection. The famous Frick Collection in New York is an example of that, but there are all kinds of collections throughout America and Europe where this kind of thing prevails.

The McMichael was never intended to be a general art gallery, some place just to get people to hang pictures or keep up with the times; it was to carry the work of a period of Canadian art and a group of great painters, who I still believe are the greatest we have ever produced. As a matter of fact, if we were to ask any art dealer in Canada who would be the most highly ranked artists in Canada—in other words, with the idea that they would like to have them to sell to their clientele—I think invariably they would start with Tom Thomson, Emily Carr and the members of the Group of Seven—and David Milne of course. They would also add the great work of Clarence Gagnon, J. W. Morrice and the others our advisory committee brought into the collection. In other words, we approved it unanimously and stopped at a certain point, when we had reached 17 artists, much like these great galleries throughout the world that have been founded by other families.

At that point, for 10 years, until I stepped down, until I retired, stepping down as director, that is exactly where it stayed. We got marvellous additional pictures because people who had these wonderful things were willing to come forth and present them to the collection. There was no thought of a need for more pictures. We had more than we could hang, but we liked to rotate them. We liked to give the best works a regular chance to be shown at specific times. Just like Mr MacEachern—I remember well the picture his mother gave to the collection. It was a marvellous Lawren Harris. I don't know why it has never been up, but I know that a lot of things that are not in the same league as the Group of Seven, not even to be considered in the same breath as the Group of Seven—but I have to stress again that the collection wasn't built—and the word is "collection," not "gallery." Its incorporated name in the province of Ontario is The McMichael Collection. That was never intended to be a gallery in the sense of, "Come one, come all, we'll hang

all these different kinds of new work as it comes along” and so on. It was a memorial to a particular period of Canadian art, and that’s what we wanted to stress. We said this right from the first. In our 1965 agreement, we mentioned 10 artists because at that time we did not have even all the members of the Group of Seven yet. We hadn’t been able to afford to buy some of the ones we wanted very badly. So the 10 were just to lead, but the advisory committee, which was specifically spelled out in the agreement, was charged with making a selection of the artists.

As I say again, repeating myself, we came up with seven other artists, all great Canadian artists, and that total did it. For as long as I was director, it stayed that way. But it was only a matter of a short time after that that unwanted pictures started to come in, simply because curators and other staff members wanted to see the numbers go up. They wanted to be heroes and have thousands of pictures in the collection, which apparently, in their opinion, made them heroes. But the vast percentage, probably 95% or 98% of the works that have been received since 1989, which was the time the Liberal government changed the mandate—I would say that’s not a bad estimate. We’ve looked through the inventory very carefully and, on average, I would say most of these pictures are less than \$1,000 in value, and most of them, to be very truthful, were actually valued by the collection upon receiving them at about \$200 each.

One gift they received—and I remember so well. I sat at that meeting, even though we were outnumbered. At that point, they had changed the art committee and just eliminated Signe. Signe wasn’t even allowed to be on the art committee. It was a wonder they kept me, as a matter of fact. But I remember examples of cases. One man offered to give over 700 etchings and drawings by an artist we had never heard of, a man named Mr Wood. No disrespect, I don’t know the man, and he’s long since gone. But these etchings and drawings had been saved. The 700 works were valued at an average of \$200 each. That gives us some kind of picture. Anyone who knows anything about the value of art these days would know that a Tom Thomson sketch, and I’m speaking of a little sketch smaller than the size of that piece of paper, goes for about \$200,000. It speaks for itself. It’s not because of the dollars and cents or anything. The group had its period. They have maintained these prices. Their prices have gone up, while other artists before them and other artists since have continued to go down or barely hold their own in many cases.

Though I’ve broken entirely from the theme of my discussion—I’d like to be able to repeat this sometime so others could read it if they wish—it is our most profound goal that with the enactment of Bill 112, the McMichael Canadian Art Collection will be returned to its original focus, for the benefit of the taxpayers and the citizens of this great province.

The Chair: Thank you, Mr McMichael. I’ve been a little indulgent in terms of time, but I think it only fitting, in terms of who is making the presentation. Thank you

very much, both for the original gift and for taking the time to come before us today.

Mr McMichael: If there are any questions, I’d be prepared to—

The Chair: Well, we’ll be done in another 10 minutes, and I encourage members of the committee to approach you then, if you’re still around. Technically speaking, from this point on I have to ignore the clock to be able to have the next presenter.

Mr Marchese: I’m not sure you can.

The Chair: As Chair I have that authority.

Mr Marchese: Ms Stokes, does he have the ability to do that?

The Chair: Considering that debate is still on in the House, Mr Marchese, you’re out of order and being disrespectful. Please let me call the final presenter.

Mr Marchese: On a point of order: When the bell rings, do you have the authority to keep this committee going?

The Chair: Yes. The Chair, in his sole discretion, has the right to decide whether he sees the clock.

Mr Marchese: Ms Stokes, can you comment on that, please? What’s your comment on that, Ms Stokes?

The Chair: If you wish to point out afterwards—if you want to interrupt a presenter, you have the right. Any committee member has that right.

Mr Marchese: Was that your comment, Ms Stokes?

VIRGINIA MacDONNELL

The Chair: Seeing that the debate is still on, we’ll call forward the V. MacDonnell Gallery, if Virginia MacDonnell is here, rather than take any more time away from her presentation. Welcome to the committee.

Ms Virginia MacDonnell: Thank you. No one denies the magnitude of the gift that Robert and Signe McMichael made in giving the Canadian people the works which became the foundation of the McMichael collection of Canadian art, and for that we thank them. However, this gift has been paid for many times over, and the McMichaels have been abundantly compensated.

The McMichael collection of Canadian art has grown into a large and comprehensive collection of diverse and exceptional pieces of Canadian artwork. It represents the development of Canadian artwork within the 20th century and should be allowed to continue to grow and expand its collection into the 21st century. In doing so, the works of the Group of Seven are not being ignored or forgotten, but rather are being expanded upon. They can be seen in the full context of the development of Canadian art rather than merely appearing as a simple, isolated episode. This is something which should be encouraged and which hopefully the McMichaels should support.

Robert McMichael wrote in his autobiography that in 1968 “...we were forced to admit that although the collection and its setting were very appealing, they were not extensive or impressive enough to command the national, and possibly even international, attention that

we sought." He goes on to state that with additions to the original collection and with the expansion of the collection's premises, "growth and ever-increasing public attendance went hand in hand," and it makes sense that it would.

Many public galleries and museums in Canada have fine works of art by members of the Group of Seven and their peers. It isn't necessary for people to go to the McMichael Canadian Collection in Kleinburg to see a Tom Thomson or an A.J. Casson. The Art Gallery of Ontario, for example, has a number of wonderful works by these artists, and one can also see works by Claes Oldenberg, Pieter Breughel and Joanne Tod. The gallery in Kleinburg must continue with the curatorial and directorial mandate to build and expand upon its collection by continuing to add work by contemporary Canadian artists. That will be its strength and what will separate it from the myriad of other public and private galleries which are out there.

1800

Mr McMichael has also likened his case for returning the McMichael collection to its original works through comparisons to the Barnes and Frick collections in the United States. These comparisons aren't really appropriate. Both the Barnes and Frick collections are private foundations and remain so. They are not public institutions. They maintain themselves through what they've been able to generate privately. They are self-sustaining.

A more accurate comparison for the McMichael gift might be the Whitney Museum of American Art in New York City. Here, a family created the initial endowment, which has since been expanded upon and is regularly added to. The Whitney also hosts a Biennial of American Art to celebrate the achievements of contemporary American artists. It is building upon its strengths and, in doing so, expanding its audience.

The McMichael collection of Canadian art could do the same here in Canada. The lack of pride in and knowledge of our visual artists is appalling. The McMichael collection of Canadian art has the opportunity to do something brave and wonderful which would celebrate contemporary Canadian art without doing any kind of disservice to the artists from Canada's past.

In consideration of the enormous changes which have taken place since the McMichael collection of Canadian art was first formed, one suggestion might be to change the name of the gallery to the Museum of Canadian Art, and to have a special gallery set up within it called the McMichael Gallery to house the original collection, much the same as was done with the Henry Moore Gallery collection at the Art Gallery of Ontario.

Whatever the decisions are regarding the programming and collecting mandate of the McMichael collection of Canadian art, they must be made by the professional curators, director and gallery staff and not by the Ontario government. To deaccession and sell off thousands of artworks would be catastrophic to the current Canadian art market and will create a myriad of problems regarding past and future donations of artworks to

museums and galleries. Government funding for the arts is decreasing yearly, yet simultaneously initiatives which would increase private support for our public museums and galleries are being frustrated by the government as well. This dichotomy must be recognized.

Private commercial galleries will also be affected by the deaccessioning of works of art from the collection. For example, my small gallery employs two full-time staff and four part-time staff. We represent 12 artists from Ontario and Quebec, and exhibit the work of 16 others from Ontario, Quebec, Saskatchewan, Spain and England. We regularly contract work to other small businesses such as printers, designers and technicians, as well as patronize larger businesses such as Future Shop and Business Depot. We receive no government funding or grants, and we sustain ourselves through sales of contemporary art. Should there be a loss of confidence in the art market, or if the market is deluged with many contemporary works being sold at bargain basement prices, our business and the many others like it will close. The effect from this would be immediate and damaging to many.

The government should not pass Bill 112. Repeatedly in his autobiography, Robert McMichael refers to the McMichael collection as a promising youngster and of himself and Signe as proud parents. Yet every parent must step back at some point and realize that their child is an adult, capable of making his or her own decisions, and that whatever vision that parent might have had for their child's future, the destiny of that child is his or her own to make. The McMichaels and the Ontario government must realize that the McMichael collection of Canadian art is no longer a child. It has grown, developed, matured and is capable of and ready to fulfill a unique and thrilling destiny of its own.

I would like to close with the following quote: "Too often, the creative figures who timelessly reflect and shape the true character of the nation are ignored in public places." This statement was made by Paul Duval in the introduction to Robert McMichael's autobiography. I couldn't agree with it more. The McMichael collection should be one of those public places, and it must be allowed to continue to exhibit and collect work without interference or limitations of those figures who reflect the shape and character of our nation from the past, the present and in the future. Undoubtedly, those figures include Tom Thomson, J.E.H. MacDonald and Emily Carr, but they also include General Idea, Joanne Todd, Tom Dean, Carl Beam and John McEwan.

This collection of Canadian art can be a source of infinite pride and a true treasure for ourselves and for generations of Canadians to come, and the Canadian people deserve no less.

The Chair: Thank you, Ms MacDonnell. We appreciate your sticking with us to the bitter end and ending our first day of hearings here today.

Mr Marchese: For the record, and on a point of order, Mr Chair: You do not have the authority to sit beyond 6 o'clock.

The Chair: Mr Marchese, with the greatest of respect—

Mr Marchese: Out of respect, I stayed here to listen to the deputant.

The Chair: —you are wrong.

Mr Marchese: Listen to the point. You do not have the authority to do that on your own. Second, out of respect, I sat here through the presentation because I think that was the right thing to do.

The Chair: I'll let you score your points, but you're wrong.

Mr Marchese: If you want to change the rules next time, consult us; otherwise it will be difficult.

The Chair: Mr Marchese, you're treading thin ice now.

The committee stands adjourned till Wednesday at 3:30.

The committee adjourned at 1806.

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Mercredi 18 octobre 2000

Standing committee on general government

McMichael Canadian
Art Collection
Amendment Act, 2000

Comité permanent des affaires gouvernementales

Loi de 2000 modifiant la Loi
sur la collection McMichael
d'art Canadien

Chair: Steve Gilchrist
Clerk: Anne Stokes

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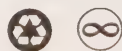
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LEGISLATIVE ASSEMBLY OF ONTARIO

ASSEMBLÉE LÉGISLATIVE DE L'ONTARIO

STANDING COMMITTEE ON
GENERAL GOVERNMENTCOMITÉ PERMANENT DES
AFFAIRES GOUVERNEMENTALES

Wednesday 18 October 2000

Mercredi 18 octobre 2000

*The committee met at 1531 in committee room 1.*McMICHAEL CANADIAN ART
COLLECTION AMENDMENT ACT, 2000
LOI DE 2000 MODIFIANT LA LOI
SUR LA COLLECTION McMICHAEL
D'ART CANADIEN

Consideration of Bill 112, An Act to amend the McMichael Canadian Art Collection Act / Projet de loi 112, Loi modifiant la Loi sur la Collection McMichael d'art canadien.

GEOFFREY ZIMMERMAN

The Chair (Mr Steve Gilchrist): I call the committee to order for the second day of hearings on Bill 112. Our first presentation this afternoon will be from Mr Geoffrey Zimmerman, if you'll come forward to the witness table. Good afternoon. Welcome to the committee.

Mr Geoffrey Zimmerman: Good afternoon, Mr Gilchrist and committee members. I'd like to thank you all for the opportunity of coming here this afternoon to make my presentation.

I am a former vice-chair of the McMichael Canadian Art Collection and, in my submission, Bill 112 is both necessary and extremely important legislation. It's necessary because the alternative is a continuation of the chaotic conditions which, until very recently, have prevailed at the gallery. All of you will know, from the legislative debates that have taken place thus far, that the deficit this year is, at the very least, \$1.6 million. I say chaotic conditions because not only is that situation outrageous and untenable, but the original reports that the board made to the government and to the minister in March of this year placed the estimated deficit at \$300,000. As the ministry went forward to examine in more detail what was already an alarming situation, they uncovered evidence of gross mismanagement at the collection. If Bill 112 is not passed, in my view, as I say, the alternative is a continuation of this chaotic and untenable situation.

It's important because of what it says about the role of fairness and honesty in public policy. When the McMichaels gave their art collection and their home to the province of Ontario, it was agreed that the character of the collection, as established by them, would be

maintained in perpetuity. The language of the 1965 agreement was unequivocal on this point. Over the next 17 years, the McMichaels, together with a small advisory committee, enhanced the collection with works by members of the Group of Seven who were not named in the original agreement. Those members were Frank Johnston, Edwin Holgate and Lionel FitzGerald. They also enhanced the collection with a very small group of their contemporaries. These included Thoreau MacDonald, son of J.H. MacDonald; James Morrice; and Clarence Gagnon, who of course produced the fabulous Maria Chapdelaine collection which was given to the collection in its entirety.

It was in this context that the phrase "and other artists who have made a contribution to the development of Canadian art" was interpreted. That phrase, which was incorporated in the original agreement, was absolutely essential to be understood in the context of what went before, and what went before were the names of 10 artists: six members of the original Group of Seven; one later member, that was A.J. Casson; and three others, Tom Thomson, David Milne and Emily Carr. They defined what "other artists" were to be interpreted as.

All of this changed when Mr McMichael stepped down as director in 1982. All of a sudden, the McMichaels' vision, which until that time had stood the test of time, was deemed irrelevant, replaced with a corporate view of what the public should see. During my tenure on the board, the results of this departure from the successful formula created by the McMichaels were spectacularly apparent. Attendance plummeted, donations of artwork vanished and corporate giving dried up. There were apparently no principles to guide acquisition. The only two criteria, it seemed, for acquiring art were: was the artist a Canadian and did his work fit within the parameters of an available government grant?

The board meetings I attended were controlled from start to finish by gallery management, who were permitted to remain and participate in these meetings. In my view, the boards that I attended were dysfunctional to say the least. They had absolutely no control over the affairs of the gallery, and that's manifestly evident in what I said before about their lack of knowledge of the true state of affairs at the collection as recently as March of this year.

The board's failure to assert control over management led directly to this financial disaster. Bill 112, if passed, will correct these historical wrongs and restore to the

McMichaels and to the people of Ontario nothing more than what they bargained for. More importantly, it says that honesty and fairness are cherished principles of public policy in Ontario. Thank you very much.

The Chair: Thank you, Mr Zimmerman. That allows us about four minutes for questioning. This rotation will be for the Liberals.

Ms Caroline Di Cocco (Sarnia-Lambton): When you made a suggestion about "gave the collection," what is your description of that? What do you mean by "gave the collection"?

Mr Zimmerman: Ms Di Cocco, the gift of the collection was given on the understanding and the express agreement with the province of Ontario that certain things would be respected. First and foremost, the character of the collection would be respected. Second, the essential role of the McMichaels in developing and expanding the collection was expressly agreed to by the province in that 1965 agreement.

Ms Di Cocco: When I reviewed this whole issue and went back to the history, one of the things I found amazing was that in 1982, I believe, the McMichaels signed an agreement that gave them a different role and they signed it with a counsel, with a lawyer. They knew what they were signing when they signed an agreement stating that they were going to now play only an advisory role.

I'd like you to know that they were also given \$815,000 as tax receipts. They were able to stay in the house from 1965 to 1982 for free. They were provided with a car and a housekeeper by the province. They were given a salary totalling \$400,000 for four years after they stepped down in 1982 at that time, and again, that same year the government purchased a house for them, \$300,000.

I have a report here from the McMichael Canadian Art Collection, 1996-97. When it comes to this gross mismanagement, it states here that there was a court challenge that was filed in 1996 and throughout that year both the board and the management found that during this controversy there was a great deal of insecurity created because the McMichaels took the gallery and the province of Ontario to court in trying to reassess their role, if you want to call it that, in having control of what the collection was to be. They lost that challenge at the Ontario Court of Appeal in 1997, and it wasn't even heard at the Supreme Court of Canada. They didn't want to hear it.

First of all, you talk about the "honesty" of an agreement. What about this agreement of 1982? What about the court challenge of 1997 that they lost? Now you talk about gross mismanagement. What about the financial issue created by the controversy of wanting control?

Mr Zimmerman: Ms Di Cocco, I have to tell you that the issue of the court challenge is, in my view, a red herring. The decline into obscurity of the collection had begun before 1996. It began in 1989 when the Liberal government of David Peterson passed legislation expanding the size of the board from nine members to 17 members, diluting the McMichaels's influence on the board

by about one-half and allowing for and legitimizing what had been going on for at least seven years in 1989, the collection of works that had nothing to do with the original mandate of the collection—nothing whatsoever.
1540

As to your allegations about the McMichaels and how they profited from this transaction, the McMichaels made an agreement. Included in that agreement were a number of features. One of them was that they were to retain a life tenancy in their home; nothing that the government of the day felt was unreasonable. It was their home. The McMichaels, at their own expense in 1966, dramatically expanded the size of their home after they had given it to the government of Ontario. They spent their own money to build themselves an apartment and create additional gallery space. They were never reimbursed for that, ma'am.

When they left the premises in 1982, the government of Ontario simply replaced that which they had been guaranteed for life under the agreement: a home, a roof over their head. Incidentally, they also bargained for two burial plots, one for each of them, so they could be buried on the premises. That, thankfully, escaped the ravages of the Peterson legislation.

The Chair: Thank you, Mr Zimmerman. With that, our time has expired, but I thank you very much for bringing your experiences before us here today.

FRED BURFORD

The Chair: Our next presentation will be from Mr Fred Burford. Good afternoon, Mr Burford.

Mr Fred Burford: Good afternoon. Thank you very much, Mr Gilchrist and other members of the committee. I certainly appreciate the opportunity to give a new perspective in support of Bill 112. This is the perspective of an educator, which was my career, as a mathematics teacher who loved art. That was the first half of the career. The second half was as principal of two schools in North York. Both of those schools had very fine art departments. This perspective is based on the experience I had when I was principal at Northview Heights Secondary School. This was in the early 1970s, so you can try to fit that into the dates you've heard about so far.

I was invited to join a field trip for grade 10 art students to the McMichael gallery. Many of these students were new to Canada. They came from a variety of countries. These 15-year-olds were enthralled upon viewing this rustic building set in such beautiful natural surroundings. The best part of their experience, though, came when their guide, Eileen Wykes, discussed the artistic backgrounds of the artists and their work as it appeared in different parts of the gallery. They were especially impressed by the stories about the Group of Seven.

What really impressed me was how this vibrant work of the Group of Seven, aboriginal Canadian artists and other Canadian artists gave them the vision of their new country, Canada. At present, usually we do not do a good

job of instilling pride in our province and our country in young people. Here I saw it actually happening through the visit to the McMichael gallery. After the field trip was over, I would see some of these students in the halls of Northview Heights between classes and they would always come up and say how wonderful their experience had been.

Bill 112 reconstitutes the selection committee of five people, Robert and Signe McMichael included. Consequently, it ensures that the selection of new works will be of the same high quality that captivated these young art students. I recommend that Bill 112 be passed in its third reading.

The Chair: Thank you, Mr Burford. You've afforded us about four minutes again. This time the rotation will be for the NPD, Mr Marchese.

Mr Rosario Marchese (Trinity-Spadina): Thank you, Mr Burford. I have a couple of questions that I want to ask you, because the government makes two claims: first, that we have strayed away, or the McMichael has, from the original mandate; and second, that we have a deficit and therefore we need Bill 112 to fix that problem.

My first question is on the mandate. The mandate says that it would include the Group of Seven plus others designated by the advisory committee "who have made contributions to the development of Canadian art." Professor Zemans said in the committee on Monday that, given that mandate, we haven't strayed away from the original mandate and the curators have made decisions based on what they thought was appropriate based on the mandate, which gives us the kinds of works of art that we have had over the years. I agree with that interpretation Professor Zemans and others have made, that we look at the original mandate and it appears that curators have the power to be able to determine what they see is a contribution to the development of Canadian art. Do you think they strayed away?

Mr Burford: My response to that is based on my experience seeing the great art galleries of the world—the Tate Museum in London, the part of the Wallace collection in London that is devoted to art and the famed art galleries in Amsterdam and Paris. As you view the work there, there is a certain high quality that you see.

When I returned to the McMichael gallery—and I've been back several times over the years, but my most recent visit was just several years ago—the quality was not there uniformly.

Mr Marchese: I understand your view, Mr Burford. Let me continue with the question. This issue of quality is disputed by many, I understand that, including yourself. I'm not an expert, able to dispute one version of quality versus the other. I'm focusing on the original mandate. My opinion is that they haven't strayed at all. For example, Inuit artists and aboriginal artists, First Nations people, were not included in that original mandate, it seems, but they fall within the "who have made contributions to the development of Canadian art." My understanding is that Mr McMichael supported that

and that came much later and other people came much later. So my view is that they haven't strayed away.

I understand your view of quality, which I'm not in a position to dispute one way or the other, but have they moved away from the original mandate? That's my point. That's the argument they made. I'm saying they haven't. Are you saying they have or they haven't, based on what I read to you?

Mr Burford: I guess the control of whether they have was based on the selection committee. The selection committee changed, and the makeup of it was such that there was not the same quality control based on experience and knowledge that there was at one time. It was during that period—

Mr Marchese: Mr Burford, in 1972—

Mr Burford: I would like to have an opportunity to—

The Chair: Can you do it in 30 seconds?

Mr Marchese: In 1972, this is the composition: a board of trustees, 9 members, runs the gallery; the McMichaels are trustees for life; Mr McMichael is named director and is on salary. So in 1972 he's still there; he's part of the decision-making process. In 1982, McMichael loses the director's position, is named founder director emeritus pursuant to the 1980 deal, and so on. The McMichaels have been there forever. They've always been there to be part of those decisions.

Mr Burford: But the selection committee changed. They became two of, I believe, eight.

Mr Marchese: So we've just got to get rid of them all and just get back to the old—

Mr Burford: No, in a selection committee of five, two people can't outvote the other three.

The Chair: Thank you very much, Mr Burford, for bringing your perspective before us today.

1550

VINCENT TOVELL

The Chair: Our next presentation is from Mr Vincent Tovell. Welcome to the committee.

Mr Vincent Tovell: Thank you, Mr Chairman and members of the committee. I'm here speaking for myself. I'm still a trustee of the McMichael collection, in my second term as a voting member. Before that I was a councillor without a vote.

The issue before you is fundamentally a curatorial matter: the nature of this collection and the right ways of managing it for its owners, the people of Ontario. It has not been a private, personal collection since 1965, and it must not be subject to the domination of any donors, past or future.

I've sat on the acquisition committee for almost a decade now, and I chaired it interim. Some knowledgeable trustees sit on that committee with art historians, artists—two at present. The McMichaels are there as members. So is the director, the CEO, with a vote like the rest.

The curators—our specialists, professional experts—are there without a vote to provide carefully prepared

backgrounders and justifications for the works on offer. We see the works—paintings, works on paper, sculptures, important archival material—and we discuss them, pro and con, in the light of our legislated mandate. It's lively, you can be quite sure.

Most of these works are donations. If accepted by the committee, they are ultimately taken to the board. A donor may apply for a federal tax receipt according to formally established procedures. Our purchase funds are severely limited: a percentage of shop profits, some occasional federal public money. Corporate and private names are sometimes applicable and are approached.

The committee's report, totalling the pros and cons, then goes to the board with documents and justifications, and the discussion continues with curators present. The board votes, and this is the time for personal judgment. All this procedure is in accordance with good and accepted Canadian practice in public museums.

I won't take time, which I haven't got, to comment on some of the false impressions that one way or another have been in the air about the nature of the collection, which you're free to go and see, and the origin and decision-making process connected with particular works which may have been controversial. What I want to stress is the professional process involving all the key trustees and the professional players: the directors, the CEO, curators, conservators and the registrar. As trustees and committee members, we must be careful to distinguish between our personal likes or dislikes and the needs of the collection as a whole. Does a work fit in? Why? We must always be aware of our legislated mandate, knowledgeable about the collection as a whole and about Canadian art history, and we must have all our stakeholders in mind.

In all this, the professional director, the CEO, is central. Selected by the board—though not in this draft bill—and serving it day to day, she or he is the voice of the institution in-house, in Canada and increasingly internationally. This institution is a major tourist attraction and it's on the Internet and now known all over the world.

This legislation, Bill 112, as it stands will seriously and sadly misdirect the institution for years. It was envisaged in a rear-view mirror. It is injudicious. Where is the common sense in it?

You've heard and you can read the carefully considered warnings from some of the best professional minds in the country: the CMA, the OMA, OAG and others. Please listen. Respect their long, wide experience, their record of work in the public interest.

I ask you as legislators to look five or 10 years ahead. You hold—we all do—a trust of great value and promise. We must think now, not only of the various stakeholders today but of the next generations. May I suggest, take the boiling pot off the stove before it overflows and major damage is done.

This bill has come to you without proper and appropriate prior dialogue with the experienced people, the dedicated, the professionals and the committed volun-

teers who have worked so long and hard for this institution. Stop, look and listen, I urge you. Bill 112 should be reconsidered.

The Chair: Thank you very much. This time the questioning will be from the government. You've got about three minutes, Ms Elliott.

Mrs Brenda Elliott (Guelph-Wellington): I'm going to begin by thanking you very much for your contributions on the board. That is truly appreciated by the province of Ontario and its citizens.

In listening to your remarks carefully, I think we have a difference of opinion as to what is at the heart of the matter here. In your opening remarks you indicated you believe it's a curatorial matter. We just heard from a former board chair who essentially said he thought that at the heart of this was not only mismanagement but the role of fairness and honesty in public policy. That's where I think we have a difference of opinion.

I'll quote to you from the legislation in 1972: "The board shall ensure that artworks and objects acquired from time to time as part of the collection are not inconsistent with the general character of the collection at the time of such acquisitions." That was referring directly to the 1965 agreement, which was the beginning of the relationship with the province and establishment of the collection.

In 1989, this changed dramatically and the key words that I think were dropped and are important for us to recognize are "consistent with." Surely that is what this is all about. As the collection has evolved over the years, through decisions of various people—curators, board members and so on—it has become, in the view of many, inconsistent with the original spirit of the gift and of the collection.

Would you like to elaborate on that?

Mr Tovell: Quite clearly, I echo the view which has been expressed publicly by many people, and is the view of the current board, that we have always been attentive to the mandate as legislated.

Mrs Elliott: In 1989?

Mr Tovell: 1989 is the current legislation.

Mrs Elliott: The mandate that was changed by the Liberal government in 1989 that dropped "consistent with"?

Mr Tovell: I'm sorry, I didn't hear the question.

Mrs Elliott: The mandate was changed in 1989, the most recent piece of legislation. "Consistent with" was dropped.

Mr Tovell: All I can say, Mrs Elliott, is that this gets into the area of opinion. I can only tell you I have served under the 1989 legislation. I know I have spent an uncounted number of hours arguing, and I sat through all the two stages of the court hearings and heard these arguments thrashed out, and subsequent arguments after that.

I think I'm as familiar as anybody can be with the pros and cons of the arguments, legal or otherwise. What I am saying is that we have honestly tried to keep the Group of Seven at the centre. That's never changed.

The developments of their contemporaries and later artists—even Casson, after all, lived far into the later part of the century—has been consistent with both the spirit and, in my view, the nature of the original agreement. The contract was an agreement; it was not legislation. It's critical to remember that the legislation process began in the 1970s. This was part of a continuing public discussion. None of it is secret, that I know about, and that is why I refer again to the lack of dialogue this time. We, as a board, had none with the minister. We were simply told the morning of her presenting it to the Legislature.

The Chair: Thank you very much, Mr Tovell. We appreciate your taking the time to come before us here today.

1600

LUCY KRISTAN

The Chair: Our next presentation will be by Ms Lucy Kristan. Good afternoon and welcome to the committee.

Ms Lucy Kristan: My name is Lucy Kristan and I am a resident of Caledon and live approximately 25 minutes away from the McMichael gallery. I have been a member of the board of governors of Sheridan College and adviser to the board of directors of TVOntario, as well as an area councillor for the town of Caledon. I can appreciate the difficulties involved in running a public institution during difficult fiscal times.

I was a member of the McMichael gallery. I ended my membership the day that I visited the gallery and discovered that the large hand-carved, wooden bench that had been located in the First Nations and western Canadian gallery for as long as I can remember had been removed by management. This was the last of numerous changes made by the gallery that went against what I felt the collection was all about. The McMichael collection was the world's best display of the Group of Seven and their contemporaries, with their special interpretation of the Canadian landscape.

As a collector of old and rare books, I've reviewed many of the catalogues that other museums and galleries have printed when the McMichael collection was on tour throughout the world. Without fail, each show was developed with the same look and feel as the gallery had had and they wanted examples of the membership of the Group of Seven. Starting with the 50th anniversary at the National Gallery to major showings in Glasgow, Edinburgh, Aberdeen, London, Leningrad and Moscow, there have also been a number of showings in the United States, with one currently showing at the Society of the Americas in New York City. I wonder how many people have visited Canada because of these tours of the original collection.

I am here today because I personally don't understand why a collection that had a clear, defined scope and focus is trying to become all things to all people. If I wanted to see the best of impressionist art I would go to the Barnes Foundation, not to the Bata Shoe Museum. I have always thought the McMichael collection was about the Group

of Seven and their contemporaries, not about every type of art or artist in Canada. For broader examples of Canadian art, I could go to the AGO or the National Gallery of Canada. As long as the McMichael collection tries to look and feel just like all the other galleries in the province, it will continue to weaken. The gallery's rotating shows will always contribute with fresh and new ideas, but this should not affect the primary mandate of the collection.

Premier John Robarts and the Ontario government signed an agreement which defined the start of the new collection. David Peterson changed the agreement signed by the government and Robert and Signe McMichael. How was the 1989 legislation passed without the input of the McMichaels themselves? Did the government allow public hearings or debate? This current legislation serves to correct, not change, the mandate of the gallery.

The recent articles in the media against Bill 112 focused on the specific statements of the original agreement that define what the collection should include outside the specific members of the Group of Seven. I don't believe there should be any disagreement about the focus of the collection. Robert McMichael can speak eloquently of his understanding of the original agreement. As well, Richard Rohmer should be contacted in order for you to understand the original intent of the act on behalf of the government. If there is any question, ask the two men directly involved in the creation of the original agreement. I'm sure that both of them would be pleased to answer your question.

I expect those who are against Bill 112 will discuss the size and the scope to which the gallery has expanded. The question I would ask is, as the years have passed since the McMichaels were directly involved with the collection, how many dollars have been spent and how has this translated into revenues? If the expanded mandate of the gallery had been successful, we would all have to reconsider this amending legislation, but to my understanding, revenues, membership and visitors are all down. Above all else, I'm sure the McMichaels and the taxpayers of Ontario want a successful, viable collection so it will last for many generations.

The last management team implemented the changes they believed were necessary. The results of those changes are clear: lost membership, reduced visits, loss of revenue so great that the entire collection is now in debt. The gallery will not be able to succeed, regardless of the mandate, unless the collection returns to doing what it does best. I willingly accept that the world is in constant change. I can agree that there are alternative ways of running an organization such as the McMichael collection, but Webster's dictionary defines a collection as "things brought together by choice." Clearly, the membership of the collection and the regular visitors no longer agree with the choices, and it's time to change the direction back.

The Chair: Thank you very much, and that leaves us about three minutes for questions. This time the rotation will be to the Liberals.

Ms Di Cocco: I thank you for your submission. You're talking again of the curatorial kind of decision that has been made as it evolved since 1965. That was changed because of the way that it was governed.

Do you know about the findings in 1997 from the Court of Appeal? This whole issue of whether the collection should be returned to its 1965 interpretation that the McMichaels felt was being eroded—did you see the findings of that court?

Ms Kristan: To my understanding, the results of the finding were that the Court of Appeal could not rule against the 1989 legislation.

Ms Di Cocco: The 1989 act stated, "The board shall ensure that the focus of the collection is the works of art created by Indian, Inuit and Metis artists, the artists of the Group of Seven and their contemporaries and other artists who have made or make a contribution to the development of Canadian art."

What is at issue here is what that interpretation is, who is going to interpret what is going to be hung up on the walls. That's what's at issue with this legislation.

Ms Kristan: That's correct.

Ms Di Cocco: Do you believe that government should have a direct role in legislating what that interpretive aspect should be?

Ms Kristan: I think the government should make sure that a quality gallery such as the McMichael collection be the world's best at something. It has gone from being the world's best to being bankrupt, and it is the government's responsibility as representatives of the taxpayers to make sure that this public institution is not running at a deficit.

Ms Di Cocco: "This public institution"—I'm glad you said that, because it is a public institution, and what we're doing is attempting to revert to the interpretation of two individuals. I believe that's really what the intent here is.

Ms Kristan: There are no other two individuals who have given the province of Ontario so much in a gallery. This collection would never be put together today, never.

Ms Di Cocco: There have been other donors. One donor has contributed \$1.6 million.

Ms Kristan: Yes, and that's what Lawren Harris today is running. Lawren Harris and Emily Carr are now selling at over \$1 million a piece. This province would never be able to put this gallery together.

Ms Di Cocco: The Gardiner museum—I don't know if you're aware of this—

Ms Kristan: I'm aware of Mr Gardiner. He lived up the road from me.

Ms Di Cocco: OK, and do you realize the value of his contribution to the province?

Ms Kristan: Yes.

Ms Di Cocco: And his endowment that he left with his gift, bequeathed it in a way that I would say definitely was a gift? There's an interpretation of "gift" here I think that we're losing in this vein.

Ms Kristan: As I said, I'm a collector of old books, and in the 1966 copy of the Canadian—I can't actually tell you what the Canadian was; it was a Telegram-type

newspaper, a public newspaper—it says very clearly that the only condition was that the collection be interpreted long past the government of John Robarts.

The Chair: Thank you very much, Ms Kristan. I appreciate you coming before us here today.

1610

WEST TORONTO ART NEWSPAPER

The Chair: Our next presentation will be from the West Toronto Art Newspaper, Paul Thompson. Good afternoon. Welcome to the committee.

Mr Paul Thompson: Thank you, Mr Chairman and honourable members and other visitors. My name is Paul Thompson, editor of West Toronto Art Newspaper, representing their views and opinions. I'm pleased to share the concerns and recommendations by our staff and sponsors of West Toronto Art Newspaper relating to Bill 112.

This community publication, now entering its second year, was formed for the specific purpose of promoting public awareness of art and cultural interest in Toronto's west-end neighbourhoods, and the primary objective of our publication is to focus on emerging or developing artists, and/or educational facilities in the aforementioned communities.

Because two distinct procedures were employed in determining the content of this report, we included two separate reports. The first lists the considered opinions of the editor and publisher of West Toronto Art and the second report provides a summary of reactions and opinions from associates and sponsors of West Toronto Art. Herein are the views and recommendations of the editor and publisher of West Toronto Art.

Prior to the publicity resulting from Bill 112, we were unaware of any overwhelming urgency or public controversy that would or should precipitate legislative solutions. In short, there appears to be no compelling reason for the Ontario government to proceed with such drastic interventions. Similarly, the current government has not been perceived as vociferous advocates of the arts community in this province, and inasmuch as Bill 112 invests enormous, if not inordinate, control and responsibilities in the hands of the government, the modus of the government could be construed as suspicious. In particular I note that—and I may be confused on this—in terms of the repeal of the minister's control on the third anniversary, it's confusing to me whether, if the gallery doesn't conform to the wishes of the government, that role will be extended indefinitely. Finally, it is our contention that creative decisions regarding the arts are best served by a body or a process which is independent from government control.

Our clear recommendation is that should the current powers fail to achieve the desired outcome without reverting to legislative solution, the government would be wise to provide a more detailed rationale to justify the furthurance of Bill 112.

Should Bill 112 proceed, we would propose the following—actually we concur with the purpose of Bill

112, except for the matters relating to the proposed changes in the corporation structure. We also concur with the lifetime appointments of the McMichael family, or their surrogates. But we do oppose the role of the Lieutenant Governor in Council to designate the position of chair and vice-chair. We question also the composition of the art advisory committee, given the reality that four of the five positions of the committee are predetermined by conditions of the amendment. This, in fact, limits the democratic selection of the board to one member. Further limitations to that selection are imposed by conditions as set out in section 4, and that's the issue of the approval of the minister.

To encourage greater vitality in exploring the future of the McMichael collection, we propose the following recommendations: first, the positions of chair and vice-chair be selected by those board members appointed by the Lieutenant Governor in Council; second, the board appoints three members to the art advisory committee from its own members, in addition to the chair, vice-chair and lifetime members or their surrogates; third, that the art advisory committee be empowered to nominate two additional members who are not trustees, subject to the ratification of the board; and finally, that all appointments by the board are binding and not subject to the veto of the minister or Lieutenant Governor in Council.

On the second report, I give you the reactions of the associates and sponsors of West Toronto Art. I think the committee will be pleased, as are visitors, to hear that, without exception, all those answering our informal questions hold the McMichael art gallery in very high regard. "Historically and spiritually important," "an incomparable tribute to Canadian art" and "aesthetically unmatched" were just some of the reverent descriptions that we received.

The most common dynamic in our appeal for input on Bill 112 was the apparent lack of public information. This led often to confusion and/or a concern over the government's need to intervene. Four respondents proposed the induction of other artists not named in Bill 112 but generally limited to the genre inspired by the Group of Seven. Three respondents expressed specific objections to recent acquisitions, judging them to be inappropriate to the original intent of the McMichael gallery. Two respondents found life-term appointments alone to be unusual, and the ability for two trustees to appoint their own replacements to be quite extraordinary. Two respondents spoke strongly in favour of restoring the mandate to its original vision, and were unconcerned about the proposed methods to achieve this. Two respondents strenuously opposed both the implicit limits imposed by the new mandate and the increased role of government, arguing that artistic decisions are best served when the government remains at arm's length. Furthermore, art is an evolutionary process that must move forward and not backwards.

All the remaining respondents, and that was 22 in addition to those I mentioned, offered no serious objections to the mandate as described in section 8, basically a

restoration, except they wanted to see the inclusion or the exploration of new artists enthusiastically pursued. Most respondents expressed apprehension in varying degrees as to the possible ramifications of the increased role of the government; not a single respondent was indifferent.

The overriding attitude resulting from our request for feedback from the general readership is: although the majority opinion favours a return to the more limited scope and vision reflected by the original Group of Seven, our readers would prefer a resolution of this debate without major alterations to the existing legislation.

Let me offer a related comparison: few would deny the Ontario government has a prerogative and responsibility to set guidelines for developing the curriculum of history studies in our Ontario schools, but no one would expect the government to delete a chapter from an approved text or to mandate the inclusion of the government party's political platform in the classroom studies. Similarly, one would not expect government officials to be directly or indirectly empowered to determine the artistic merits of a particular acquisition or group of exhibits.

Finally, it's our fervent hope that decisions regarding the current situation at the corporation, as well as the long-term future of the McMichael art gallery, be concluded with the least possible intrusion from the government of Ontario. Hence, we oppose Bill 112 in its present form.

The Chair: Thank you very much. Mr Marchese, we have about a minute and a half in this round.

Mr Marchese: Mr Thompson, just a couple of quick comments. I happen to think that what this government is doing is nuts, and it's more than that; it's dangerous, in fact. The claim they make is that we've strayed away—I say "we" because I'm in support of what has been going on for the 35 years or so—from the original mandate, and that the deficit somehow would be corrected if we fix the mandate and go back to the presumed original mandate. I think they're indefensible; I think they're wrong. The mandate that we read out earlier, and you must have heard it, that speaks about the Group of Seven plus those who have made a contribution to the development of Canadian art—it means it's open-ended. It means it includes many artists other than the Group of Seven. The 1989 mandate says that it will include the gallery to collect art by artists who make, as well as have made, contributions to the development of Canadian art. That's 1989, when these bad guys were in. It's the same thing; it's the same kind of mandate. Do you not agree?

Mr Thompson: I'll answer your first question.

Mr Marchese: That they're nuts?

Mr Thompson: I'm alarmed: if the deficit or financial management is the priority here, then why isn't it a financial advisory committee and not an art advisory committee? Secondly, I think it's very important that in the words "made and making a contribution," they have eliminated "making," therefore retreating somehow to the past, eliminating the decision. I don't consider myself a qualified art critic, but I am a qualified art observer, as all

of you are, and so is my seven-year-old granddaughter, but let the people in the know make the decision, not government officials.

The Chair: Thank you very much. I appreciate your comments today and taking the time to come before the committee, Mr Thompson.

Mr Thompson: I'll leave these copies over here.

The Chair: Certainly. The clerk will distribute them.

1620

CANADIAN ARTISTS' REPRESENTATION ONTARIO

The Chair: Our next presentation will be from the Canadian Artists' Representation Ontario.

Ms Jane Martin: I have 30 copies of my text, which are now being given to the clerk.

The Chair: Thank you. Perhaps you would be kind enough to introduce yourself for the purpose of Hansard.

Ms Martin: My name is Jane Martin. I am a senior Canadian artist whose work is in public collections all the way from the Art Gallery of Greater Victoria to the Memorial Art Gallery in St John's, Newfoundland, and many Ontario galleries, including the National Gallery, in between. I have for 30 years been closely involved with Canadian Artists' Representation Ontario, le Front des artistes canadiens de l'Ontario, which I will refer to as CARfac. With me is Barbara Anderson-Huget, our executive director.

We, Ontario's visual artists, join CARfac in order to collectively establish and protect our economic, professional and moral rights. It is these rights which we feel will be jeopardized by Bill 112. Therefore we are respectfully asking that this committee of the Ontario Legislature recommend to the government of Ontario that it withdraw Bill 112 in its entirety.

I realize that it is the view of the government that there is another set of rights involved, that is, the rights of the initial donor of the 200 artworks. I find it odd, given the tax incentives to donations by which the donation is less a gift than an exchange for generous tax credits, that the word "donor" is not reserved for us, the taxpayers of Ontario. Even more than in most cases, the McMichael gallery can be viewed as the property of the people of Ontario. The 200 donated artworks grew to a collection of 6,000 largely at our expense. The land, the building and the other assets also grew hugely thanks to the generosity of the people of Ontario. The original donor, unless I have a warped understanding of the word "gift," has no such claims to ownership. Anyway, isn't the true gift the anonymous gift, the one which is not conditional on thanks, let alone decades-long strings?

Rather than devoting this rather disproportionate amount of parliamentary time to tailoring a law to an individual who has long since been handsomely thanked and memorialized, I think it more proper for the government to attend to the artists and other taxpayers. How do they wish the McMichael to be run? Well, not by the little boy at the birthday party who hands you your be-

ribboned gift but refuses to let go of the package, even if it means tearing the present to shreds, and not by the government either.

"Arm's length" is a long-established principle guiding the relationship between mature and corruption-free democratic governments and art institutions. We elect you MPPs to do better and bigger things than micro-manage our cultural institutions. We expect directors and curators to do that. Because good artists tend to break new ground rather than stroke the status quo, it is particularly important that choices concerning the public acquisition and funding of contemporary art be singularly free of political interference. I would ask the honourable members to remember governments which ignored the arm's-length principle. Think of the Red Guard or Stalin-esque art. I know these are not models you wish to emulate, yet this would be the direction you would be moving in if you usurp the power of the board and professional staff of the McMichael.

In addition to the repudiation of public support for the work of the province's living artists and the dangers to their professionalism of any eroding of the arm's-length principle, there will be economic consequences to this bill. By far the largest number of Canadian artists, and nearly half of CARfac National's members, live in Ontario. The art market in Ontario is pitifully small and very fragile. Our members depend on sales to institutions like the McMichael and to a tiny band of private buyers. If the government, by this bill, removes one important institutional buyer and causes 3,000 artworks to be de-accessioned, it will flood the market, drive down prices, reduce sales and cause real economic harm to artists. There may also be damage to the reputations of artists whose work is de-accessioned.

I believe that when all this is considered, it will reflect much better on this government to direct its energy to opening up opportunities to the provinces' artists, providing more funding, more exhibition venues, more acquisitions. Culture and content are hot issues now. You should be seen as part of the future, not caught picking at the scars of some long-ago hurt.

The members of the Group of Seven were once contemporary artists. They annoyed governments, collectors and critics alike, just as any leading-edge artist does. They exhilarated in their unique voices and the shock of the new. If the government of Canada back then had done to the National Gallery what this government is proposing to do to the McMichael, past National Gallery directors Eric Brown and subsequently H.O. McCurry would have been pressured or embarrassed into resigning, rather than amassing the wonderful collection of works by the alive and kicking Group of Seven. It is by trusting curators to collect the best contemporary art being produced in the country that a government, even an uncomprehending one, best supports the creation of contemporary art by the living artists. Ontario's artists are the heirs, not to the style of the Group of Seven, but to their spirit of innovation and courage. You keep the group alive by allowing their works to be seen in relation

to that of their living peers. Their peers are the innovators, not the imitators. If you want to seal the seven off from their inheritors, you might as well bury their works with them. If you want them to live forever, you must involve them in a dialogue with the present.

I wish to end with the words of Sigmund Freud, not a Canadian, but—when Freud was too ill with cancer to seek out at sales and auctions objects for his very outstanding collection of Egyptian antiquities, a collection which had given him immense joy throughout his life, he lost interest in his beloved art. When asked by his daughter why his collection no longer gave him pleasure, Freud replied, “A collection which is not being added to is a dead collection.”

The Chair: That gives us about two minutes for questions. This time the rotation will be the government, Ms Munro.

Mrs Julia Munro (York North): Thank you very much for coming here today to give us your point of view. I wanted to ask you two questions. One is related to the issue of de-accessioning, because a number of people have raised this. Given your particular professional background, I thought you were the right person to ask the question to. Is it not your understanding that galleries generally would have—I don't mean private galleries but public galleries—more in their possession than they would have on display?

Ms Martin: Of course, but when it's not on display, it's very well cared for in vaults, where it's protected.

Mrs Munro: Yes, that was what I understood. My question simply came from the notion that I didn't think anyone would see flooding the market as an appropriate thing to do, as you suggest. In fact, the chair, the person who has taken that responsibility, was asked that question and specifically did say that it would be foolish to think that would be an appropriate course of action. My second question has to do with—

Ms Martin: I'm not sure what the question was. What do I think about de-accessioning?

Mrs Munro: No, the question that it would be appropriate to have in the vaults that you describe more than just what would be on display at any given time.

Ms Martin: But in the vaults, is it there waiting to go because they've been told they have to sell it? What will it be doing in the vaults? Hiding it from—

Mrs Munro: We have the word of the chair, as I just gave you, that he sees that as a foolish suggestion. In fact he says, “One would have to be foolish to sell a lot of art at one time,” when the market would be devalued. My question to you was simply to ask you if it would be common practice to have more than one has on display.

Ms Martin: Well, yes, but it's not common practice to have work they don't own or wish to own in their vaults. If this bill goes through and these 3,000 works have to go, I suppose you could bury them underground, but then you're looking at all kinds of problems with contracts, artists' reputations, their copyrights, their access to their copyrights. What's the point of not being able to show it? I'm sort of loosing it here, I'm afraid.

The Chair: Thank you, Ms Munro and Ms Martin. We appreciate your coming before us to make your presentation.

1630

KEN DANBY

The Chair: Our next presentation will be by Mr Ken Danby. Welcome to the committee.

Mr Ken Danby: Thank you. I would like to read a short statement, and then I'd be happy to answer any questions.

My name is Ken Danby. I am an artist and a painter, and I've been professionally engaged in the creation of art in this province for more than 40 years. I'm also quite familiar with the needs and aspirations of the visual art community. I served as a member of the board of directors of the Canada Council for the Arts for six years and as a member of the board of trustees of the National Gallery of Canada for four and a half years, as well as serving as a member of various other boards.

I don't know Robert or Signe McMichael personally, but I am certainly aware of them. It's been some time since I visited the McMichael gallery; I believe the last time was 1981. Therefore, my perspective on this issue is not influenced by personal relationships or much familiarity with the facility, but only by the principles of my beliefs and my experience.

I believe that Bill 112 is a most commendable act which returns the McMichael Canadian Art Collection Act to its rightful position by reflecting the terms which the province originally agreed to when accepting the McMichaels' generous gift. I believe it is most regrettable that the McMichaels have personally been subjected to so much compromise and condemnation by those who prefer to deny they should have any rights in this matter. They most certainly do. It is perfectly understandable that the McMichaels would only want to extend their considerable gift to the people of Ontario if they could be confident that the terms of the gift—the agreement, if you like—would be honoured. By subsequently revising these terms, for whatever reasons, the government of the day breached the agreement. It's as simple as that.

Like many of you, I've read the various articles in the press which criticize this bill, often on the premise of protecting artistic freedom of judgment, the sanctity of curatorial decision-making, why we shouldn't challenge the expertise of the experts and the need for our cultural institutions to be free from constraints within their mandates and on and on. What I see appears to reflect a rather insecure and elitist attitude from those who probably feel a need to defend their territories from perceived or imagined threat. They would have us believe that only the members of their community are capable of interpreting art and that the average citizen is irrelevant to their preferred programs, except of course as a taxpayer to cover their annual deficit when they lose money.

In my opinion, while they obsessively defend the policy prerogatives of the art gallery and museum com-

munity, they completely ignore the main issue of the McMichael problem, which is that the original agreement was broken. Bill 112 will fix it. I support the bill.

The Chair: Thank you very much, Mr Danby. You've certainly left time for questions, let's say about four minutes. This time the rotation is the Liberals, Mr Gerretsen.

Mr John Gerretsen (Kingston and the Islands): I want to respond to something Ms Martin, the previous presenter, mentioned, and I'd like to have your comments on it as well.

When I was elected as an MPP five years ago and re-elected last year, I never thought I would get involved in this kind of situation or that it would be the main order of business for a provincial parliament, after it had been in recess for three months, with all the various problems we've got with respect to education, health care and everything else in the province, that this would be the government's first order of business for more or less the first couple weeks of its session.

I enjoy the arts. My wife and I spent the last two or three weekends going to all sorts of studio tours in eastern Ontario, watching the vibrancy of Canadian art displayed in so many different ways by so many different artists. But I'm certainly not going to sit here and say, "Well, this group of people has better judgment of what should be good for this collection than another group of people." I don't think that's the role of us as legislators, and yet I think we've been put into this position with this kind of bill.

From everything I've heard, basically we have a financial problem here. The organization ran a \$1.6-million deficit last year and, I know, the year before that etc. Wouldn't you agree with me that what's needed, first and foremost, is an advisory board to deal with the finances of the organization rather than the artistic advisory aspect of the organization? Isn't that where it all should start, and get government, per se, out of the business of deciding which art is better or who's got a better feel for what aspect of Canadian art? Do you agree with that?

Mr Danby: I don't believe it's the government's job to determine what kind of art is inherent in the collection. I don't believe that's part of the bill.

Mr Gerretsen: Well, I think the bill says we are basically setting up an advisory committee in which two of the three people will be the McMichaels—whom I don't know, although I understand Mr McMichael is in the room today, and God bless him for the tremendous gift he made to the province; I think generations to come will benefit from that—and that two other people will be appointed, in effect, by the Premier, and then one person, presumably appointed by the board, to make specific decisions with respect to artistic matters.

Mr Danby: I've read the proposed bill, and I don't find a problem with the way it's been structured. Certainly the McMichaels are being brought back in at a level which reflects what they originally agreed to, obviously, and I think this is what I was referring to: the fact that this bill will return the flavour, the character and the rights of the agreement they originally came to accept.

Mr Gerretsen: But the assumption by everybody is that if we set up this advisory committee, that will somehow deal with the financial situation. There's absolutely no guarantee that will happen.

Mr Danby: I don't see that as being a part of it. The financial situation is surely a policy that is overseen by the board in consultation with others who they bring in to advise them, and certainly the whole thing falls under the Ministry of Culture.

Of course there are measures, there are steps where the financial aspects of things are answerable.

Mr Gerretsen: I can tell you that the government has basically taken the position that the reason this bill is needed is to deal with the financial situation that exists at the McMichael. That's why this bill is here and that's why we're dealing with it. That's the reason we've been given over and over again, and yet the bill itself doesn't seem to deal with that aspect at all. It seems to deal more with who should, or should not, be on this advisory committee.

The Chair: Thank you, Mr Danby. We appreciate your taking the time to come before us today.

Mr Danby: My pleasure.

SOCIETY OF INUIT ART COLLECTORS

The Chair: Our next presentation will be from the Society of Inuit Art Collectors. Welcome to the committee.

Ms Jamie Cameron: Thank you very much, Mr Chair. I'd like to begin by thanking the committee for granting us this opportunity to appear this afternoon.

My name is Jamie Cameron, and I am the secretary for the Society of Inuit Art Collectors. I'm joined this afternoon by Mr John Cowan, president of the Society of Inuit Art Collectors, and by Mr Christopher Bredt, a member of the Society of Inuit Art Collectors. We appear this afternoon to speak on behalf of the society.

We appear this afternoon because we have some general concerns about Bill 112, but we have particular concerns about the future of the art of indigenous peoples under Bill 112. We have concerns, as well, about the management structure of Bill 112.

1640

We have submitted a written presentation that I believe has been distributed to members of the committee. Ten minutes is not very long, so I'll start on our presentation and deal mainly with our first and primary point, and hope to get to our second point about the management structure, which is also very important to us. We'll see how the time goes.

I would just like to say before I start on our main presentation that all three members of the Society of Inuit Art Collectors who are here before you this afternoon are members of the McMichael gallery. We have been supporters of the McMichael gallery for very many years and we are very anxious to see the McMichael gallery survive for the future, whether under Bill 112 or other legislative arrangements.

I'd like to begin by calling the committee's attention to proposed section 8 of Bill 112, where the nature of the collection is defined by the statutory provision. I'm not going to read out section 8 because I don't have time to sit here and read legislative provisions, but what is very striking for us as Inuit art collectors and enthusiasts is that nowhere in section 8 is the art of indigenous peoples mentioned, explicitly included or explicitly protected in the mandate of the nature of the collection. That is a matter of very serious concern to us and it is indeed our main point about Bill 112 this afternoon.

We regard the omission of any mention of the art of indigenous peoples as a glaring omission in this piece of legislation. I want to take just a moment to give several reasons why we view this as an omission. What I'm leading up to here is a proposed amendment that we would strongly urge the committee to consider, which I'll read out in a moment, to explicitly include the art of indigenous peoples in section 8 as part of the mandate of the nature of the collection.

But first I'd like to take just a moment to explain the reasons why we as a society for Inuit art collectors believe this is an omission that needs to be remedied by amendment to section 8. First of all, the art of indigenous peoples has been a part of the McMichael gallery's vision since at least the late 1960s and the early 1970s. The McMichael gallery's commitment to collect and exhibit the art of indigenous peoples has been a consistent commitment over the years since the late 1960s and the early 1970s. It's been a consistent commitment on the part of the gallery to collect and display the art of indigenous peoples.

By the way, perhaps I ought to mention, just for clarification, that when I use the expression "the art of indigenous peoples," I'm referring to Inuit art, I'm referring to northwest coast art and I'm also referring to the art of the woodland communities, but I'm not making an exclusive or limited definition of the art of indigenous peoples. I'm using it more in a generic sense.

The first reason we would give for pointing to that omission in section 8 is that there has been a commitment which has been consistent since the late 1960s by the McMichael gallery to collect and exhibit and display the art of indigenous peoples.

The second reason we think this is an omission that requires rectification by amendment is that the McMichael gallery has a substantial collection at this point in time of Inuit, northwest coast, woodland and other indigenous arts.

The third reason we would give for asking the committee to consider an amendment along these lines is that we view the McMichael gallery as a true leader in this area. The McMichael gallery has mounted some highly impressive exhibitions in recent years, it has very strong curatorial staff in the area of the art of indigenous peoples and we would be very distressed to see the McMichael gallery's leadership in this area lost by reason of oversight or legislative omission.

The fourth reason we would give is that the art of the indigenous peoples is very important and is an aspect of art that the public has grown to appreciate and enjoy.

I should also say that we've come here today on very short notice and therefore have not provided any appendix materials to document the degree of commitment by the McMichael gallery to the art of indigenous peoples over the years. But if it would be helpful to the committee, we would be happy to undertake the task of documenting our presentation in more detail, if it would help the committee come to any decision about amending section 8 to include a specific reference to the art of indigenous peoples.

Last, I guess we would like to say that we think it's important for the committee to consider an amendment along these lines and not to leave the status of the art of indigenous peoples up in the air as a result of the legislation. I guess our view is that not specifically protecting and mentioning the art of indigenous peoples throws a significant aspect of the McMichael gallery's operations into uncertainty and doubt for the immediate future under Bill 112. We also believe that the failure to specifically protect the art of indigenous peoples under section 8 is detrimental to the leadership and the forward energy the McMichael has shown in educating the public about the art of the indigenous peoples. We think the uncertainty in this regard is likely to affect public confidence in the McMichael gallery in the future and could affect membership support and donations.

I hope I have been able to convey to the committee that we are deeply concerned about the status of the art of indigenous peoples under Bill 112. We strongly urge the committee to adopt the amendment we have proposed as set out in our initial summary page, where we suggest that a subsection should be added to section 8 that will expressly include indigenous or native artists, encompassing but not limited to the art of Inuit, west coast and woodland communities, in the McMichael collection's statutory mandate.

I would like, with the committee's indulgence, simply to read the second part of our concerns about Bill 112. I'm taking this directly from our summary just so that it is read into the record. Our second concern has to do with the narrow composition of the art advisory committee under section 4.1(1) of the proposed legislation—and I can't take the time to read that out to you—and the unfettered authority that is granted to that committee to designate artists under subsection (e) to be included in the collection. Recommendations regarding acquisitions, exhibitions loans and disposal should, in our view, be formulated by a much broader group than that contemplated by Bill 112, including the McMichael Canadian Art Collection CEO and curatorial experts. Decisions regarding which artists are to be included in the public collection, even within the narrower original vision of the McMichael collection, need to be made with a much broader consensus.

Therefore we propose two further amendments to Bill 112. First, we suggest that a subsection (5) should be

added to section 4.1(1), to include the McMichael Canadian Art Collection CEO and senior curatorial staff as members of the art advisory committee as well as three additional nominees from the board. Second, to achieve consistency with the rest of section 4.1(2), subsection(e), in our view, should be amended and the word "designate" removed and replaced by "to make recommendations to the board."

I'm sorry I went through those latter two recommendations fairly quickly. It was out of necessity. We have put in our main submission a more detailed explanation of our reasons for having concerns about the composition of the art advisory committee, and we would simply ask this committee to give serious consideration to the amendments we have suggested and to take seriously the concerns we have about Bill 112 as currently drafted.

The Chair: Excellent. We've actually gone a little over time, but thank you, Ms Cameron, and your colleagues, for coming forward and making your presentation today.

1650

MICHAEL BURNS

The Chair: Our next presentation will be from Mr Michael Burns. Welcome to the committee.

Mr Michael Burns: Thank you, Mr Chairman, and thank you for the privilege of being allowed to speak to this illustrious group. Let me start by giving you a brief explanation as to who I am and why I'm here.

I was first appointed to the McMichael board in 1986. I subsequently received two further appointments, one for three years and another for two years. I held the positions of trustee, vice-chairman and chairman. I was chairman for six to seven years—I'm not quite sure how long it was. Subsequently I was the founding chairman of the McMichael Canadian Art Foundation. So you can see I have a long association with this organization.

During my tenure with the McMichael, I devoted my full energies toward fundraising, budget control and control-management of the McMichael. When I joined the board, we had just reopened from renovations and were in the process of seeking a new executive director.

Prior to the reopening, the McMichael was funded 100% by the government of Ontario. During my tenure and in subsequent years, we were able to take the government funding down from well in excess of 90% to just below 50%. I think that's a remarkable accomplishment, and I think the trustees and the volunteers who worked so hard to do that deserve credit for it.

Along with our fundraising went the reduction of the grant from the government—and rightfully so, I think—but we were always able to struggle through and show a slight surplus of revenues to expenses. The year we fell behind, and it was only one year during my tenure, was the first year of the Rae government. The previous government had instituted a study of the salaries of employees at the McMichael and had decided they were underpaid. They agreed they would fund them up to the

level of the AGO and the ROM over a three-year period. Unfortunately, it was not in writing. The government changed, and the Rae government chose not to honour it for the next two years. The trustees felt morally obligated to honour it for one of the two years. We had a slight deficit that year, which we subsequently repaid.

After my tenure as chairman I moved to the foundation, and the subsequent two and a half years as a trustee again. The foundation was created to do the fundraising. It got off to a very good start and was doing what I considered an excellent job. Due to various suits brought by the McMichaels against the government of Ontario, this fundraising came to an abrupt halt. People will not give to an institution that has no credibility. This institution gained no credibility when one of the founders was suing the government. Donors do not want to give money to an institution they think is going to pay legal bills, despite the fact we were not. Subsequent to winning in the appeals court and the denial to go to the Supreme Court, fundraising got started again. Again, our credibility went all to pot when a series of articles appeared in the newspapers about the McMichael and what was going on there.

Then this bill appeared out of nowhere, the court-won battles now reversed by legislation. Legislation was in effect that worked for everybody but one individual. That individual helped create some of the previous legislation. The McMichael operated under various acts, the first creating it an agency in the 1970s, and then the 1989 act that clarified what the trustees had been doing to manage this asset for the province and for the taxpayers of the province.

Mr Chairman, I personally have given cash well in excess of \$150,000 to this institution. I raised well over \$1 million in cash from my friends, from corporations and from foundations. I helped bring the Cape Dorset collection to the McMichael. This is the largest archival and print collection in the world today. By this legislation, this collection must be returned. We cannot keep it, because the legislation does not allow us to maintain First Nations, Inuit or Metis art, as the 1989 act did. It's a strange thing that a government would act in this way.

Why must the mandate change? Because one person changed his mind? Why should the provincial government go back to paying 100%? That is what will happen. I'm not a professional fundraiser, but I've raised funds for many organizations. Why is professional management being challenged on their ability without any input? How much consulting on this bill was done with the people who have worked at and for the McMichael and understood the challenges, people who understand the uniqueness of the gallery and the problems around the controversy?

Chairman and ladies and gentlemen, I implore you to take a step backwards. The 1989 bill, which the McMichael worked under, worked. No new bill is required. Leave the collecting and management in the hands of the professionals, not the government or un-

trained individuals. Allow the director and curators to operate a growing, vibrant place, not a dying, stagnant place.

I can point out a few flaws in the bill:

In the bill, the board is not able to reject any artist selected by the committee of five.

There is lack of clarity in the collection. This is what the 1989 act tried to do.

The elimination of First Nations, Inuit and Metis art is a grave mistake.

Reduction of the director's authority—he's not even allowed to be an ex officio member of the group of five.

The elimination of the need of a curator: if the group of five are going to make the decisions, why do we have to pay a curator?

The disproportionate ratio of government appointments to the board versus the public, and here I mean that the people who are donating the money are not allowed to sit on the board. If it's a 19-man board and there are 19 government appointments to the board, where do you think the fifth member of the group of five is going to come from? It will be a government appointee. Therefore the government controls it.

Does the ministry want to run the gallery and be accountable to ensure the McMichaels get their way?

The wording is vague enough that it appears the McMichaels will reach out of their graves to continue their control.

In summary, the board has been stripped of its authority and power. The director has been reduced from CEO to a mere administrator. The McMichaels are restored to power and control, and are protected by the ministry.

If there are any questions, I may well be able to answer some of the financial questions—the numbers being bandied around this table are inaccurate.

The Chair: Actually you're just about bang on your time, so I'm afraid there won't be time for questions. But I very appreciate much your bringing the historical perspective before us today.

Mr Burns: I have copies of my comments if anybody wishes them. I'll just leave them.

The Chair: Thank you. The clerk will distribute them to the members.

1700

DAVID BRALEY

The Chair: Our next presentation will be by Mr David Braley. Welcome to the committee.

Mr David Braley: Thank you, Mr Chairman. I have been two and a half hours on the Queen Elizabeth way with a major traffic accident, four ambulances and a whole pile of things which aren't very nice. It's been a frustrating two and a half hours to get here and I arrived about one minute ago. So I'm still a little—

Mr Marchese: What about the trucks? Any trucks on the road?

Mr Braley: Not on that road. Well, the normal ones travelling, but not any stoppage. But the police had every

exit sealed off and it goes right back to downtown here, so getting out of here, you'd better leave about 7 or 8 o'clock tonight.

Mr Gerretsen: Would you like a glass of water?

Mr Braley: Yes, that would be nice. It's been a frustrating two and a half hours.

I'm rather new to the process and I can only talk as an individual and I can't even at this point speak as chairman of the McMichael because our first board meeting is next week, on Friday. So I can only tell you what I feel and the things that have come to my attention over a period of time.

The McMichael collection is the best collection of Canadian art that I know of. I believe everybody in Ontario should know about this collection. One of my jobs is to find the correct way to market it to our audience. As chairman, I believe that I can make a contribution to that end. Most of you are aware of my managerial experience, and I have a sensitivity toward art that can be useful in revitalizing the McMichael. I realized there would be some irritations connected with acceptance of this task, but I thought it was worthwhile to try.

I've been talking to a lot of people. I've talked to some of the directors, I've talked to the general public, I've talked to the staff, I've talked to people who have contributed in the past—I'm up to over 150 people at the present time—to find out their thoughts and ideas about the McMichael. I've come to some tentative conclusions, which I'll get back to in a minute.

First, I want to say a word about the McMichael. It has a core collection of art built around the Group of Seven, but it also includes the work of many other contemporary Canadian artists. This, of course, includes aboriginal art. There was a time, I'm told, when the McMichael attracted twice as many visitors as it does today, back when it was seen as a gallery for the kind of art that symbolized Canada. We'd like to see it draw those kinds of crowds again, and more.

Many of the world's museums and galleries are tourist attractions and destination points. The McMichael collection, which would serve as a similar tourist destination and showcase for Canadian art, has in recent years never had its assets marketed toward this goal to the degree that I envision, and I say "to the degree I envision." I'm not saying it hasn't been marketed, but maybe not marketed to the degree that I envision.

For any of you who have not seen it, let me tell you what a wonderful treasure we have here in the McMichael. The location alone is unsurpassed. As I said, I've seen a lot of the world's art galleries and museums. I travel a great deal on business and I've been in Budapest, behind the Iron Curtain, in foreign countries, to their art galleries, to the middle of a beautiful plaza with bronze statues that are all carved and the art galleries around the outside, to see exceptional works of art.

I view the McMichael as what tourists call a total destination package: a whole-day adventure for the family. Look at what is being offered: the artwork focused on the Group of Seven and their contemporaries; the

beautiful grounds themselves; the conservation area beyond, which is now linked to the gallery.

I know that good marketing of a good product can work. It worked in Hamilton where I was a governor of the Art Gallery of Hamilton. Admissions in Hamilton improved 60% in 1999 and another 40% so far this year. That's a program that I took personal interest in developing with the Art Gallery of Hamilton. We started from what might seem the obvious: you have to get people into the gallery before anything else can happen, and once they are there, they leave their money behind.

There are a lot of new approaches that will be taken in the coming months. We will be seeking community partners in the corporate world to help us market the McMichael. Why shouldn't every schoolchild within 100 miles come for a relaxed and pleasant learning experience at the gallery?

We are taking care of a few mundane problems, too, that haven't helped the gallery sell itself. That includes fixing the roof, windows and mechanical systems in the building that houses the collection, thanks to a generous \$2-million donation by the provincial government.

I'd like to say at this point, having been the chair of the McMichael for a couple of months, that I'm very optimistic about the future of the gallery. In the McMichael, as a gallery and a tourist destination, we have an opportunity to build a lasting monument to Canadian art.

As chair, I've been listening to people's concerns about some part of Bill 112. I've come to the conclusion that a few amendments are required to make the legislation function more smoothly.

In section 2 we need to add at the end of the section 1.1, paragraph 2, the phrase "and other artists who have contributed to the development of Canadian art." In the same section, section 1.1, paragraph 3, the word "province" should be replaced by "country" or something equivalent—Canada or country or something. We also should drop "during the first half of the twentieth century" because the collection, even when the McMichaels collected it, went beyond just the first half of that century and it was a little wider. So by putting the word "country" and dropping "the first half of the twentieth century," you actually meet the mandate exactly as outlined in the first place.

Under the same section, section 1.1, paragraph 7, "There should be an art advisory committee to advise on matters related to the collection," the words "composition" and "display" should be added.

The same is true under subsection 3(1), paragraph 2. Eliminate "Four trustees appointed by the board." That was added in 1989. In my opinion, he who owns the collection should appoint the trustees. It should not be a matter for the board itself to appoint. He who owns the gold in business makes the final decisions, calls the shots, and should place the trustees to protect their interest in that asset, and therefore the board should not appoint those trustees.

I'm trying to tie the changes together with my verbiage that I've prepared. I believe, and it doesn't

matter whether it does or not, the current bylaw should be repealed on passing the legislation. Otherwise I'm going to be spending 60 days changing all the bylaws to meet the current needs of the mandate of the legislation. Instead of having seven committees, I've got now an art committee to replace another committee, so it would be wise if we repealed the existing bylaws to be able to facilitate doing business. It's not necessary, it can be done, but it just takes a little longer to get there.

Under subsection 4.1(1), paragraph 3, there's a little bit of confusion between the McMichaels' appointment as lifelong members of the board of trustees and on the art advisory committee. They should be both the same and they should all have added "in accordance with subsections 3(1), 3(2), 3(3), 3(4) or 3(5)." There's a listing that just ties the legislation together. I've had my attorneys go over it in great detail. It's a little confusing. If it was added, it would just straighten out and make consistent how the McMichaels sit, and they sit with their trustees in place if they're not able to sit, and how that works in both sections being consistent.

The role of the art advisory committee should be made more explicit by pointing out that it may advise on the composition and display of the collection.

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Subsection 4(2) should be amended to permit committees to be made up of trustees, employees and volunteers for the control and conduct of the gallery. The existing legislation refers to committees of trustees only and it would not allow us to use the expertise of all the people. We could do subcommittees of committees to get there, but everybody who has the kind of knowledge we need should be utilized. It doesn't mean they have the authority; the authority is vested in the board. In other words, the committees would pass a motion and that would have to go to the board for approval, and the board, in the final analysis, would make the decisions. But there are an awful lot of great volunteers out there who should be put to work as part of the overall organization. But they can only make recommendations to the board, and the board has the final say and carries with it its mandate and therefore the responsibility.

It allows, then, also our—

The Chair: Excuse me, Mr Braley. I should point out you're in your last minute now.

Mr Braley: Oh, I'm sorry. I had no idea. I've never been to a committee meeting before. I'm almost done.

The Chair: We've had so many people request spots before the committee, we've had to limit it to 10 minutes each. So if you have any closing comments.

Mr Braley: In addition, there's a need to clarify that a quorum for the art advisory committee should be a majority of the committee. There are many ways of tackling this. You can increase the committee to seven and therefore have five or leave it as five and have three, but you could be stalled forever if you didn't have a quorum as a majority.

These changes, while essentially housekeeping in nature, will aid with the rehabilitation of the McMichael

as the finest gallery in Canada. I'll stop there, rather than continuing, but I've made my recommendations known to the ministry so that in due course they can be dealt with or not dealt with as they see appropriate, because it's their money and it's their gallery.

The Chair: Thank you, Mr Braley. I appreciate the effort you took to get here today, and I wish you all the best in your new role.

Mr Braley: Thank you very much, and thank you for listening to me.

JEAN EADIE

The Chair: Our next presentation is from Ms Jean Eadie. Good afternoon. Welcome to the committee.

Ms Jean Eadie: Good afternoon, Mr Chairman, committee members. This is not going to be a formal presentation; I have no printed things. Dr Trevor Hancock was supposed to be here from Kleinburg today, but he couldn't come. I am a great lover of the McMichael gallery, and I am very concerned about Bill 112, and when the opportunity appeared, I came here.

Back 50 years ago, Lib and Jack McClelland, the Bertons, the McMichaels and the Eadies—I am Jean Eadie—purchased property near Kleinburg. The other three families remained in Kleinburg for many more years than us. In 1955, my husband went to India and for the next 30 years we had been living and working mostly in Asia, four years in Labrador. Then we came home to build a house on the property which we had owned.

My husband was a very fortunate little boy; he was one of Arthur Lismer's Saturday morning students. To Arthur Lismer he gives credit for making him able to do the things he has done in his life. So of course we immediately became members of McMichael when we returned. Oh, and we found out that when he was 11 years old, Doris McCarthy was his mentor. Anyway, McMichael was very special, and after we had the house built I became a docent for some years and really loved McMichael. No longer am I a docent; age has sort of crept up on me. Each tour is always begun with the explanation that this originally was the home of Robert and Signe McMichael and there's a small collection which they gave to the people of Ontario in 1965.

I happen to believe that they gave it to me and to all of the people of Ontario and the citizens of Canada. They gave us a gift, and we really appreciate it. Then things happened. During those years since 1988, when I came back, a number of us who have worked with the gallery felt that the people were doing a wonderful job. There were so many volunteers, including the trustees. I was going to mention Michael Burns, Joe Goldfarb, Lyman Henderson and Neville Poy and many volunteers who are there many days. I was there two days a week. Many of the other volunteers are there more days than that. We felt that the administration were doing a superb job.

Unfortunately, Robert McMichael smirched the name of his gift. Three people ahead of me have presented much more articulately than I can what my stand is. Jane

Martin gave a terrific presentation, as did Michael Burns and Jamie Cameron of the artists' collection.

My request is that the bill be rescinded or withdrawn. I am totally opposed to Bill 112 because I think the current staff have carried on the initial, and Michael Burns has put forward to you the reason they could not raise funds. Thank you very much.

The Chair: Thank you very much, Ms Eadie. If you'd like to take questions, we've got about four minutes. Mr Marchese is next in the rotation.

Mr Marchese: Thank you, Ms Eadie, for coming. I think you're expressing the concerns of many Ontarians and many who are following this issue. I happen to think that what this government is doing is wrong and stupid.

This intervention has intended and unintended consequences. I'm not sure they've thought about the unintended consequences, and there are many. Many presenters who came here Monday have spoken to them, and some today.

I happen to believe that the mandate of 1965 is what we have all been working on.

Ms Eadie: That's what we believe.

Mr Marchese: I'll read it again. "The mandate is limited to the Group of Seven and three other named artists plus others designated by the advisory committee who have made a contribution to the development of Canadian art."

I argued earlier, and others have argued, this was intended to be inclusionary, not exclusionary. It meant that many would be part of the McMichael collection. Who it would be we didn't know, but that would progress according to the times and according to curatorial kinds of decisions.

Somehow this government has convinced itself, and I don't know who started what, but Mr Harris through his intervention has convinced himself that we need to go to some original mandate, which is not what I have read. The impression I get from what others have presented here, who support Mr McMichael and his desires, is that we should go back to the Group of Seven presumably and the three others he had agreed to, and that would be the extent of it. That's the impression I get. Is that the impression you're getting from some of the presentations, from those who support this bill?

Ms Eadie: One of my concerns I didn't mention is the First Nations artists. Jamie Cameron didn't present that. That is one of our very serious concerns. We think the McMichael is quite unique.

Mr Marchese: By the way, it's my concern too. I don't just want to amend it; you see, I think the whole bill is wrong. I think amending it is a problem.

Ms Eadie: Yes, exactly. The bill should be withdrawn.

Mr Marchese: The other group that came before us said we should include an amendment that would include Inuit and aboriginal works. I think that would be a mistake, if we get sucked into including some and excluding others.

Ms Eadie: Absolutely, yes.

Mr Marchese: The problem that others have commented on is that we should go back—I'll read section 8 to you: "The board shall ensure that the collection reflects the cultural heritage of Canada and is comprised of artworks and objects and related documentary material created by or about," and it lists the various names, and I think it's just 10 names, the ones Mr McMichael agreed to.

Ms Eadie: Yes, only 10; I counted them. Frank Johnston is missing.

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Mr Marchese: The other change that worries me is that it says, "other artists who have been designated by the art advisory committee under clause 4.1(2)(e) for their contributions to the development of Canadian art." It's almost the same as the original mandate, except that the ones who would determine who else it would be are comprised of the two McMichaels and three other people—friends, I assume, of Mr Harris and possibly Mr McMichael.

I'm worried because this advisory committee has this power. It's a non-professional committee, called the art advisory committee, that would actually have direct responsibility for acquisitions—not to advise but to acquire—de-accessioning, meaning getting rid of, and exhibitions and displays. All that power now goes back to Mr McMichael and a few others. As opposed to being advisory, they decide these things. What do you think about that?

Ms Eadie: The advisory committee of five, as far as I am concerned—many of us who have worked as volunteers at the McMichael believed the collection belonged to us, and we are willing to share it with Signe and Robert McMichael. We are all equal. I feel I should equally be one of those five advisers. It is my art collection. Why those five should be is beyond comprehension.

The Chair: With that, our time is up. Ms Eadie, we appreciate your taking the time to come before us today.

MARGARET MCBURNEY

The Chair: Our next presentation will be by Ms Margaret McBurney. Welcome to the committee.

Ms Margaret McBurney: Thank you. I'm here on behalf of myself, first of all, but I'm also here as the immediate past president of the Arts and Letters Club, which, as I think you know, is where the Group of Seven began. I'm also the author of six books on Canadian social and architectural history. So I've had more than a nodding acquaintance with the Group of Seven for more years than I care to think about.

If you will bear with me—and I don't know how much of this you have heard in the last two days—I thought I would give you a brief rundown of the group, who I think you must know were a group of raging iconoclasts. They were young, feisty men who were fighting against an entrenched system, with the rest of the art world looking at them with far more than raised eyebrows. They ran into a lot of problems with some members of the Arts and

Letters Club, who accused them of being part of a hot mush school of painting. They said that their work looked like flung paint pots. They told them that and threw buns and whatnot at them across our great hall, which still rings with the sounds of the roaring about their painting.

J.H. MacDonald, who was pretty well the head of the group, was struggling hard, along with the rest of them—with the exception of Lawren Harris—to make a living by painting in the 1920s. He said, "If Michelangelo or Giotto had lived in Toronto, they'd have had to move to New York." Plus ça change: 75 years later, things are not a lot better.

The group painted for only about 11 years. MacDonald died in 1932 when Mr McMichael was 11 years old, just to put things in perspective. Frank Johnston left in 1922. Holgate, Casson and so on came in during the next 10 years, and it was all over as a group in 1933, when those who were left formed the Canadian Group of Painters. I thought Lawren Harris summed up very well what the group was about, and I find it extremely pertinent to what's happening today. He was an articulate man. He said, "There is no finality, no final statement; everything remains to be re-created by every creative artist." If he were here today, he'd be applying that to the situation at the McMichael.

An anonymous artist at the time—you'll know why he was anonymous, and this is just to tell you what the situation was like and what they were fighting against then—said in 1931, "Tonight I give a lecture to the Art Student League. I want a picture of a horse to show that the animal is beautiful because every part of it is made for function, without ornament. In Paris I would show a woman. But in Toronto I show a horse." Things progressed as the group broke up, and in 1955 Graham Coughtry said, "Every damn pine tree in the country has been painted." They were moving on, as they should have.

Yesterday I called my friend Franklin Arbuckle, RCA. He's known as Archie to his friends. He's the son-in-law of Frank Johnston of the Group of Seven. I think Archie is the only man alive who knew every member of the Group of Seven, so I phoned to see what he thought of this situation. He has a remarkable memory and can talk at some length about the group. He listened to this for a while and then he said, "I love going to the McMichael, but I wouldn't want to go there if it's a museum. I want to go to the McMichael to see what's new." This from a man who has 12 of his paintings hanging in the McMichael collection, and he as an artist is still looking for what is new.

I think it's clear from these few remarks and from almost anything I have read of the Group of Seven that they would not want to see their works hanging in a museum where little changes, but in a gallery that is constantly changing, demanding our attention and exciting us. They wanted much more than a museum. Should Bill 112 take effect, that's what we'll get. Before long we'll be hearing people say, "The McMichael? Oh, yeah. Been there, done that, bought the poster."

Surely we can work creatively to deal with the present financial situation at the McMichael. As Sir William Osler said, in a line that still haunts me in many situations, which I want to share with you—this is about 100 years ago, but again, some things never change—“Conservatism and old-fogeyism are totally different things: the motto of the one is, ‘Prove all things and hold fast that which is good,’ and of the other, ‘Prove nothing but hold fast that which is old.’”

The Group of Seven’s Arthur Lismer said much the same thing: “Art is not something for ourselves to hoard, like a possession.” He also said, “The truest art, that which necessity creates [so] that beauty may live, civilization destroys.” I ask you not to be part of a civilization that destroys this wonderful gift to the Canadian people.

The Chair: That gives us time for about two and a half minutes of questioning. From the government side, Ms Munro.

Ms McBurney: Mr Chairman, the Arts and Letters Club sends for you people a copy of our book, called *The Group of Seven, Why not Eight or Nine or Ten?* I’ve got one for each of you. Is it all right to distribute them?

The Chair: The clerk will be happy to do that. Ms McBurney, does that mean you’re not interested in taking questions?

Ms McBurney: Oh, no, I’m happy to try to answer.

The Chair: I’m sorry. Perhaps I wasn’t loud enough.

Mrs Munro: Actually, I’m going to acquiesce to Mrs Elliott.

The Chair: OK, Ms Elliott has a question for you.

Mrs Elliott: Thank you very much for your presentation today. I think that in many ways you’ve struck at the heart of what is being debated here today. I couldn’t help but be reminded, in your comments, of presentations that were made in 1989 by the Liberal minister, Ms Oddie Munro, when the Liberals were presenting the changed mandate for the McMichael collection to the House. Interestingly enough, while we’re here in the midst of this long debate—and several days of debate in the House have already preceded us—only five minutes of debate occurred at that time in the House when the mandate was changed so very dramatically. I guess that’s what is at the heart of this. In 1989, under the Liberals, the mandate was changed so that the McMichael collection, which is managed through an agency of the province of Ontario, was essentially being redesigned, and the words she used several times were, “with a more dynamic mandate.” I think you used those same words yourself. It’s our view that that was a great variance from the spirit of the original 1965 agreement.

While I understand your concern that a gallery or a collection should be constantly interesting and exciting and wanting to draw people forward, I guess we’re viewing very differently how that is to be done. We view that focusing on a collection that has a very clear focus—the Group of Seven and its historic interest in the development of Canadian art—is the way to go.

Are you aware of how deeply the finances have been mismanaged over the last while and our concerns about how this would actually affect the success of the gallery?

Ms McBurney: I understand the deficit is \$1.5 million. I’m not brushing that aside. I think poor management is rampant in all aspects of society, not just in the art world, although I would suggest that art galleries should be treated in a somewhat better way in a civilized society, the way they are in most European countries where they’re not expected to earn money.

I assume this can be looked after by bringing in good financial management. God knows I’d be the last one to be ageist, but I’m not sure a 79-year-old man is someone to tackle a problem of this scope.

The Chair: We’re out of time, I’m afraid.

Thank you, Ms McBurney. I appreciate your taking time to come before us here this afternoon.

1730

CANADIAN ART MUSEUM DIRECTORS ORGANIZATION

The Chair: Our next presentation will be by the Canadian Art Museum Directors Organization. Ms Davis, welcome to the committee.

Ms Kate Davis: My name is Kate Davis. I’m director of the MacKenzie Art Gallery in Regina, Saskatchewan, and I’m also vice-president of the Canadian Art Museum Directors Organization, known as CAMDO. I’m presenting today on behalf of the president of the association, Jann Bailey, who unfortunately couldn’t make it to Toronto in time to make a presentation, as well as the membership of the Canadian Art Museum Directors Organization.

Thank you for the opportunity to present our views regarding Bill 112. The Canadian Art Museum Directors Organization is a national organization of art museum directors. Our membership includes Canada’s art museums from coast to coast, and I’ve provided a list of our members with the documentation of this presentation for your reference.

CAMDO has worked with the Canadian Museums Association and many others concerning issues surrounding Bill 112. We feel this bill is inappropriate, unnecessary and potentially hazardous. Indeed, as arts professionals, we feel this legislation simply is not in the best interests of the cultural community and, more importantly, not in the best interests of the public good and we urge you to please reconsider passing this legislation into law.

CAMDO would like to address three primary issues that are all interrelated: (1) governance; (2) donors, sponsors and funders; and finally (3) the public trust.

(1) Governance: Art museums in Canada are incorporated and structured to serve the public. Through best practices policies adopted and passed by trustees, professional staff maintain, nurture and steward an organization. They are guided by policies that are morally and ethically driven to maintain the public trust.

An orderly governance structure also ensures the arm’s-length principle whereby the state does not intervene in the day-to-day operations of an institution. The

McMichael and the government of Ontario have a governance structure already in place with administrative and regulatory tools needed to resolve any and all difficulties without layering yet another level of legislation on this public institution.

McMichael board members are fiduciaries whose primary duty is not to the crown, but to the public interest. The government of Ontario is placing these appointed friends—trustees—in a very difficult position, as the board's primary duty is to the objects and beneficiaries of the trust, in other words, the public, not its political masters or individuals, even if these individuals are past donors.

CAMDO adamantly feels that this legislation is legally questionable and could be vulnerable to a variety of legal and constitutional challenges under section 15 of the charter, and trust law. The law imposes a general duty of loyalty upon all fiduciaries: an obligation to act honestly, prudently, diligently, even-handedly, candidly and strictly in the best interests of the trust. Are you really prepared to have a member of the public name each and every board member and your government as co-defendants in a case of public trust? Surely the government of Ontario can slow down, consult the appropriate parties—the board, the arts professionals, the public, your legal teams—and find a proactive, collaborative path to help this important Canadian institution.

(2) Donors, sponsors and funders: I know you've heard from many other speakers about the important relationship all museums share with their donors to ensure fiscal stability, so I won't belabour this point. The key is, through both provincial and federal law, we have avenues to acknowledge and compensate donors. We understand that the McMichaels are only two of many donors whose generosity throughout the past three decades has played a critical role in the founding and development of this great Canadian asset. We also understand everyone has been appropriately compensated for those gifts.

The McMichaels are recognized for their outstanding gift to Ontario and Canada, and they play an important role in the continuing life of this institution. The 1972 act stipulates, in fact, that the McMichaels shall be trustees for life, but there's no suggestion whatsoever that their powers will in any way be superior to those of the other trustees.

Moreover, CAMDO would urge the government of Ontario to consider the enormous effect this bill would have on our donors and charities in relation to financial gifts, as well as gifts of artworks. We can only anticipate the anxiety among other patrons and donors who will justifiably worry if their original gifts with the McMichael, or other museums and galleries for that matter, can't or won't be respected. If this trust is broken, so is our ability to be fiscally sound and to steward continuing development of our collections.

(3) The public trust: CAMDO firmly believes this legislation undermines the fiduciary responsibility of the government-appointed board. They are accountable for this institution in the public trust.

The government and members of the board surely must ask themselves about the legalities of this legislation. You need to protect yourselves from liability in the case of subsequent litigation by other donors, funders, artists held within the collection and all those who supported this institution in good faith.

The government must ask:

What is the role of the government vis-à-vis the administration of the trust and what rights and obligations does this involve?

Is the proposed legislation consistent with the original purposes of the trust as spelled out in successive instruments and as interpreted through practice and by the courts?

If the government is a trustee of the McMichael, would the passage of this legislation constitute a violation of its fiduciary duty?

If the government is acting in its capacity as a public watchdog, has it exceeded or lost its jurisdiction through procedural improprieties or errors of law?

There are a number of concerns we could comment on concerning issues of public trust, but given our time I'd like to conclude my remarks.

Museum professionals, scholars and others concerned with Bill 112 have been accused of being out of touch with the public. What the people want, the government urges, is to honour the intent of the gallery's original mandate, which is to display works by the Group of Seven and their contemporaries.

Please forgive me but I want to end with a short story about a young Chinese boy growing up in a repressed country learning to draw and develop his lifelong passion for art from battered, torn and faded images of works from books by members of the Group of Seven.

Struggling through art school, having drawn with limited sticks of coal on whatever surface he could find, this passionate and proud man immigrated to Canada and just recently held a show at the McMichael. Gu Xiong, working with contemporary curator Andrew Hunter, is now a Canadian working through his art practice, which has been influenced by the Group of Seven. This is a powerful example of the kind of contribution to the development of Canadian art that we in the field feel needs to continue at the McMichael.

Who should be making these decisions about art? The Premier, our donors, the public? How about professionals who have been trained and who have dedicated their careers to the arts as experienced cultural professionals?

Members of the Canadian Art Museum Directors Organization urge the government of Ontario to rethink this legislation, and we would be happy to assist in the process. We ask that you consider the integrity of this proud and forward-thinking institution and move forward in assisting the board through appropriate governance structures.

The Chair: Thank you very much. That basically has taken the full 10 minutes. I appreciate very much your taking the time to bring the perspective of the association to us here today.

Ms Davis: Thank you.

1740

ROYAL CANADIAN ACADEMY OF ARTS

The Chair: Our next presentation will be the Royal Canadian Academy of Arts. Good afternoon, Mr Bolt, and welcome to the committee.

Mr Ron Bolt: Thank you very much. I drove in from Cobourg this afternoon, and just to keep you informed, there are lots of trucks on the road.

I am here as president of the Royal Canadian Academy of Arts and as a professional artist of 35 years who was given a one-man show at the McMichael gallery in the early 1970s.

At the RCA's October 14 meeting of our national council, I was asked to speak to you on the issue of the McMichael gallery and Bill 112, but first a few points about the academy to put our viewpoint into some context.

The national council represents over 600 members from coast to coast. The membership roughly parallels the general distribution of the Canadian population, with the highest percentage of members residing in Ontario and Quebec. The only criterion for membership is outstanding work as defined by a jury of the applicant's peers. The membership recognizes artists in the conventional fields of painting, sculpture and architecture, plus cutting-edge practitioners in those arts and 17 other disciplines, including film, photography, set design and industrial design. Our outreach programs include scholarships to emerging artists, grants to public galleries for the purchase of Canadian art, plus national and international exhibitions of the work of academicians.

The academy and the Group of Seven share a common history. Every member, with the exception of Varley, eventually became an academician, and A.J. Casson was president of our group from 1948 to 1952. Those who know the history of the two groups also know of the pitched battles they had in the 1920s and 1930s, so it may seem ironic that we are here to protest the intent of Bill 112.

Our primary concern is that if this legislation is adopted, the Canadian people will be denied a unique and powerful opportunity to learn about our country's past in relation to the issues revolving around our natural environment that shape our lives today. Contemporary artists deal with issues that were unknown to the Group of Seven's generation, issues like environmental degradation and urban sprawl. The Group was cutting-edge for its time. If they were alive today, some of them would be addressing just such issues. Contemporary Canadian and international art has come to be not only about defining what is beautiful—in this case, the vast and rugged Canadian landscape—it is also about dealing with concepts such as that landscape's fragility and the need to protect it for future generations.

These are some of the issues today's artists are dealing with, using the language of today's art. They are important issues and they need an audience. What better place to introduce them to the public than the McMichael

gallery, where the best of the past can be seen in context with the dynamic statements of today's artists? The Group of Seven loved this country. That love and concern for the country is shared by contemporary artists and they need an audience to tell people about it.

There are examples of institutions that consistently join the past with the present to make powerful contrast with what has gone before and what is happening now. The Tate Gallery in London, England, has established a number of satellite galleries around the country, including the Tate Gallery West in St Ives, Cornwall. Its mandate is to preserve, collect and exhibit the work of the artists who made St Ives a centre of the international art world in the 1950s and 1960s. However, they also exhibit challenging contemporary work along with this. Their current exhibition also includes a video installation inspired by the Cornish coastline and beaches in Canada—by a Canadian, by the way—a statement using an electronic medium unknown to the artists of the period.

Surely we as Canadians have advanced in sophistication to where we can have at least one institution that consistently does the same kind of thing, namely, expanding the relevance of a treasured collection that is historically and culturally specific by relating it to the imagery and visual language of today's art.

If you adopt the policy of collecting only painting of a narrow range by only a select group of artists and give control of temporary exhibitions to those with a narrow historical view, then a great educational opportunity is lost. The McMichael gallery becomes a museum, a place frozen in history, rather than what it is now: a living gallery that celebrates the past and relates that heritage to the public through today's art. The academy asks that you leave the exhibition, collecting and curatorial policy of the McMichael gallery as it now stands.

Our perception of this legislation, and we believe the educated public shares that perception, is that of government interference in the running of a publicly owned gallery. The issues addressed in this legislation have already been dealt with several years ago in a lawsuit that the McMichaels lost.

This legislation sets a dangerous precedent. Will the Ontario Arts Council, the government agency that distributes funds to galleries across the province, soon come under pressure from government in terms of what kind of art it supports because it can't match its budget, or for whatever other reasons?

As for the financial debt of \$1.6 million, again the perception is that the government is attempting to water down and popularize a cultural institution to attract more crowds and make the place financially viable at the expense of a challenging exhibition agenda.

We have not seen the books. Did the debt arise because of the restaurant, or the advertising and promotional budgets not being big enough or imaginative enough? There are all kinds of creative ways to deal with the budget. Or is it because, as this legislation suggests, the kind of art being shown is driving people away?

If the latter is indeed the thought behind the legislation, we would remind you that the Group of Seven made art in their own time that challenged Canadians' perceptions of their country and, in the beginning, had to struggle for public acceptance. The very reason for the existence of a cultural institution is to challenge the public and move it to new understandings, not to make us comfortable and to confirm what we already know.

The current mandate of the McMichael gallery allows it to fulfill its proper function. Don't change it. Leave it alone and support the gallery with the public funds it deserves.

The Chair: Thank you. That leaves us about two and a half minutes for questioning. This time, it will be to the Liberals.

Ms Di Cocco: Thank you for your presentation. I have a tremendous problem with this bill. I think it's absurd. I think it's nonsensical. I don't even understand why we are dealing with this kind of a bill that's micromanaging a gallery. I feel like I'm being held hostage by some individuals who want control of a public gallery. That's how I feel, as a legislator, at this point. Have you ever seen in your experience any such legislation by government that is micromanaging a gallery to this extent?

Mr Bolt: No, but I would suggest that if you look at the Soviet Union before the revolution, you might find one.

Ms Di Cocco: In looking back, as well, I believe this situation was clarified in the 1997 Court of Appeal, where we spent thousands of taxpayers' dollars to fight exactly this type of control. I guess the point I'm trying to get at is, how in tarnation are we, as a province, going to—we have the largest and one of the best galleries of Canadian art in Canada at the McMichael. How is this kind of draconian legislation going to either help financially or attract visitors? I can't understand it. Can you enlighten me if this is a step toward that?

Mr Bolt: No. As I said, if it is an attempt to water down the collection to make it more popular, then you're defeating the purpose of what a museum is. As far as the financial situation is concerned, I am no expert. I'm an artist, I'm not an economist, but I have done fundraising for various organizations. My local gallery in Cobourg has struggled over the years because of lack of government funding. I started out a few years ago with \$64,000 a year from the Ontario Arts Council and now they're down to \$8,000. I don't know what's happened to the McMichael gallery, but if it's a matter of government money, then maybe they should use some of their new-found wealth to prop it up.

The Chair: Thank you, Mr Bolt, for coming in and making your presentation.

DOUG WRIGHT

The Chair: That takes us to our final presentation this afternoon, Mr Doug Wright. Good afternoon. Welcome to the committee.

Mr Doug Wright: Thank you, Mr Chairman and members of the committee. Thank you for the privilege of being with you this afternoon to speak to this legislation. Let me introduce myself briefly. I was, for some 12 years, president of the University of Waterloo—I'll explain the relevance of that in a moment—and before that I spent a dozen years or so as a deputy minister, serving the government of Ontario. My last two years, actually, were as Deputy Minister of Culture and Recreation, before that ministry was divided. It's only recently been more or less reconstituted.

I believe that the essential purpose of the legislation is to go back to the spirit of the original undertaking the province gave to the McMichaels when the original donation was made. I believe the integrity of that is the centre of the issue. I don't think it's about artistic freedom or anything else. I think that the importance of that speaks to the credibility of government policy as it affects donations for which our institutions—universities and galleries and others—are so enormously dependent today.

I spent a lot of time as president of the University of Waterloo soliciting donations. We had often to give undertakings about the uses of the money. If a government, as was done some years ago, changes the spirit and letter of an undertaking, I think it prejudices the prospect for further philanthropy. It undermines the credibility of the capacity of public institutions to seek private support.

1750

I happened to be here earlier when Mr Danby spoke and I agree entirely with him. I think the central issue is the credibility of an undertaking, once given. I believe that the decision that is implicit in the proposed legislation will restore that trust and credibility, and I think that precedent is extremely important for future philanthropic donations. I'm aware of several major donations now pending from individuals that I believe would be made less credible by the failure to pass this legislation.

The Chair: Thank you very much. That certainly leaves us time for questions, if you're prepared to take them. This time the rotation would be to Mr Marchese.

Mr Marchese: Mr Wright, you must have been present when I was reading the original mandate from 1965. Should I reread it?

Mr Wright: I'm sorry?

Mr Marchese: You must have been present when I read out earlier on the—

Mr Wright: Oh yes, I'm sorry. I thought you meant I was somewhere in 1965.

Mr Marchese: I just came from Italy three years after that.

Mr Wright: I was dean of engineering at the University of Waterloo in 1965.

Mr Marchese: God bless. I'm reading the 1965 agreement: The mandate is limited to the Group of Seven and three other named artists, plus others designated by the advisory committee "who have made contributions to the development of Canadian art." That was the agree-

ment in 1965. How would you describe that agreement? What does it mean to you?

Mr Wright: I think it's fairly clear. But there are other features to that legislation, including the roles of the McMichaels and so forth, which are also central to the spirit of that original agreement.

Mr Marchese: No disagreement, except they want to return to the spirit of the 1965 agreement, which I just read out to you. The spirit of the 1965 agreement includes the Group of Seven, plus three others, plus those designated by the advisory committee to have made contributions to the development of Canadian art. That, to me, means it could mean anybody else. It could mean Inuit artists; it could mean aboriginal art—

Mr Wright: As a matter of fact, it did.

Mr Marchese: It did. They were included later on.

Mr Wright: Yes.

Mr Marchese: My assumption is that if you revert to the spirit of what you're referring to and others are referring to, it always assumes somehow that the spirit includes just the Group of Seven.

Mr Wright: No, I don't believe that.

Mr Marchese: Right. It includes others, doesn't it? Who else does it include? Do you have a sense of that?

Mr Wright: No. Like some of the others, I don't believe in bureaucratic control of the content of art.

Mr Marchese: That's a good point. You don't believe in bureaucratic control, but you believe in curatorial control, don't you, or at least that the curatorial people have the experience and expertise to make decisions about what works of art—

Mr Wright: To some degree.

Mr Marchese: To some or to a great degree?

Mr Wright: Yes.

Mr Marchese: Some?

Mr Wright: Some.

Mr Marchese: Not a great degree?

Mr Wright: I think there are very interesting questions about the role of curators in our galleries and

museums. There is a strange tendency on the part of curators to secrete their collections and allow the public only to see examples from time to time.

Mr Marchese: That's an interesting view.

Mr Wright: There are other collections where a much greater effort is made to display a larger proportion of the total collection.

Mr Marchese: That's fair, too. What this government wants to do with Bill 112 is to set up an arts advisory committee—they call it an "advisory committee," right? Although it's a misnomer, it's wrong, because it does more than advise. This advisory committee, made up of the two McMichaels plus three others named by them, would actually have direct responsibility for acquisitions and de-accessioning, including exhibition and display. In effect, they become the curatorial group; not advisory, but the curatorial group. They don't necessarily have the curatorial experience. Don't you think that's wrong?

Mr Wright: No.

Mr Marchese: OK. I'm glad you were the president of the University of Waterloo and the deputy minister of culture and rec. Because I'm worried about those views. I really am. You and I are obviously not in sync with what most people in the art world would agree with. The people in museums and others would say that this course is completely opposed to professional practice elsewhere. In other words, it's wrong. But you obviously don't think that's a problem.

Mr Wright: I think that's a smokescreen for other issues of control.

The Chair: Thank you. Mr Wright, thank you very much for taking the time to make a presentation and sitting through this afternoon and for taking the time to share your perception on this issue.

With that, the committee stands adjourned until 3:30 on October 25th.

The committee adjourned at 1756.

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**Standing committee on
general government**

McMichael Canadian
Art Collection
Amendment Act, 2000

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affaires gouvernementales**

Loi de 2000 modifiant la Loi
sur la Collection McMichael
d'art canadien



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ASSEMBLÉE LÉGISLATIVE DE L'ONTARIO

STANDING COMMITTEE ON
GENERAL GOVERNMENTCOMITÉ PERMANENT DES
AFFAIRES GOUVERNEMENTALES

Wednesday 25 October 2000

Mercredi 25 octobre 2000

*The committee met at 1537 in committee room 1.*McMICHAEL CANADIAN ART
COLLECTION AMENDMENT ACT, 2000LOI DE 2000 MODIFIANT LA LOI
SUR LA COLLECTION McMICHAEL
D'ART CANADIEN

Consideration of Bill 112, An Act to amend the McMichael Canadian Art Collection Act / Projet de loi 112, Loi modifiant la Loi sur la Collection McMichael d'art canadien.

RUDY BIES

The Chair (Mr Steve Gilchrist): Good afternoon, all, and welcome to the third day of hearings on Bill 112, An Act to amend the McMichael Canadian Art Collection Act. We'll call the committee to order and we will move directly to our first presentation. That would be from Mr Rudy Bies.

Good afternoon, sir, and welcome to the committee. Please have a seat at the witness table.

Mr Rudy Bies: Can you hear me?

The Chair: Absolutely.

Mr Bies: I'd like to say good afternoon to the committee and I will begin with my presentation. My presentation to you will start on page 2.

My name is Rudy Bies. My wife, Gloria, would love to be here today but her work schedule does not permit that, so I will do a presentation on behalf of the two of us. This is a presentation from Gloria and Rudy Bies.

To give you a little bit of background about the two of us, neither one of us is an artist, nor are we employed in the art field, either commercial or with a public gallery. I am a practising professional engineer; my wife is a practising professional pharmacist. We are that part of the art world that is called the general public. Part of this general public is made up of art patrons who are often referred to as "the collectors." We could be called collectors but we don't like the term "collector" because we find the word cold and calculating.

We have specialized in collecting Canadian art from the 1970s and 1980s, largely Inuit, native and some contemporary non-native art. Among the artist friends we have collected art from, Arthur Shilling was a great Canadian artist and one of our closest friends. We have

collected Inuit and native art and we were delighted when the McMichael gallery added Inuit and later native art to the collection.

As collector-patrons, we not only support public galleries but also we have an opportunity to mentor up-and-coming artists. We often think back to our own start at enjoying art. The McMichael created for us an intimacy and an interaction of art, artist, art lover and nature. We know Bob and Signe McMichael and admire what they have done. Our young, growing family loved to visit the collection. Today, our three children, all in their 30s, are young adults and each one continues to be interested in art, an interest that was born at the McMichael gallery.

Just recently, for my birthday, my youngest daughter bought me a copy of the first edition of the McMichael collection catalogue, dated May 1967. I was delighted to receive this gift from my daughter, and the thoughtfulness that went behind this. I think all of us who have visited the gallery and the collection during the early 1970s have a catalogue signed by A.Y. Jackson. A visit to this gallery was always a happening for our family.

The Group of Seven and their contemporaries, as spelled out in the original McMichael agreement and as currently spelled out in Bill 112, represents a unique benchmark in Canadian art. This group of artists put Canadian art on the international map. They also made many Canadians, like ourselves, appreciate that Canadian artists are good. The Group is a Canadian icon, and this special segment of Canadian art deserves a special home of its own, as the McMichaels established when they founded the original gallery. The McMichael gallery deserves to remain unique, as the original founders' vision saw it.

As citizens of Ontario, we are privileged to be able to live in any of the diverse cities and towns that suits our needs. We have lived in several of Ontario's magnificent cities and enjoyed what each had to offer. In the same way, we want to enjoy the many diverse art galleries that Ontario has to offer. There are many galleries that can provide a home for the newer, modern conceptual art. We feel that public galleries should stress more Canadian content, outside of the McMichael gallery. The intent of Bill 112 is to restore the collection to its original mandate and honour a 35-year-old commitment to the McMichaels by a previous government.

Virtually every public art collection in the world established by people such as the McMichaels was created to include only the great artists chosen by that family. The Frick collection in New York is such an example. It became a model for many other collections and galleries. There is also the Munch Gallery in Oslo, Norway, and the Van Gogh Gallery in Amsterdam. There are many more such galleries in America and Europe that are dedicated to very specific artists and their works. There have always been guidelines for the type of art to be acquired by these galleries, and these guidelines have been honoured.

We feel that the McMichael should be the unique home for the artists spelled out in Bill 112. There are many publicly funded galleries in Canada that can show upcoming Canadian artists, Canadian art prior to and post-Group of Seven. These galleries need to increase their Canadian content so that more art patrons would get the message that Canadian art is good. We are not comfortable when we read or hear statements from Canadian art collectors such as, "I do not buy Canadian art because it is a bad investment." The McMichaels's chosen artists were a showcase to the world through much of the last millennium. Let this continue into the new millennium.

Let me conclude by reading the first two paragraphs from Paul Duval's introduction to that first catalogue of the McMichael conservation collection that I brought with me: "The most interesting personal art collections in the world have been born of a compelling enthusiasm for a particular period or kind of art. Material for such collections may be the work of one painter, one nation or one school of artists. The enthusiasm that founded the McMichael conservation collection was triggered by the art of a legendary Canadian, Tom Thomson, and those Group of Seven painters who shared his devotion to our Canadian landscape."

The intent of Bill 112 is to restore the collection to its original mandate and to honour a 35-year-old commitment to the McMichaels by a previous government. The McMichael gallery deserves to remain unique, as the original founders' vision saw it. In summary, I would like to say that Gloria and I are art collectors. We support Bill 112. The McMichael gallery must remain unique, as the original founders' vision saw it and it was originally agreed to. Other Canadian public galleries can put a little more general emphasis on Canadian art and thus provide a home for contemporary and modern art. That, members of the committee, is my presentation.

The Chair: Thank you very much, Mr Bies. In fact you have taken exactly 10 minutes, so I applaud you on your preparation, you and your wife in the preparing of the report. Thank you for taking the time to come and make those views known to the committee. We appreciate it.

JOY COHNSTAEDT

The Chair: Our next presentation is from Ms Joy Cohnstaedt. Good afternoon. Welcome to the committee.

Ms Joy Cohnstaedt: Thank you very much. I know that the document I have prepared has been circulated, but I'll take a moment to read it into the record.

Thank you very much for the opportunity to meet with you and to share some of my concerns with you about Bill 112. I am speaking as an individual and as a former deputy minister responsible for culture. I am a regular user of the gallery. On my visits, guests from Toronto, other parts of Canada and elsewhere often accompany me. I encourage my York University art history students and others to visit the McMichael because they can see First Peoples art from pre-contact to the present, as well as other Canadian works of art. The most recent show I saw was the Emily Carr exhibit.

I visit and encourage others to visit the gallery because for me it is more than a celebration and monument to the past. As an informed society, we need interpretation and critical analysis of the collection and the other exhibits of historical and contemporary Canadian art presented by the McMichael gallery.

I read in Hansard that the Minister of Citizenship, Culture and Recreation said, "The purpose of this bill is very clear. It is to restore the McMichael collection to sound financial health and to honour the intent of the gallery's original mandate." I have read the arguments for and against changing the legislation, and find those in support of the current mandate and in opposition to Bill 112 compelling.

I have also just now read the presentation prepared by Vincent Tovell, and I would associate myself with it.

However, I want to focus my comments on the impact of Bill 112 and its assumption that passage of the bill will restore the McMichael Canadian Art Collection to "sound financial health."

I have seen no evidence in support of the assumption that the measures to be taken, in particular the narrowing of the collection, will have any positive impact on the finances of the gallery. Indeed there appears to be only the assumption that because other single-focus galleries in the world are viable, this one will be too once the collection is reduced. Where is the analysis to support this assumption? Where is the evidence that exhibiting the Group of Seven and their peers is of international, let alone of sufficient national and regional interest, to sustain the gallery?

The McMichael Canadian Art Collection is located in splendid surroundings, but a visitor to Toronto and to Canada can see fine examples of the Group of Seven and their peers in other galleries, such as the Art Gallery of Ontario and the National Gallery, without traveling outside the urban area. Incidentally, most galleries with a single focus are located in urban areas. Tourists and local residents need not make the trip once, or more than once, unless the programming of the gallery is interesting and changes on a regular basis. What they cannot see is a gallery whose sole purpose is exhibiting not only historical but also contemporary Canadian art.

1550

Once the gallery's mandate is narrowed, where is the programming to be drawn from? It is not the purpose of other galleries in Canada to provide exhibits to meet the new mandate, and there are few—the Art Gallery of Victoria, for example, with an interest in Emily Carr—to provide occasional touring exhibitions that satisfy the new mandate. Where is the plan for exciting new exhibitions to attract new visitors and compel current visitors to return to the McMichael Gallery? Where are the curators and art historians? Where is the funding? Deaccessioning a portion of the collection provides one-time-only funding; the gallery needs long-term, stable and predictable funding. Where is the government's commitment to this?

Finally, I do not believe that the introduction of this legislation, and its goal to restore the collection to sound financial health, is based on any substantive research to demonstrate the measures proposed will accomplish this end. Indeed I believe the passage of this legislation offends the public interest, and I strongly recommend that it be withdrawn until such time as the government can demonstrate its passage will provide the McMichael Canadian Art Collection with sound financial health. Thank you.

The Chair: Thank you. That leaves us with about four minutes for questioning. This time the rotation starts with the Liberals.

Ms Caroline Di Cocco (Sarnia-Lambton): Thank you very much for your presentation. It's no secret here that I, too, feel the bill should be withdrawn. This bill, to me it's not so much that it's dealing with restoration or financial stability, but it appears to be changing the governance, the arm's-length relationship, the governance model that boards of art galleries across this province have had for a number of years. In your experience, if you've taken a look at this advisory committee model they're proposing, what's your interpretation of that advisory committee model in governing the gallery?

Ms Cohnstaedt: Regardless of whether or not the committee is advisory, it appears to me that the decision-making regarding the collection and the programming will rest with a few individuals, some of whom will not be professionally trained. They will have a strong avocational interest. I think the museum and gallery community has moved well beyond this practice at this time, and so, like you, I'm concerned about the relationship between, first of all, the government and the management of the McMichael and within the McMichael, the relationships that will exist among those who are employed there. It's for this reason that I believe that the presentation of the legislation offends the public interest.

Ms Di Cocco: I've received a draft of the audit statements for 1980. I don't know if you have ever been privy to those.

Ms Cohnstaedt: There's no reason why I would be.

Ms Di Cocco: OK. In it, it speaks clearly to the unprofessional perspective of dealing with, let's say,

selling and attaining a price, if you want to call it that, under the past governance of the McMichaels. It was astounding to me because in here it suggests that there were times with the corporation, under the McMichaels, when there was some interference when it came to actually pricing some of these works. There was no public tender in some instances in selling off the works of art. As I said, I have the document, and I will be sending it to the minister because I find it just appalling.

When you are selling a piece of art in a gallery—"deaccessioning" I think is the proper term—what is the correct way to do it? The audit says that it wasn't done correctly. Could you tell me what the—

Ms Cohnstaedt: I'm not someone who acts as a dealer in art, so I'd rather not. I think the issue at hand is that there are a variety of individuals who have, in good faith, either given money or given works of art in kind, and they too expect that their wishes be respected. This collection is made up of much more than the donation of a couple, who, by the way I think need to be applauded for what they have initiated, but I believe they have received more than their fair share of benefits from the state for the contributions they have made.

The Chair: Thank you, Ms Cohnstaedt. We appreciate your taking the time to come before the committee this afternoon.

CANADIAN SOCIETY OF PAINTERS IN WATERCOLOUR

The Chair: Our next presentation will be from the Canadian Society of Painters in Watercolour, Elizabeth Gilbert. Good afternoon. Welcome to the committee.

Ms Elizabeth Gilbert: My name is Elizabeth Gilbert and I am here representing the Canadian Society of Painters in Watercolour. The CSPWC is the national organization for professional watercolour artists in Canada. The watercolour society was founded 75 years ago by 12 artists, including A.J. Casson, Franklin Carmichael and Fred Brigden. Now, with over 200 elected members from Newfoundland to the Yukon, we are a very active and diverse group. Within our members' work you would see every imaginable style of art, from incredible realism through to the abstract. What we all share is the passion for painting with watercolours.

We are very concerned about the proposed changes to the McMichael collection. The McMichael Canadian collection is a treasure that continues to play a premier role in Canadian art. In a country where we struggle to define our identity and culture, the McMichael collection is absolutely and beautifully Canadian. The Group of Seven and Tom Thomson saw the Canadian landscape and interpreted it so successfully that it is a foundation for our culture. What the McMichaels have given to the people of Canada is awesome. What they have contributed to the Canadian culture is an immense gift.

But what we are losing with this proposed bill is the very creativity that gave birth to the work that we seek to protect. Thomson, MacDonald, Jackson, Lawren Harris,

Lismer, Casson, Varley, Carmichael and Johnston all broke the mould. They experimented, they saw in new ways and developed their own styles. They were original and they were rejected. Artists, to be successful, must learn from those who inspire them, but then must find their own expression in the original. Originality is inherent and essential in the creation of art.

The McMichael collection has played a pivotal role in Canadian art. With the cessation of new initiatives and showing the work of new generations, we are amputating its role in the creative processes of Canadian art. To restrict the collection to only the Group of Seven and to cease showing the work of living Canadian artists, the McMichael collection becomes only the McMichael museum—a museum where history is safely stored, but no longer a place seeing and expressing Canadian culture. The whole character of the McMichael collection is at stake now, as much as if a tremendous tornado ripped through Kleinburg.

The watercolour society feels strongly that the McMichael Canadian collection must remain open to new ways of seeing and expression, and that continued exhibition of living artists is very much in keeping with the philosophies that inspired the original Group of Seven and Thomson. Canadian culture and identity is being put at risk here.

We feel that political interference does not belong in art. Creativity is what makes humans so special and unique among the species. We know that it is seldom logical to be an artist. Consider this: you can be among the best in the country, train for many years and yet struggle to make as much money as a mediocre, unmotivated office worker. We are artists because we are compelled and creative.

1600

Politically motivated interference in the art world can only have negative consequences. The sell-off of modern works from the McMichael collection will flood the art market. It will depress the prices of new and existing works. The damage from this bill will reverberate across Canada, more like a massive hurricane than a localized tornado.

We ask you to reject Bill 112. We request that you work with the McMichaels, the gallery and living Canadian artists to support the continued, vital and dynamic role of the McMichael collection in the context of its pre-eminent position in our very identity.

Now I'd like to speak as an individual. I love the McMichael gallery, and I have since the first time my high school class walked through those doors. It is my favourite gallery in the world, and I am saying this having been through the Louvre, the Uffizi, the Vatican and countless others. I have not liked everything hung at the McMichael, and I defy anybody to say honestly that they have liked everything. I share with the McMichael family their frustrations with some manifestations of modern creativity. The solution, I feel, is not in this bill. Bill 112 cuts off the creativity and chains the collection to the past.

The artists of the Group of Seven conceived, had vision and created. The McMichaels took that seed, cared for it and planted it. They gave it to the people of Ontario. The seed of the artists' creations thrived and grew into a tree. This tree is much bigger and more complex than the seed that was planted. It is now subject to the wind, the seasons and the environment it stands in. The tree has the strength of the years and complex hardwood supporting it. The leaves come and go each year in a celebration of colours. The tree is always magnificent and alive. At first it was fragile and susceptible to the possibility of poor soil or lack of water. Now, however, it affects the climate around it by cooling, warming and moderating the effect of heavy rains.

The collection is now much, much more than it was when the McMichaels planted it. If we sell off the newer works and stop showing the work of recent and current seasons, we are in effect slicing off the tree at the widest point of the trunk, varnishing it and displaying it, saying, "Count the rings and see the magnificent tree we grew." The McMichael Canadian collection is alive and magnificent. Do not cut it down.

This weekend I have coming up a thrill of my lifetime. I am showing and selling some of my own paintings at the McMichael autumn art sale. Along with 49 other artists, I am participating in this fundraiser for the McMichael volunteer committee. I invite the members of this committee to come, see and talk to living artists in a gallery that is very much alive. Although this is the first time I have been in a McMichael art sale, I predict that you will see there diverse and beautiful images of this diverse and beautiful country.

The Chair: Thank you, Ms Gilbert. That leaves us just over two minutes for questioning. This time it will be for the NDP.

Mr Rosario Marchese (Trinity-Spadina): Thank you, Ms Gilbert, for your presentation. I like some of the poetic imagery you used to describe your feelings.

In my quick two minutes or less, I want to talk to you about the mandate and then ask you a question about that. The original 1965 mandate said the mandate was limited to the Group of Seven and three other named artists, plus others designated by the advisory committee—so it says "others"—"who have made contributions to the development of Canadian art." Is there anything in that mandate that I read to you, from 1965, that the McMichael gallery has strayed away from, on the basis of what I just read to you?

Ms Gilbert: I wouldn't pretend to be an expert on what the mandate was originally or whether or not it strayed away from that. What I see now is a gallery that wants to step back in history and wants to cut off the living part of its existence.

Mr Marchese: I appreciate your answer. My point is that as I read the mandate, we have been consistent with it. I say "we" because I've accepted what the McMichael has done through the course of its history, accept it as part of what the gallery is like, what I believe to be a very good, living, breathing gallery that reflects very much the

contributions Canadian artists have made. The government claims we haven't respected that mandate. That's why I read the mandate to you, because it includes the Group of Seven and three others, plus any other artists "who have made contributions to the development of Canadian art." My point is, we've been faithful to that. Why would they want to change it?

Ms Gilbert: If we think it takes eight artists to make a country, something's wrong. It takes many people and it's an evolving process. It's not something we stop in history and say, "This is it. This is what was good. Now we're going to keep that like it was." It's like the tree. It's magnificent when you see one of those big, cut-off trees and you can count the rings—"Gee, this one was here when Columbus sailed"—but it's not a living tree any more. The McMichael is alive.

The Chair: Thank you, Ms Gilbert, and all the best this weekend at the sale.

LYNN BEVAN

The Chair: Our next presentation will be from Ms Lynn Bevan. Good afternoon, and welcome to the committee.

Ms Lynn Bevan: My name is Lynn Bevan and I speak in unqualified support of Bill 112. I would like to say from the outset that I'm not a supporter of any particular political party. Anyone who tried to align me with any party would have difficulty doing so. To me, Bill 112 is not a question of politics, and I've been very sorry to see it reduced to that. To me, Bill 112 is a question of integrity, specifically integrity in governing, and I don't say integrity in government.

We have heard art historians, critics, artists and others say what works of art they would like to see in the McMichael collection. We have even heard some speculate what the Group of Seven would say should be in this collection. But I ask you, does that really matter? This is a collection, and it's a collection that was given on terms and accepted on terms. It is not the first and it is not the only collection created by private donors, attached to a particular location, a particular building. Two examples, of which I'm sure you've heard, are the Frick in New York City and Sir John Soane's Museum in London, England.

I would also like to say that this is not the only place in Ontario or Canada where artists can exhibit. When I hear concerns expressed about the impact on limiting this collection to the basis on which it was given, I find that insulting to other artists and to other institutions. It's to suggest that the only place of value for artists to exhibit is the McMichael collection. It suggests that the only place available to some artists is the McMichael collection. It suggests that unless the McMichael collection accepted gifts of certain artists, their art would have no value. I'm hopeful that you don't listen to those comments without considering what they're really saying.

I also find the comments about deaccessioning being present or not present in this bill mystifying. De-

accessioning is like trying to guess the stock market. Deaccessioning can be done in a rational way. It also again goes to the question, does it suggest that works that may not be suitable for the McMichael collection would have no home elsewhere? Those artists who might not be within the mandate of the collection again might be insulted.

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If there's any doubt as to the scope of this collection, ask the donors, Bob and Signe McMichael, what they meant when they gave their home, their land and their art. There's no need to speculate. They're still alive, and I believe that the treatment they have received is shameful. The government of Ontario has been complicit in that shameful behaviour for the last 20 years. What I find most appalling is that part of that shameful treatment has come from the recent administrators of the collection itself. In press releases, catalogues and interviews, administrators state that the McMichaels made one gift 35 years ago. This statement completely ignores the fact that without that gift there would be no McMichael collection and those administrators and trustees would have nothing to administer. It is not to me a question of narrowing a focus but of restoring it.

It is also incorrect, and I would suggest unfair, to say that the McMichaels made one gift 35 years ago. The McMichaels have made almost yearly gifts of art to the collection since 1965. Those additional gifts are worth over \$1 million. The claim of one gift only also ignores the efforts made by Bob and Signe McMichael, both as unpaid curators and promoters to have others donate to the collection, allowing it to grow with a limited acquisition budget.

These same administrators have from time to time claimed that the McMichaels obtained a huge tax relief at the time of their gift. Simple research would show that there was no tax relief for gifts of art in 1965. When relief came later, it was of limited use to the McMichaels, because by then they were unpaid curators with limited income and they were given an extremely short time frame within which to use that retroactive relief.

Not surprisingly, given the source of this apparently official information, the press has repeated these stories over and over again. More recent opposition has become personal and spiteful. The McMichaels have remained steadfast and loyal to the collection that they founded. My own view is that they should have said to the government of the day, whichever one it was, a long time ago, "Give it back. If you can't do what you said you would do—we did what we said we would do—then just give it back." Why would anyone make a similar gift to government in light of the McMichaels' experience?

The McMichaels could still be sitting in their house, with that wonderful view, sharing their extraordinary art collection with a select group of friends. They could have sold their art to private collectors. Instead, they gave it to the people of Canada for all time. What people like the McMichaels give no government can ever create, and we

would all be the poorer, in my view, if it were not for gifts of this kind.

When I look at Bill 112, I like to look at it as a reflection of the gratitude of the people of Ontario, speaking through their government, to the McMichaels, but perhaps much more significantly it also recognizes that governments must keep their word if they're going to maintain the confidence of the people. Thank you very much.

The Chair: That leaves us about two minutes for questions. This time it will be from the government benches.

Mrs Brenda Elliott (Guelph-Wellington): Thank you very much for coming before us today. I have very little to question you on other than that I want to compliment you. I think, along with a few other presenters before us, you have come right to the heart of the matter. I think your presentation was very articulate and heartfelt. Are you an artist yourself?

Ms Bevan: I am a lawyer.

Mrs Elliott: You're a lawyer. That's very interesting.

Ms Bevan: But I was a guide at the McMichael gallery in 1965 and it changed my life.

Mrs Elliott: Isn't that interesting. So you have had a very long connection with this particular gallery.

Ms Bevan: I have indeed.

Mrs Elliott: I think what you're saying is what we've been feeling here on the government side, that this is a matter of integrity. It's a matter of restoring it to the spirit of 1965 and indeed honouring the collection. We would agree with you, and I think one presenter put it very well: this collection will be diminished by trying to be everything to everybody all the time. But thank you very much for your comments.

You mentioned at one point you thought that seeing the gallery and seeing the collection change so much over the years, it might have been useful for the McMichaels to say to the government of the day, "Give it back," when they saw it going off the rails, so to speak. It was I think with the Liberal government in 1989 where things really went off the rails. If you look in the Hansard, the minister of the day refers to her vision of the changing collection to be a dynamic collection, a changing collection; not to say that it can't be a dynamic and wonderful collection today, but I think it was at that point where we on the government side felt the direction of the collection in the province was beginning to go off the rails.

I compliment you and I thank you very much for coming before us today. I appreciate the advice from someone who has had a long and obviously a very heartfelt connection with this particular institution.

The Chair: Thank you, Ms Bevan. I appreciate very much your taking the time to come before the committee today.

JOHN McEWEN

The Chair: Our next presentation will be from Mr John McEwen. Good afternoon and welcome to the committee.

Mr John McEwen: I'm of course the sculptor who made *Babylon*, which is installed at the McMichael. I've been a sculptor for over half my life, which is more than 28 years, and I've made my living from it exclusively in the last 15. I'd like to read a statement, essentially, into the record, for the speed, about my work.

I was asked recently by Matthew Teitelbaum, director of the Art Gallery of Ontario, whether I considered *Babylon*, my sculpture at the McMichael Canadian Art Collection, to be site-specific. The answer is a resounding yes. The McMichael is the optimum place of dialogue for *Babylon*. It was, after all, specifically designed to be installed along the long, winding driveway into the collection, which it was meant to introduce. "Site-specific" means that a sculpture is so thoroughly integrated into its site, both physically and contextually, that to move it would effectively sever the intended dialogue.

Babylon was originally commissioned for a two-year period, and had it not been bought and donated to the McMichael, it would after the two years have been returned to me, and it would have been up to me to find a new place of dialogue. That is the life of any artwork that isn't more than a shiny jewel in a vault.

The attack on my work at the McMichael is both rhetorically crude and, in the end, sentimental. You might consider the vault, but first consider the word "Babylon." I like how it sounds, I like its origin in Psalm 137 and I like how I came across it in *Rivers of Babylon*, a song from Jamaica—reggae music by the Melodians. *Babylon* is a classic tale of the fit we feel in the landscape. Obviously, the Israelis didn't feel a good fit several millennia or so ago.

Babylon is about a longing to be in one's landscape. *Babylon* may even be a longing for a lost landscape but not an unpeopled one. My wolf stands next to the satellite dish. That's our landscape, neither unpeopled nor blank.

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Art is alive when it's reviewed and revisited. My time at the McMichael left me with a renewed interest in the Group of Seven and people like Northrop Frye who thought deeply about them. Yes, you can think about art.

Removed from the McMichael or not, my work will continue to think about our nature and our place in the Canadian landscape. Two new works of mine do just that. The work being sent by the city of Mississauga to its sister city in Japan does that—that, by the way, is a bear and canoe—and so does the 20-foot-high Rocky Mountain ram's horn that I am currently developing in Calgary.

In reality, Bill 112 destroys the very idea of dialogue. In 1995 I created a memorial in Coronation Park here in Toronto to the contribution made by Canadians at home and abroad during the Second World War. That's my

parents' generation. In the memorial there are 50 words for peace that would be recognizable in today's Toronto. That's quite different from the Toronto of my parents. But the word "peace" was a result of their generation and that makes the memorial a dialogue between generations.

Situated at the McMichael, Babylon is also a dialogue between generations.

The Chair: Thank you very much. That allows us about four minutes for questioning. This time the rotation will take us back to the Liberals.

Ms Di Cocco: Thank you for your presentation about the spirit and the intent of an artist that is exhibited at the McMichael. My biggest concern about this process is that what we're discussing are curatorial definitions. What we're doing here with this act, in my estimation, is deciding what is constituted as Canadian art. That's what, unfortunately, seems to be the topic. What I'd like to know from you, if I could, because it seems to me you said Bill 112 destroys the idea of dialogue: can you expand just a little bit on that when it comes to how this bill is affecting you as an artist who has exhibited and has been there for the length of time that you have?

Mr McEwen: I'm not sure whether it will have an effect in the future for me. The opportunities and the kind of work I'm doing will not be affected, but the basic reality is that the young always win, and 20 years from now they're going to win over me. You can't keep a dialogue going as an ostrich, basically.

Ms Di Cocco: The argument the government gives in regard to this bill is that it's going to restore financial stability. Do you have any comments on that?

Mr McEwen: No, not really.

Ms Di Cocco: None at all.

Just one other item, if I could, with regard to the McMichael. Did you donate your—

Mr McEwen: No, it was bought by a collector and donated. As I said, had it not been bought, then it would have been my problem to place it in a new kind of dialogue.

Ms Di Cocco: Thank you. I have no more questions.

The Chair: Thank you for taking the time to come and make your presentation before us.

DON LAKE

The Chair: Our next presentation will be by Mr Don Lake. Good afternoon, Mr Lake, and welcome to the committee.

Mr Don Lake: I speak here as a member of the small business community. I own a gallery in Toronto at 1199 Yonge Street. I have a firm of five people. The firm has been in business since 1978. My concerns are with the marketplace and what I believe this bill represents. My firm pays a considerable amount of taxes, including taxes on approximately 12,000 square feet of retail space in Toronto, which is getting more expensive.

In my opinion, and I have prepared a brief, these are what the facts are. Mr and Mrs McMichael gave their collection to the public—to the public—in 1965. All

relevant parties agreed the enabling legislation was appropriate and fair. Over a long period of time, in my opinion, the McMichaels have tried to regain control of this collection. Successive boards of the McMichael have been forced to go into deficits, to a large degree as a direct result of the high cost of ongoing litigation brought on by the McMichaels. Notwithstanding the immense pressure of McMichael, the boards and staff have been able to build a very significant collection. No provincial government has been prepared to defend the public interest by directly defending and paying for the public's right to control its own assets in a professional curatorial manner. The current government has in fact decided to back the interests of McMichael, not the public's.

The McMichaels' view of the tradition of this collection is false. The Group of Seven was not an exclusive group at a certain time in history. Rather, the group was inclusive, doing a series of shows where a broad range of artists were invited to participate. The Canadian Group of Painters grew directly from the group shows, which were disbanded in 1931. The tradition of the Group of Seven is open, inclusive. In its inception it was a radical rupture with the past. May I say that I have a Group of Seven show on as we speak. I have a big position in the Group. I am a big believer in the Group. I believe their tradition is not narrow.

Successive boards of the McMichael have developed a wonderful and important collection of Canadian art of all periods, particularly the collection of First Nation artists. The McMichael board has ensured outstanding scholarship and publications which are very important to all Canadians.

It is my opinion that this government has a duty of care, and that duty of care is very broad. It is not simply to the McMichaels' version of what this collection is all about. Neither the public nor the government owes anything to McMichael. The gift was given, a great thanks was bestowed and McMichael received the appropriate considerations under the tax act and related legislation of the day. Indeed, McMichael even received lodging at the expense of the public.

There is a duty of care to the rights of the public. That duty is best exercised by creating a professional board and staff that act in the best interests of Canadian art and the public. The board and staff must be independent of government and any particular interests. There is a duty of care to the immediate surrounding community. A substantial level of economic growth has occurred directly as a result of the vibrant programming of the staff and board of this institution. An attempt to shortcut this programming will have a negative impact directly in 905. Please allow me to disclose that my firm had an opportunity to purchase a property at the right price on the main street in Kleinburg recently. We decided that given the political tampering with the gallery, which is the main reason why any art gallery would be in Kleinburg, the risk that this town could be destroyed by political interference was significant enough for us to

conclude that an investment in this town at this time would be unwise.

There is also, in my opinion, a duty of care to tourism and the many children who attend this institution via buses. If the collection becomes stagnant as a result of a very narrow and false view of Canadian art, visitors will have no reason to keep attending and seeing the same narrow collection. Let me point out that this collection is definitely inferior to the AGO and the National Gallery in the Group of Seven. Both of those collections are in Ontario. If one wishes to see a great Group of Seven collection, one, generally speaking, would not go to the McMichael. However, it does contain many other important collections, especially Inuit, and that is of great international interest and that does bring tourism and that does bring dollars to this province.

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There is also a duty of care to the artists in Ontario and Canada. The promotion of contemporary art makes that art economically viable. Taxpayers have a substantial investment in art education. As most artists in Canada live at or below the poverty line, it is politically prudent to show support and create markets for this art.

There is also a duty of care to the donors, who have also very generously given, as the McMichaels have given, to this collection. That art should be removed because of political interference raises grave questions about the character of political interference in this collection, which leads to liability, and I don't think this government needs to create any new liability.

We live in a democratic society governed by Parliament. All members of our society should be treated equally. If one donor-collector is treated in a certain fashion, then all donors and collectors can and should be treated in the same fashion. What is to stop other institutions from changing the way they operate and also commencing to treat their donors in the same way that McMichael will be treated in this proposed legislation?

The current government or governments in the future can start to change the arm's-length relationship between themselves and public institutions. Lobbying could commence immediately for other institutions to change the manner in which they are treated or the way in which their board is treated. McMichael is not the only donor who wishes to have his cake and eat it too. Believe me, there are some very aggressive donors out there.

What is to stop other donors from bringing class actions or individual actions against this government or this institution if there is an attempt to disperse their art, which they have given in good faith, in the same good faith that Mr McMichael gave his material? I have spoken—and believe me, this is so—to a number of collectors who have given art to this collection in good faith, and they would be immediately prepared to join a class action if there were an attempt to disperse their gifts. That would of course also be true for artists, such as the last speaker. A deal is a deal is a deal not only for Mr McMichael, whatever he may allege. There were many other gifters here. I don't think you want the liability.

Conclusions: This act will have an entirely negative impact on the institution and the taxpayers. This act will open up a new level of liability to the taxpayers. This act will change via political interference the arm's-length relationship between government and institutions. The precedent that this political tampering will set will create a situation that is not in the public interest.

Recommendations:

(1) This committee recommends that this legislation not be passed.

(2) The committee recommends that new overriding legislation be introduced that forbids any gifts being given to the province that have any conditions whatsoever placed upon them.

(3) The committee recommends that the province closely look at the way that boards are constituted in Ontario. The principle of arm's-length relationships should be enshrined. Governments put people on boards based on patronage rather than merit, and that's true for all three parties in this room. The people whom governments put on boards are most often not qualified, and that's an understatement. They do not understand the dynamics of these institutions or the art market. A successful car parts manufacturer may know how to run a large company and he may be a wonderful party supporter, but it does not follow that he knows how to run a gallery.

(4) Government involvement must be only in cases of irregularities on the part of boards.

(5) The current government is concerned with the efficient expenditure of tax dollars. The only way this can be guaranteed is if institutions are professionally run, boards are constituted on merit, not nepotism, and those in control of public assets do not have a separate agenda. Therefore, the original enabling legislation that all parties agreed to must be allowed to stand in the best interests of the public.

The Chair: Thank you, Mr Lake. You went slightly over, but clearly we appreciate the perspective you've brought. Thank you for taking the time. Best of luck in your show. I see that your new venture is starting up on December 1.

COMPAQ CANADA

The Chair: The next presentation will be from Compaq Canada. Mr John Challinor, good afternoon. Welcome to the committee.

Mr John Challinor: Good afternoon, Mr Chairman.

Ladies and gentlemen, on behalf of the senior management team and employees at Compaq Canada, I want to thank you for the opportunity to appear before this standing committee to offer counsel on Bill 112, An Act to amend the McMichael Canadian Art Collection Act.

The reason for Compaq Canada's appearance this afternoon is really quite simple: as the official technology supplier to the McMichael Canadian Art Collection, the company has invested more than \$500,000 at the

McMichael as part of a three-year sponsorship agreement announced on November 16, 1999, less than a year ago. We want to ensure that our investment continues to be valued by all concerned and, further, that it continues to be protected. The context for Compaq Canada's submission today is as follows.

Compaq Canada empathizes with the position the government of Ontario finds itself in today. The financial position of the McMichael came as a surprise to the government. It most certainly came as a surprise to Compaq. The government is no doubt disappointed with a number of parties associated with the McMichael, possibly even the board of directors and those individuals who were appointed by the government to ensure that its investments were being properly managed.

Given the national significance of the collection at the McMichael, the government has a burdensome responsibility regardless of the financial position of the McMichael. The McMichael has to be a financially sound, fiscally responsible institution, yet remain open and accessible to all Canadians, which are somewhat historically disparate goals in the cultural community. Most Canadians don't understand the high wire museums tread in their attempts to achieve these sometimes conflicting objectives. All they want to do is view the art whenever they feel the urge to do so.

Rightly or wrongly, the government of Ontario will be held accountable by all Canadians, and particularly Ontarians, if the McMichael does not remain accessible. Thus, the government not only has a responsibility to ensure that the McMichael continues to be a viable entity but, to use the marketing vernacular of the new millennium, that the McMichael remains an experience and a destination.

Compaq Canada is fully supportive of the government of Ontario's requirement that the McMichael be managed in a fiscally responsible manner, and that the board of directors at the McMichael reflect that government dictum and not only be responsible for ensuring that the institution is managed in a fiscally responsible manner, but also be ethical in their dealings with sponsors like ourselves and other partners, the government itself and the general public.

Compaq has some questions. We seek clarification of article 1, which states, "The bill also recognizes that the focus of the collection has changed over time and that it is appropriate to return the collection to, and then maintain it in, the spirit of its original focus." Unless this article is well defined, in our view any debate that has taken place vis-à-vis focus will continue unabated.

Compaq seeks clarification of article 4, which states, "The art advisory committee is ... empowered to designate the artists who have made contributions to the development of Canadian art." As written, this committee would have a substantial level of authority within the McMichael, perhaps beyond that of the board or the executive director. Beyond that, this committee appears to have been afforded authority that could be viewed as being beyond the McMichael's mandate. In our opinion,

any responsibility beyond the mandate of the McMichael is the purview of Heritage Canada.

Compaq seeks clarification of subsection 3.1(1), which states, "Robert McMichael, founder director emeritus, and Signe McMichael are trustees for life or until they are unable or unwilling to continue to be trustees." If the McMichaels are unable to continue to be trustees, how will that be determined and dealt with in a sensitive manner that is in the best interests of both parties? Further, how is the public interest being served in permitting them to select trustees to replace themselves?

Compaq seeks clarification as to the general authority and responsibilities of the Minister of Citizenship, Culture and Recreation when it comes to the management of the McMichael Canadian Art Collection. It appears that the minister's involvement extends beyond policy direction to include operational management.

Compaq seeks clarification as to the general authority and responsibilities of the executive director of the McMichael, particularly as they relate to the Minister of Citizenship, Culture and Recreation, the board of directors and the art advisory committee. It appears that the executive director will have little authority, yet a continuing considerable amount of accountability. It also appears that the executive director will be responsible to the minister, to the board and perhaps even to the art advisory committee.

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In closing, the legislation appears draconian in nature, given the real issue at hand at the McMichael, as Compaq Canada understands it. We aren't convinced that amending legislation was ever required to deal with what we see as a financial management matter. Our solution is this: financially enlightened senior management is most certainly required, as is an involved and active board of directors that is fiscally responsible, socially conscious and politically accountable.

Those are my comments, Mr Chairman.

The Chair: Thank you. That leaves us about three minutes for questioning.

Mr Marchese: Mr Challinor, thanks for your presentation, because you raised good questions that we're all asking ourselves. For me, I want to get right to the heart of the problem. My concern is that this government, through this bill, is violating the original agreement.

Interruption.

Mr Marchese: I may be wrong. That's my opinion, and that's why I think this government is wrong. The original mandate says the following. Were you here earlier? I'll read it again: the mandate is limited to the Group of Seven and three other named artists, plus others designated by the advisory committee, "who have made contributions to the development of Canadian art." That's the spirit that I think the McMichael has operated out of since 1965. It's in that spirit that Mr McMichael continued to the 1980s, when he was the director from 1972 to 1980.

In law, when that Conservative government of the old days changed the mandate to specify that all works of art

must not be "inconsistent with the general character of the collection," I read it as in the same spirit as 1965. I wouldn't have changed it, but the Tories at the time decided to do it, in law, and that's what we've got. There are various changes made to the mandate, but I see them as all consistent with the original agreement.

Have you had a chance to look at the original mandate, to see whether you think these people are right, and that they might be violating the spirit of the 1965 agreement?

Mr Challinor: I have not viewed the original agreement. The only concern we have with respect to the issue you've raised is that it be well defined. I think it has been open to interpretation, and I think we all know that whenever things are open to interpretation, they're open to interpretation by just about anybody. That is the issue.

Our concern of course is this: if the collection becomes too narrowly defined, it will not have an awful lot of public value, and if it doesn't have a lot of public value that means there will be fewer people going through the gallery, which means fewer people will see our contribution to that gallery.

Mr Marchese: You're absolutely right. I'm concerned about that focus. They say, "and return it to the spirit of its original focus," which is what I was reading out of the mandate of 1965, and I'm concerned that the McMichaels, through the so-called advisory committee, which is really in charge of acquisitions, are going to decide who also will be in the McMichael collection in addition to the Group of Seven, so it'll be left to them. You're worried about the possible narrow focus. At least it should be defined somehow.

Mr Challinor: It should be very clearly defined, as to what the focus of the gallery will be. I can tell you—and I think this is not news to anybody who sits around this committee, because we're all consumers—the museum community has had to change considerably in the last 30 years. They have had to change their attitude considerably. I just spoke at a museum association meeting in Victoria two weeks ago on this subject, the subject of sponsorship. They've all had to find more creative ways to keep people coming through the gates to maintain their financial stability. If anything, that speaks to actually increasing, not decreasing, the focus of what they do, but within the parameters of their mandate. Sometimes that mandate has to change.

The Chair: Thank you, Mr Challinor. I appreciate your taking the time to come before us this afternoon.

DAVID SILCOX

The Chair: When the agenda was typed up, the clerk informs me there was one error. There should have been written in at 4:40 Mr David Silcox. Mr Silcox, would you come forward, please. The floor is yours.

Mr David Silcox: Good afternoon, members of the committee. I want to thank you very much for having me here this afternoon. I apologize for not having been here

last week. I had hoped to hear what was being said by some of the other people who appeared before you.

My credentials for coming to talk about this issue go back some 40 years, during which time I've been involved with art gallery and museum policy, starting at Hart House at the University of Toronto, where I'm now the director of the art center there, at the Canada Council, where I initiated the museum's assistance program, and on through various capacities including the assistant deputy minister responsible for culture and museums at the federal level and the Deputy Minister of Culture and Communications for this province for five years.

I've also written on the artist Tom Thomson and David Milne, particularly David Milne—although the book on Tom Thomson sold better—and I've appeared before a number of Senate committees, House of Commons committees and legislative committees over the years.

I find it a little unsettling that this issue, which has seized so many people in the cultural community, has been so structured that a lot of people whom you should be hearing from are not getting enough time to really discuss the issue substantially.

This legislation, in my view, is a form of cultural liposuction. It's cosmetic, it's risky, and I think some of the results that it may achieve may be unexpected. The facts, as I see them, are that the original mandate, which was established back in 1965, has been followed by all subsequent boards, curators, directors and staff who have served the McMichael with many, many hours of volunteer time over the years.

The Group of Seven, which is the core of the collection, stood for both revolution and tradition. It was 30 or 40 years after the Group of Seven was formed before Mr McMichael came upon the scene and began to form his collection.

The Group of Seven inspired many of the artists they lived with during the 1920s and 1930s and they inspire artists today, artists who draw their inspiration from Tom Thomson, J.E.H. Macdonald, Lawren Harris, David Milne and people of that generation. I suspect none of today's artists, or very few, would support this legislation, and I very much doubt that the original members of the Group of Seven would, if they were here to talk about it. Mr McMichael and a few friends, none of them professional curators, directors, artists or arts administrators, disagree because they basically want control of the McMichael collection again.

The collection was a gift to the people of this province, who now own it and who paid for it and paid for it over the years. The donors, Robert and Signe McMichael, had been very well compensated through taxes and through direct payment for their gift. That Mr McMichael wants to control this collection again I understand, but that the government would allow him to do so I find quite frankly incredulous.

It's not a question of this collection and the place it's in being frozen in time. No institutions I know are frozen in time. They've cited the Frick collection, I understand.

It has changed; it still adds to its collection. The Wallace collection in London, even the Barnes collection, are having to face up to the fact that they can't remain static forever.

What's wrong with this legislation is that it's wrong-headed and inappropriate, I think, on four counts.

First of all, nothing is broken. The policies, the practices, the administrative structures, the reporting and the auditing processes that are set up for this public institution are all in place and they're all working. It's really only Mr McMichael who thinks it's broken, and I disagree with him. You have a responsible board, you appoint members to the board—the government has that opportunity—there's a professional staff and there are sister institutions who would let you know pretty fast if there was anything really wrong at the McMichael.

1650

Second, the governance issues: I think that creating an advisory committee in the way that's proposed by the legislation, which Mr McMichael will control, undercuts the board and sets a very bad example. It's too much concentration on too few people. I don't quite understand how the board can fulfill its proper function in the face of an advisory committee which basically gets an opportunity to second-guess it. This legislation may mollify the original donors—and this is my third point—who have already been exceptionally, and excessively, one would say, mollified, but it betrays all other donors, who both greatly outnumber the McMichaels and outweigh them in terms of the gifts they have given to public institutions in this province.

I really believe that that betrayal of the trust is something that really has to be looked at. I'll set aside the issue of the financial implications of it, but if you deaccession any work, the institution is going to have to pay the cultural property review board quite handsomely for that. The tax, by the way, is 30% for any works deaccessioned that were acquired in the last 10 years, and in the case of the McMichael that comes close to nearly \$5 million. So you figure it out. It's \$1.5 million that'll be due if the works of the last 10 years were to be put up to auction.

Finally, my fourth point is that this legislation really throws the institution into a financial limbo. It has been there really for the last two or three years because of the confusion and uncertainty. The donors of both art and money will go elsewhere if there is uncertainty, and I think it's a very bad signal. I simply don't think that is the way to structure a public trust, which is what the McMichael is.

I'm surprised that in the face of a united collection of opinion from museum professionals from across the country—the museums association, Ontario Association of Art Galleries—you would actually proceed with this legislation. Some legislation, I quite understand, is unpleasant but necessary, taxation bills being a good example, but this legislation is just plain wrong and the unpleasant consequences are, unfortunately, predictable.

I support the Canadian Museums Association's call for a thorough review. I wish you would suspend the process of going ahead with this legislation, and I would certainly urge Compaq to go on hold until they find out exactly how this institution is going to be structured.

The Chair: Thank you very much, Mr Silcox, and you have timed it perfectly. I appreciate your taking the time to come before the committee and be our final presentation for this portion of the parliamentary proceedings.

Mr Silcox: I hope you take my comments to heart. Thank you.

The Chair: I'm sure all the members will. Thank you very much.

With that, we will move into clause-by-clause consideration of Bill 112. The Chair will deliver the appropriately ordered packet of amendments. I believe there are 10 in total. The first motion is a government motion. Mrs Elliott?

Mrs Elliott: I move that section 2 of the bill, paragraph 3 of section 1.1 of the act—that paragraph 3 be removed and replaced with the following—

Interjection.

Mrs Elliott: Sorry. I have to read the exact words.

The Chair: Forgive me, Mrs Elliott. I neglected to notice that section 1.1, so we'll have to approve section 1 first, after any debate. Is there any debate on section 1 of the act? Seeing none, I'll put the question.

All those in favour of section 1?

Mr Marchese: On a recorded vote.

The Chair: A recorded vote has been requested by Mr Marchese.

Ayes

Barrett, Dunlop, Elliott, Munro.

Nays

Di Cocco, Marchese, Smitherman.

The Chair: That section carries. Now over to you, Mrs Elliott.

Mrs Elliott: This is in section 2?

The Chair: Yes.

Mrs Elliott: I move that paragraph 3 of section 1.1 of the act, as set out in section 2 of the bill, be struck out and the following substituted:

"3. Robert and Signe McMichael had a vision that the gallery and the art collection that it housed would continue to retain the spirit that they had originally created by remaining true to its focus on those artists who had celebrated the nation's beauty in a uniquely Canadian way."

The Chair: Do you wish to speak to the amendment?

Mrs Elliott: This is reflective of some of the comments we heard in the presentations. We believe, for instance, by changing "nation" from "province," it

reflects a broader appreciation and more truly reflects the nature of the collection.

The Chair: Further debate?

Ms Di Cocco: I'm going to go back to some of the other submissions that have been made regarding the public interest. This is a public gallery. It's been paid for over and over again by taxpayer dollars. There was a vision that was set out. There was an agreement, and that agreement has changed over the years. This motion says, "Robert and Signe McMichael had a vision that the gallery and the art collection that it housed would continue to retain the spirit that they had originally created by remaining true to its focus on those artists who had celebrated the nation's beauty in a uniquely Canadian way."

If they had a specific vision that they wanted at the time of the agreement in 1965, with all of the, if you want to call it, legal opinion, why did they not put it in there? Why are you, as the government, putting into legislation personal visions for an art gallery? I disagree with it vehemently. It's a breach of trust of your role in the conduct of governance in this province on crown corporations such as the McMichael gallery.

Mr George Smitherman (Toronto Centre-Rosedale): One further point. I agree with what my colleague said. I think it's interesting that the words contained here are "remaining true" when we know that over time there have been what I would call temperamental vacillations with respect to what was in and what wasn't. The list has not been a consistent list. There are paintings by artists that were purchased during a time when Mr McMichael was in control of the decisions around what to purchase that don't make the final list. So to suggest "remaining true to its focus on those artists who had celebrated the nation's beauty," to suggest there is some consistent list that was there in 1965 and which continues until now in some consistent fashion is erroneous and I think makes a mockery of this paragraph 3.

Mr Marchese: I ask your indulgence before I speak to this. I'll put all my objections to this bill on the table either now in relation to this amendment or get rid of this amendment and then I'll speak later. It's up to you.

The Chair: Feel free to put all of your comments on the record now, Mr Marchese.

1700

Mr Marchese: Thank you very much, unless Mrs Elliott would like to speak in advance of me. Would you like to do that? I can wait. Mrs Elliott, would you like to go first?

Mrs Elliott: It doesn't matter to me, Chair.

Mr Marchese: I'd like to hear what she has to say.

Mrs Elliott: I was just going to say that perhaps my colleagues across the way are forgetting that this is a purpose clause. This part of the bill is to set the stage as to what was in the past. If you look at the bill carefully, 1 to 3 indicate this is the way it was. By replacing the word "province" with the word "nation," we're reflecting artists like Emily Carr, for instance, who were in the

original collection, but it then says in point 4 under section 2 that "The focus of the collection has changed over time." The part we're amending speaks to what we believe was the original focus of the agreement.

Mr Marchese: I'm just going to start by saying that I'll be voting against the entire bill because the premise is fundamentally wrong and the amendments really don't do anything. What this government is doing is dumb, politically. I'll tell you why. You recall when the government came in in 1995 they said they wanted to get government off your back. Do you remember that? I remember that too. Rather than having the government off your back on many issues, man, do they climb all over you when they want to.

This is one example where the government ought to stay away from political interference, and they decided to directly intervene in an area where, in my view, they have no understanding and/or intelligence.

To get to the mandate, my view is that this government through this bill is violating the original agreement. It's actually violating it. As opposed to getting it on the right track, they're in my view getting it off track. I'm going to review the mandate for Mrs Elliott's benefit because I think they need to know this stuff; we're going to debate this for third reading.

The original agreement said that the mandate is limited to the Group of Seven and three other named artists plus others designated by the advisory committee "who have made contributions to the development of Canadian art." So it's open-ended. It means anybody, any artist who has made a contribution to the development of Canadian art. Quite apart from the Group of Seven plus three others, we have accepted many more artists, who are Canadian, who have made a contribution, on the basis of that 1965 agreement. Mr McMichael was part of it.

Interruption.

Mr Marchese: Sorry. Those "who have made contributions to the development of Canadian art" is open-ended and, yes, you're right, they're not designated.

The mandate is limited to the Group of Seven and three other named artists plus others designated by the advisory committee. So in my view we have respected the mandate of 1965. I say "we" because, having been a minister in 1990, I accepted that mandate. I wasn't foolish enough to change course, as you people are doing. I think you're making a tremendous political mistake. It's a political blunder that all of you will suffer for. You don't think so now. You think you're doing something decent and trying to bring the mandate back to what perhaps Mr—

Mr Garfield Dunlop (Simcoe North): That's exactly what we think.

Mr Marchese: Yes, I know, Mr Dunlop, but I'll continue. I'm waiting for your interventions in a few moments.

In 1972 you Tories introduced a law—you guys, not them, the Libs; you, your predecessors. I know you probably don't like them very much, but they did this in 1972. The mandate was changed to specify that all

artworks must not be "inconsistent with the general character of the collection." I find that consistent with the 1965 mandate, even though they reworded it as they did, in law, in 1972. Mr McMichael was there at the time, and he was named director from 1972 to 1980. He was part of all of this then, and the government did this with Mr McMichael, your government, the Conservatives, in 1972.

In 1982, the Conservatives again changed the law. That would be you again.

Mr Dunlop: We understand when you're pointing over here. We don't have a problem with that.

The Chair: Order, Mr Dunlop.

Mr Marchese: Take your time, take it easy. I'm going to listen to you too.

The "mandate is changed to restore list of 10 specified artists"—the seven plus the three—"and in addition art by indigenous peoples"—so we included indigenous peoples, which wasn't part of the original—"is to be collected; and work by other artists who have made contributions to the development of Canadian art, 'and whose artworks and objects will be consistent with the general character of the collection.'"

Again, in 1982 you guys changed the mandate again. I've got to admit, I don't find it inconsistent with the 1965 mandate. I still find it consistent. Something happened here, because the director emeritus—that would be Mr McMichael—left by some deal in 1980. There was some deal that was struck. I'm not quite sure what that deal was.

I want to submit something that was given to us, which is the financial statement and report of the audit for the year ending March 31, 1980. Ms Stokes, if you don't mind passing it out, because I think the members should see it. We can get a clearer copy, perhaps a longer one, if they need it.

Why Mr McMichael left had to do with a lot of problems that were being experienced while he was there. It has to do with the valuation of works of art, which the auditor points to as a particular problem; a special fund that they speak about; unreported taxable benefits; directors' expenses; housekeeping; internal audit being recommended, because there was none; works of art on loan and the problems associated with that; receiving of goods and sale of works of art.

They have nothing to do with anything, you might add. You might argue that when it is your turn. I think it speaks to some of the problems, and if indeed there might have been some financial problems this perhaps speaks to them, and I think you should see it. It might have some bearing on this bill that you're passing in terms of what you may or may not want to do with it.

I introduce it at this time because before you pass the bill you might want to consider it and defer it. I would recommend it. There were problems at the time that the auditor speaks to that most of you in the business world would find a bit troublesome. I raise it for your interest. If you don't touch on this today and if you don't deal with this today, I'll deal with it in third reading in the

Legislature. That's not a problem for me. I will raise it at the time.

I have a few more points. In 1989, the mandate was changed again by the Liberals. The "mandate is changed to drop italicized phrase from 1982 law, and to allow gallery to collect art by artists who make, as well have made, contributions to the development of Canadian art." I find that as consistent as every other mandate that was changed, in 1982, in 1972 and consistent with 1965.

You people are saying, "We've got to get back to the original focus," meaning the original mandate, the agreement that was struck in 1965. I read to you the original agreement. I'm saying, as Mr Silcox has said—who was the deputy minister for five years—that we have kept to the spirit of that mandate. It is my argument. Liberals are making this argument. Many of the others have made the same argument. Yet some of you continue to hold the view, for one reason or another, that no one has kept to the spirit of the 1965 agreement.

I'm telling you that you're making a political blunder. Your interventions are wrong and stupid. You're getting into a field of which you know little. In my view, you're making a mockery of the ministry and a mockery of culture and the arts with your complete lack of understanding of what you're doing. You're giving the power to this advisory committee that has the power for acquisition and deaccessioning, exhibition and display, which, in the view of one of the speakers, is a non-professional committee. It is completely opposed to professional practices elsewhere.

1710

It is not an advisory committee. You shouldn't say it is an advisory committee if you mean it to have different power. If they have the power to acquire, to deaccession, to show exhibits and to display, it's not an advisory committee. You're giving that group of five—Mr McMichael and spouse and a few other people nominated by Harris, who obviously are in tune with your new bill—the power to do those things which are not advisory.

If it's an advisory committee it means they're giving advice to the board on what a professional curator says we should or shouldn't buy. That's not what this advisory group is doing.

That's why I say to you it's political stupidity, that you people don't know what you're doing and you're an embarrassment to the cultural community in Ontario and Canada and beyond.

You argue that by going back to the original mandate, which is the one I say you are in violation of, that somehow you will restore financial stability. I argue and others argue—in fact, Mr Silcox argued this—that you're creating financial instability once again. You have no certainty whatsoever that doing what you're doing—which I tell you is wrong, and putting that aside even if you disagree—does not give financial security to the McMichael gallery.

One lady who wrote me, whom I quoted in the Legislature and named her, said, "The government claims that it is necessary to pass Bill 112 to solve the gallery's

financial problems. What financial adviser has suggested that the present owners and sponsors be dumped in order to hopefully get new ones? Yet this is the risk that will be exposed with this bill." She's absolutely right. This is not a political, partisan opinion. This is an opinion by someone who's gravely concerned about what you're doing.

Even if she or others agreed that the mandate you are introducing through this bill were correct, even if they agreed, they don't believe that what you're doing will put it on a financial footing that is pleasing to you. We used to fund the McMichael collection 100%. It was then 80% under our government. It's now 40% under yours. Financial institutions are struggling desperately to make up for that shortfall. Some of them are lucky and doing well in spite of all the good efforts of the board members and the volunteers and the donors—in spite of all those efforts. I argue that governments need to be there and need to fund these cultural institutions in ways that they're not getting through you. But if you believe or if you think that somehow you're going to get more money by doing what you're doing, you're wrong.

Mr Silcox suggested to you that there is a 30% tax on any of the works that you deaccession and he argues that would be a cost to you of \$1.5 million, unless, of course, you decide that you're not going to get rid of the works of art but you're just going to hide them in the vaults. That's an answer, I suppose. You don't have to sell them; just hide them. They don't have to be seen, I suppose, and then you won't have to incur a cost.

I think there are other legal obligations that you have to the donors and just a moral obligation that you have to those donors. But we don't know what's going to happen, because the McMichaels are the ones who will determine which works of art will be in the vault, will be deaccessioned, will be displayed. Who knows what else they intend to do with it? They are the only ones who will decide. That's the power you're giving them through this bill. I find that wrong.

You are essentially doing the same thing as we have in the 1965 agreement. It's the same thing except you're saying to Mr McMichael that he, his wife and three other people will have the power to decide who will be shown, displayed at the McMichael gallery. It's the same mandate except you now have said, "They are the ones in charge of who will be deaccessioned, on display, what works of art will be bought and so on." That's what you're doing.

Interjection.

Mr Marchese: No, well I'm waiting for you, Ms Elliott, to speak so that I can rebut. It'll be interesting to hear what you have to say, given there's so many people who have so much expertise in this field who have told you the contrary. I'm still fascinated to think that you might have arguments in disagreement with them.

I'm profoundly worried by what you're doing. Many questions have been raised by those who have presented today. The implications are very political and they

impinge on the arts world in a way that you don't understand.

You think that Premier Harris having had lunch or dinner with some friend of Mr McMichael or indeed Mr McMichael solves the problem. It's profoundly wrong and dumb. I thought I'd put that on the record because I've spoken against the entire bill. No amendment can fix it, because the premise is wrong. So I wanted to put that on the record and look forward to Ms Elliott's comments.

The Chair: Any further debate or motion on the floor? Seeing none, I'll put the question.

All those in favour of the amendment?

Mr Marchese: On a recorded vote always, Mr Chair.

Ayes

Barrett, Dunlop, Elliott, Munro.

Nays

Di Cocco, Marchese, Smitherman.

The Chair: That amendment carries.

Ms Elliott, you will be reading government motion number 3.

Mrs Elliott: I just want to be clear. The committee is looking at the papers that were presented by the clerk that would be numbered page 3.

The Chair: Yes, that's correct.

Mrs Elliott: I move that paragraph 7 of section 1.1 of the act, as set out in section 2 of the bill be struck out and the following substituted:

"That there should be an art advisory committee to advise on matters related to the composition and display of the collection."

The Chair: Do you wish to speak to that?

Mrs Elliott: What we have done here is added the words "composition and display." This is simply done to clarify the role and make it a little more specific for the art advisory committee.

The Chair: Further debate?

Mr Marchese: Could I ask her a question?

The Chair: You can always ask a question.

Mr Marchese: What is the relationship of this advisory committee to the other advisory committee? Do we now have two different advisory committees?

Mrs Elliott: This is the same art advisory committee. We are simply clarifying their role. In the original wording of the bill we proposed, it said under point 7 that there should be an art advisory committee to advise on matters related to the collection. We're proposing an amendment that has more specific wording in it, that adds words, "to advise on matters related to the composition and display of the collection."

Mr Marchese: Just to be clear on this, I'm referring to section 7 for a second. If I understood her correctly, this advisory committee—perhaps you can help me, Ms Elliott—is replacing the other advisory committee?

Mrs Elliott: No.

Mr Marchese: No. Is that correct?

Mrs Elliott: It's the same advisory committee. We're just altering the wording as to what they would do. Instead of simply saying, "The art advisory committee will advise on matters related to the collection," we're saying they advise on matters related to the composition and display of the collection."

Mr Marchese: So that is all that they would do now? So that original advisory committee that had the power to purchase, to deaccession, to display—it will not have that power any longer. Is that what you're clarifying for me?

Mrs Elliott: You have always been under the impression that somehow the art advisory committee had increased powers. First of all, this is in the purpose section of the clause. The actual abilities of the art advisory committee are in subsection 5(2), "The functions of the art advisory committee are," and there are five different points there. What we're referring to here is in the purpose clause of the bill.

Mr Marchese: OK. Ms Elliott, Mr Chair, further classifications. In section 8, "The board shall ensure that the collection reflects the cultural heritage of Canada and is comprised of art works and objects and related documentary materials" and it proceeds to say, "other artists who have been designated by the art advisory committee, under clause 4.1(2)(e) for their contributions to the development of Canadian art." What happens to that?

The Chair: We're not at that section, Mr Marchese.

Mr Marchese: Are you changing that section?

Mrs Elliott: I don't believe there are—

Mr Marchese: So that remains. Is that correct?

Mrs Elliott: No, there are no amendments proposed for that.

1720

Mr Marchese: OK. In section 8 there is such an advisory committee that will determine who shall ensure that the collection reflects the cultural heritage and is comprised of works of art and other artists who have been designated by the art advisory committee. So this art advisory committee will decide, I argue still, as others have argued, that they have power to acquire, deaccession, exhibit and display.

Mrs Elliott: No, that's wrong. You have to go back to what the powers of the art advisory committee as proposed—I'm sorry, Mr Chair.

The Chair: You have the floor. Go ahead.

Mrs Elliott: If you go back to section 5(2), it says:

"The functions of the art advisory committee are,

"(a) to make recommendations to the board with respect to the acquisition of artworks and objects and related documentary materials for the collection."

The art advisory committee has the ability to make recommendations to the board on acquisitions.

"(b) to make recommendations to the board with respect to disposal of artworks" and so on.

"(c) to make recommendations to the board in respect of temporary exhibits ...

"(d) to make recommendations to the board in respect of the display ...;

"(e) to designate artists."

The art advisory committee has the power to designate and to make recommendations to the board, but the board always, in this bill proposed, has the final say to what will be acquired and how the collection will actually function.

Mr Marchese: OK. So that art advisory committee has the power to designate but the board could ultimately say no.

Mrs Elliott: That's right. That's correct.

Ms Di Cocco: I see some staff saying no, that's not the case, so I want the clarification again. My understanding from what I read with regard to the role of the advisory committee is that it gives them not only this advisory capacity related specifically to composition and display of the collections; it still has the power to designate, because it really does have more than an advisory capacity. At least that's my interpretation.

I'm hoping that Ms Elliott is not giving us the wrong impression here. If the board has its regular governance authority, it means that the board is the one that in the first place should be appointing an advisory board, but obviously you're appointing it. Whatever the recommendations are made by the advisory board, it's crucial that we understand this, that whatever the advice, recommendations or designation given by this advisory board, it is only that. If it has more power than just that, please clarify again. I really do need it clarified.

Mrs Elliott: Perhaps I was not clear. I will go back and try this again. We are not proposing amendments to change the function of the art advisory committee. In the bill it's proposed that the art advisory committee will have the ability to make recommendations to the board with respect to acquisitions, to make recommendations to the board with respect to disposal, to make recommendations to the board with respect to temporary exhibits, to make recommendations to the board with respect to the display of art. The last subsection, (e), is different. It says "to designate artists," and so the art advisory committee will have the ability to designate artists to the board. That's their ability: acquisition, disposal, exhibit and display are the decision of the board.

Ms Di Cocco: Just further to that, the composition of this advisory committee that you call it is, again, the two McMichaels—just to reclarify—and they're there in perpetuity, I guess, because they can designate other individuals to sit on their behalf, I understand. Is that correct?

Mrs Elliott: Yes. While they're alive.

Ms Di Cocco: While they're alive. And then you have two people appointed by the minister, I presume, or the Lieutenant Governor.

Mrs Elliott: We are making a proposal that that be changed. It was to be by the board, three people to be chosen by the board.

Ms Di Cocco: By the board. Three people elected by the board. OK.

In this section here, the advisory “related to the composition and display of the collection,” that just means exactly what it says. In other words, however the display is set up, if this advisory board doesn’t like the way a display is set up, they have a say in this.

Mrs Elliott: In the bill they have the ability to make recommendations to the board. But again I turn your attention to the fact this is in the purpose clause, so this is saying that the art advisory committee would be able to advise on matters related to composition and display. It’s exactly the same. We believe it reflects exactly what is already proposed in the body of the bill.

Ms Di Cocco: You’re going to change the governance as you move on, you’ve said. You’re going to have three people there who are going to be appointed by the board. What if the board decides that they do not agree with what the advisory board has submitted to them?

Mrs Elliott: With regard to?

Ms Di Cocco: Their recommendations and/or their designation and/or their advice. What if the board as a whole says, “We don’t agree in that direction”?

Mrs Elliott: According to the body of the bill as proposed, the board would have the ability to disagree or not to act, whatever the advisory committee recommends, if they are recommending on acquisition, disposal, exhibit or display.

Ms Di Cocco: Or display. But the advisory board has the ultimate say in the artists, in the designation of the artists. Is that correct?

Mrs Elliott: Correct.

Ms Di Cocco: So the artists who constitute the art heritage of Canada or whoever are designated as appropriate Canadian artists. They are the ones who have the final say, not the board.

Mrs Elliott: Yes. They would designate the artists, the art advisory committee.

Ms Di Cocco: Can you clarify why?

Mrs Elliott: Again, the whole purpose of this bill is primarily to restore the McMichael collection to the spirit of the 1965 agreement.

Ms Di Cocco: I hope you get a good chance to read the audit from 1980, because the essence of control restored to the McMichael would be very much in question, as my colleague Mr Marchese sent around—we have received this audit. I think it’s of grave concern with regard to the ethics in this whole issue of the role that’s being played by the advisory board. I suggest that you have an opportunity to look at it and, as I said, I’ve sent a copy to the minister as well, because it may bring to question exactly what the advisory board is in its composition.

Mr Marchese: I’m suggesting to Mrs Elliott that they have to review this a bit more carefully. Section 8 says, “The board shall ensure that the collection reflects the cultural heritage of Canada and is comprised of artworks and objects and related documentary material created by or about,” and it lists the names, the original seven plus

three others. So remember it “shall ensure that the collection reflects the cultural heritage ... and is comprised of....” That’s the role of the board. Subsection (b) says, “other artists who have been designated by the art advisory committee,” and it has a few other words, “under clause 4.1(2)(e) for their contributions to the development of Canadian art.”

Nowhere does it say that “designates” means “recommends.” In all the other clauses it’s “recommends.” In that particular clause it says “designates,” and it suggests that they have the power to do that and it is not subject to the review of the board, as Mrs Elliott says.

Mrs Elliott: No. I was very clear on that. We went back and we were very clear on that.

1730

Mr Marchese: Let me go back to it. You said the board has the ultimate authority, decision. That’s what you said.

The Chair: No. With the greatest respect, she read the sections and made it clear I think to all members of the committee that there was a difference in that last clause.

Mrs Elliott: Yes.

The Chair: I’m sorry. I heard her very clearly, Mr Marchese.

Mrs Elliott: I was very clear on that. I’ll say it again if you want.

Mr Marchese: Yes, go ahead. Well, depending—

The Chair: Mr Marchese, I would remind you too that we had agreement that we would end at 6. I just wanted to draw your attention to the clock.

Mr Marchese: That’s fine. When it ends, you can—

The Chair: I would draw your attention to the fact that the House motion on red tape has given us the time frame, so I want you to know that if we go over 6 o’clock, you will be losing one of the possible three days we can hold hearings on that bill.

Mr Marchese: You’re kidding.

The Chair: No, I’m not kidding.

Mr Marchese: Could you explain, Mrs Elliott, what you mean again, because I’m saying “designates” means they have the power to designate the works of art.

Mrs Elliott: We agree with you.

Mr Marchese: Oh, you agree with me.

Mrs Elliott: That’s what we’re asking.

Mr Marchese: Ah, sorry. Obviously I missed something, then, either with what you answered—is that it?

Ms Di Cocco: She clarified it for me.

Mr Marchese: So what did you clarify again? Sorry, I didn’t hear it.

Mrs Elliott: That part of the bill is not being proposed for amendment. We are saying that the art advisory committee has—

Mr Marchese: Yes. I understand what the art advisory committee—by your suggestion. I understand that. I was worried about the fact that it has the power to designate artists and that it’s not to be disputed, it’s not to be refuted, by the board or it’s not up to challenge and so on. So you agree with that.

Mrs Elliott: No. It has the power very clearly to designate—

Mr Marchese: Right, because when I originally asked you, you said that the power—

Mrs Elliott: I'm sorry. I thought I was telling you accurately and I did go back to that to make sure it was accurate.

Mr Marchese: That's good. I'm glad we clarified that for the record.

The Chair: Further debate? Seeing none, I'll put the question.

Mr Marchese: Always on a recorded vote.

The Chair: Yes, that's fine, duly noted.

Ayes

Barrett, Dunlop, Elliott, Munro.

Nays

DiCocco, Marchese, Smitherman.

The Chair: That amendment carries.

The next amendment is a Liberal motion.

Ms Di Cocco: In trying to look at this bill and decide that—this is section 4 I believe, is it not?

The Chair: The page is numbered 2 in the upper right-hand corner.

Ms Di Cocco: The motion basically is to move—and I put these in only to see if there is real discussion on the financial matters—that paragraph 7 of section 1.1 of the act, as set out in section 2 of the bill, "There should be an art advisory committee to advise on matters related to the ... collection," be struck out. The reason being, of course, to retain the integrity of the board's position.

The Chair: Any debate?

Mrs Elliott: Clearly, Mr Chair, we disagree. We think that an art advisory committee is essential to keep the spirit of the original agreement and we will be voting against this amendment.

The Chair: Any further debate? Seeing none, I'll put the question. A recorded vote.

Ayes

DiCocco, Marchese, Smitherman.

Nays

Barrett, Dunlop, Elliott, Munro.

The Chair: That amendment is lost.

Shall section 2, as amended, carry? Carried.

Section 3: Mrs Elliott.

Mrs Elliott: I move that subsections 3(1) and (2) of the act, as set out in section 3 of the bill, be struck out and the following substituted:

"Composition of board

"3(1) Subject to section 3.1, the board shall consist of up to 23 trustees appointed by the Lieutenant Governor in Council.

"Number

"(2) The Lieutenant Governor in Council may from time to time determine the number of trustees to be appointed.

"Term

"(2.1) A trustee may be appointed for a term not exceeding three years and may be reappointed for one or more further terms."

The Chair: Further debate? Seeing none, I'll put the question.

Ayes

Barrett, Dunlop, Elliott, Munro.

Nays

DiCocco, Marchese, Smitherman.

The Chair: That amendment is carried.

Shall section 3, as amended, carry? Carried.

Section 4: Mrs Elliott.

Mrs Elliott: I move that subsection 4(2) of the act, as set out in subsection 4(1) of the bill, be struck out and the following substituted:

"Bylaws

"(2) The board may make bylaws regulating its proceedings and establishing committees composed of trustees, employees and volunteers of the corporation for the control and conduct of its internal affairs.

"Voting

"(2.1) Only trustees may vote on any matter before a committee of the board."

The Chair: Do you wish to speak to the amendment?

Mrs Elliott: Again, we're reflecting what we heard from various presenters who came before the committee. We're adding the word "volunteers" to this section, and we're also indicating that only trustees can vote at committee meetings. That means, therefore, that all employees and volunteers can be non-voting members of the board committee, as desired.

The Chair: Further debate? Seeing none, I'll put the question.

Ayes

Barrett, Dunlop, Elliott, Munro.

Nays

Di Cocco, Marchese, Smitherman.

The Chair: That amendment is carried.

Shall section 4, as amended, carry? Section 4, as amended, is carried.

The next amendment will be page 7.

Mrs Elliott: Section 5:

I move that paragraphs 3 and 4 of subsection 4.1(1) of the act, as set out in section 5 of the bill, be struck out and the following substituted:

"3. So long as a person appointed by Robert McMichael under subsection 3.1(2) or (5) is a trustee, the person shall be a member of the art advisory committee and the number of trustees appointed under paragraph 5 shall be reduced accordingly.

"4. So long as a person appointed by Signe McMichael under subsection 3.1(3) or (4) is a trustee, the person shall be a member of the art advisory committee and the number of trustees appointed under paragraph 5 shall be reduced accordingly.

"5. Three trustees appointed by the board from amongst the trustees appointed under subsection 3(1)."

The Chair: All those in favour of the amendment?

Ayes

Barrett, Dunlop, Elliott, Munro.

Nays

Di Cocco, Marchese, Smitherman.

The Chair: The amendment is carried.

Next up is page 8.

Mrs Elliott: Also to section 5.

I move that subsection 4.1(3) of the act, as set out in section 5 of the bill, be struck out and the following substituted:

"Same

"(3) If any member of the art advisory committee is unable or unwilling to continue to be a member of the committee and that condition continues for more than 30 days, the board may appoint another trustee to fill the vacancy."

The Chair: Debate? Seeing none, I'll put the question.

Ayes

Barrett, Dunlop, Elliott, Munro.

Nays

Di Cocco, Marchese, Smitherman.

The Chair: That amendment is carried.

Page 9.

Mrs Elliott: I move that subsection 4.1(5) of the act, as set out in section 5 of the bill, be struck out and the following substituted:

"Quorum

"(5) A quorum for the transaction of business is three members of the committee, whether present in person or represented by proxy exercised by another trustee on a committee member's behalf.

"Notice

"(6) Notice of the time and place for the holding of a meeting of the committee shall be given to every committee member by sending a notice 14 days or more before the date of the meeting by prepaid mail or personal delivery to each committee member's latest address as shown on the records of the corporation.

"Same

"(7) A notice that is mailed shall be deemed to have been received by the committee member on the 10th day after mailing.

"Same

"(8) A member of the committee may permit notices required by subsection (6) to be delivered by means other than those mentioned in that subsection."

The Chair: Any debate? Seeing none, I'll put the question.

Ayes

Barrett, Dunlop, Elliott, Munro.

Nays

Di Cocco, Marchese, Smitherman.

The Chair: That amendment is carried.

The next amendment is yours, Ms Di Cocco.

Ms Di Cocco: Again, I'm going to go to the premise of the minister, suggesting that it is a financial issue that is the reason this bill was brought forward.

I move that section 4.1 of the act, as set out in section 5 of the bill, be struck out and the following be substituted:

"Financial advisory committee

"4.1 The board shall establish a financial advisory committee, to evaluate and propose solutions to fundraising and funding issues which arise from time to time."

You strike out the advisory board, as it states, and you suggest that the board, in its format now, appoint a financial advisory committee, because nowhere in this bill does it deal with financial issues. All it does is give more control to the original donors, but nothing about how we are going to deal with the financial matters that you are saying are problematic in this institution.

That is my motion. I want to see if the government has any real intent to deal with financial matters, if that is really their issue in this bill.

1740

The Chair: Further debate?

Mrs Elliott: Obviously we think the financial situation at the McMichael collection is very important and have been quite concerned that the deficit has suddenly grown, within 10 months, from \$300,000 to over \$2 million, as one presenter indicated.

In this bill, we have proposed an art advisory committee in reflection of the true spirit of the original agreement. There is nothing in this legislation that would

preclude the board, a future board, from establishing a financial advisory committee for fundraising or any other issues. However, we do not feel it is appropriate to put it in the legislation, because the legislation, as we're designing it, is to reflect the original 1965 agreement, so we will be voting against the amendment.

Mr Marchese: In relation to what Mrs Elliot said, she doesn't really know yet how much the deficit of this McMichael collection is going to be in the next couple of years. It will throw it so out of whack. You're going to have so many financial problems you just won't know why it happened. I'm telling you now, you're creating a disaster financially and a political disaster for the arts community in general with this political blunder of yours.

Mr Smitherman: I think on this point it's interesting that the government uses the concerns with respect to financial mismanagement to justify so much of their action here, and yet when a practical solution is presented, which says not only should any legislation deal with a return to the original mandate but one that actually deals with and speaks to the need for people to be focusing on financial issues, that's rejected out of hand. That exposes this for what it is, which is simply a play on behalf of some people who have given the gift that keeps on giving and who can't cede to other people, who have also made extraordinary contributions, the right to be involved. The government's rejection of this very sensible motion tells much of the story that's going on here.

The Chair: Any further debate? Seeing none, I'll put the question on Mrs Di Cocco's motion.

Ayes

Di Cocco, Marchese, Smitherman.

Nays

Barrett, Dunlop, Elliott, Munro.

The Chair: That amendment is lost.

Shall section 5, as amended, carry? Section 5, as amended, is carried.

Shall section 6 carry? Section 6 is carried.

Section 7, Ms Di Cocco.

Ms Di Cocco: I move that clause 8(b) of the act, as set out in section 7 of the bill, be struck out and the following substituted:

"(b) other artists who have been designated by the board for their contributions to the development of Canadian art."

What it does is in actual fact give to the board its authority to designate other artists as designated by the board and not just the advisory committee.

The Chair: Further debate? Seeing none, I'll put the question.

Ayes

Di Cocco, Marchese, Smitherman.

Nays

Barrett, Dunlop, Elliott, Munro.

The Chair: That amendment is lost.

Shall section 7 carry? Section 7 is carried.

Shall section 8 carry? Section 8 is carried.

Shall section 9 carry? Section 9 is carried.

Shall the title of the bill carry? The title of the bill is carried.

Shall Bill 112, as amended, carry? Bill 112, as amended, is carried.

Shall I report the bill, as amended, to the House?

Ms Di Cocco: Chair, can we have a recorded vote for that?

The Chair: Absolutely.

Ms Di Cocco: For the last motion, please.

The Chair: You're a little late for that. But you can for the last one if you'd like.

Ms Di Cocco: OK, for the last one.

The Chair: A recorded vote. Shall I report the bill, as amended, to the House?

Ayes

Barrett, Dunlop, Elliott, Munro.

Nays

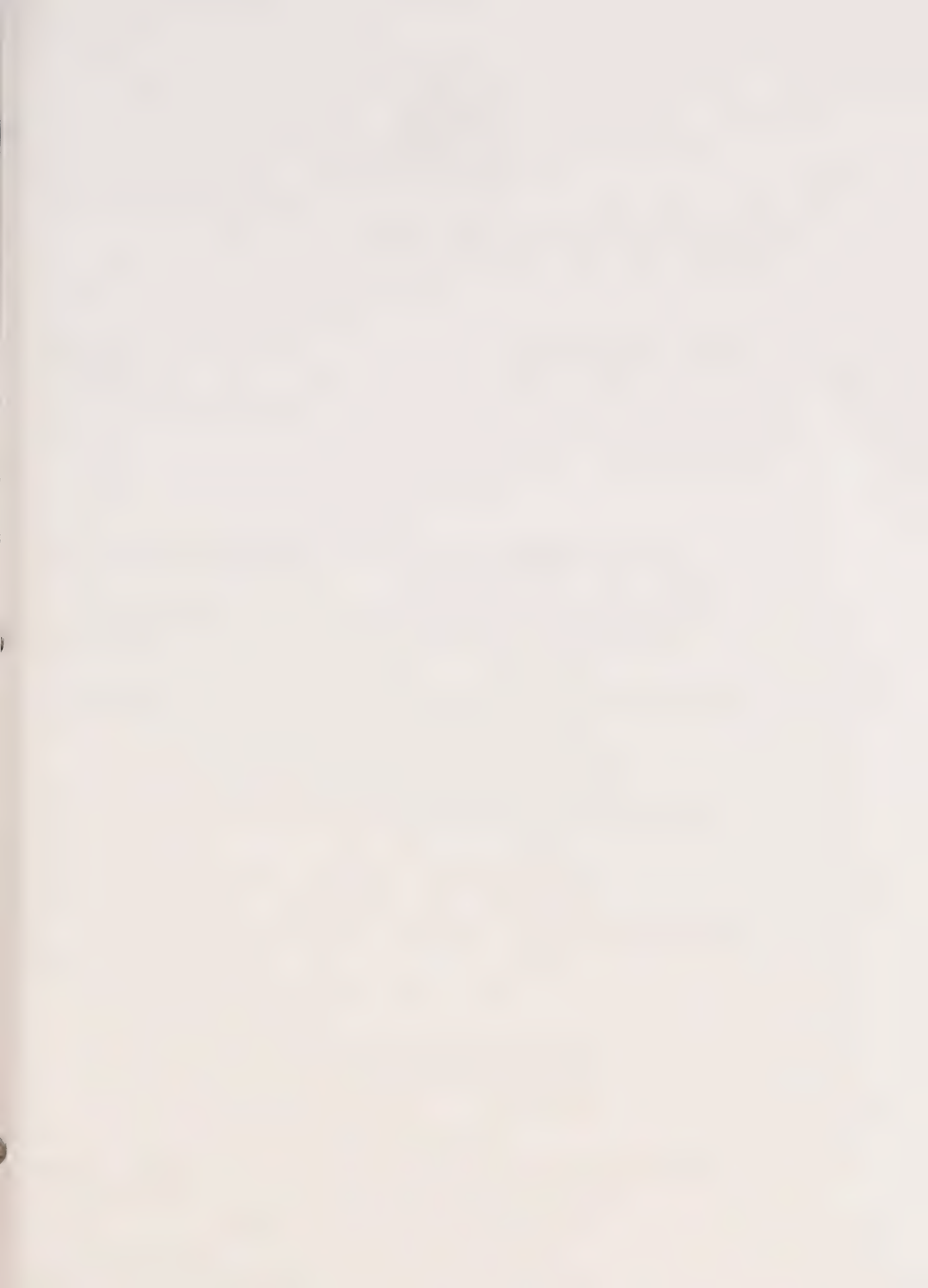
Di Cocco, Marchese, Smitherman.

The Chair: That is carried.

Thank you to all the witnesses. Thank you to the committee members. I appreciate the spirit and tone in which debate was carried out. I will report the bill to the Legislature.

This committee stands adjourned.

The committee adjourned at 1745.



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Première session, 37^e législature

Official Report of Debates (Hansard)

Monday 30 October 2000

Journal des débats (Hansard)

Lundi 30 octobre 2000

**Standing committee on
general government**

Subcommittee report

Red Tape Reduction Act, 2000

**Comité permanent des
affaires gouvernementales**

Rapport du sous-comité

Loi de 2000 visant à réduire
les formalités administratives

Chair: Steve Gilchrist
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LEGISLATIVE ASSEMBLY OF ONTARIO

ASSEMBLÉE LÉGISLATIVE DE L'ONTARIO

STANDING COMMITTEE ON
GENERAL GOVERNMENTCOMITÉ PERMANENT DES
AFFAIRES GOUVERNEMENTALES

Monday 30 October 2000

Lundi 30 octobre 2000

The committee met at 1532 in committee room 1.

SUBCOMMITTEE REPORT

The Chair (Mr Steve Gilchrist): I call the committee to order. Welcome, everyone, to the first day of hearings on Bill 119, An Act to reduce red tape, to promote good government through better management of Ministries and agencies and to improve customer service by amending or repealing certain Acts and by enacting two new Acts.

Interjections.

The Chair: I ask people to come to order. Rosie. Keep it down, please. The first order of business will be the adoption of the subcommittee report.

Mr Dave Levac (Brant): The standing committee on general government subcommittee on committee business: I respectfully submit this report of the subcommittee to the general committee.

Your subcommittee met on Thursday, October 26, 2000, to consider business before the committee and recommends the following:

(1) That the committee meet on Monday, October 30, 2000, and Wednesday, November 1, 2000, in Toronto to hold public hearings into Bill 119, An Act to reduce red tape, to promote good government through better management of Ministries and agencies and to improve customer service by amending or repealing certain Acts and by enacting two new Acts.

(2) That clause-by-clause consideration of the bill be undertaken on Wednesday, November 15, 2000.

(3) That an advertisement be placed on the Ont.Parl channel and the Legislative Assembly Web site. The clerk is authorized to place the ads immediately.

(4) That each caucus will provide the clerk with a list of names of those wishing to make presentations to the committee and that the Chair and clerk will schedule witnesses from these lists and the list of names that have contacted the clerk directly.

(5) That witnesses be given a deadline of Wednesday, November 1, 2000, at noon to make their request to appear before the committee.

(6) That witnesses be given a deadline of Tuesday, November 14, 2000, at 5 pm for written submissions.

(7) That witnesses be allotted 10 minutes for each presentation.

(8) That amendments should be received by the clerk of the committee by Friday, November 10, 2000, at 5 pm.

(9) That the clerk of the committee, in consultation with the Chair, be authorized prior to the passage of the report on the subcommittee to commence making any preliminary arrangements necessary to facilitate the committee's proceedings.

So moved.

The Chair: It has been moved by Mr Levac. Any discussion of the subcommittee report?

Seeing none, all those in favour of its adoption? It is adopted.

RED TAPE REDUCTION ACT, 2000

LOI DE 2000 VISANT À RÉDUIRE
LES FORMALITÉS ADMINISTRATIVES

Consideration of Bill 119, An Act to reduce red tape, to promote good government through better management of Ministries and agencies and to improve customer service by amending or repealing certain Acts and by enacting two new Acts / Projet de loi 119, Loi visant à réduire les formalités administratives, à promouvoir un bon gouvernement par une meilleure gestion des ministères et organismes et à améliorer le service à la clientèle en modifiant ou abrogeant certaines lois et en édictant deux nouvelles lois.

CENTRE FOR EQUALITY RIGHTS
IN ACCOMMODATION

The Chair: That takes us to our first presentation. That will be from the Centre for Equality Rights in Accommodation, Ms Jennifer Ramsay. Good afternoon and welcome to the committee. We have 10 minutes for your presentation.

Ms Jennifer Ramsay: Hello. My name is Jennifer Ramsay. I'm from the Centre for Equality Rights in Accommodation. I'm the coordinator for the early intervention project at the centre. It is known as CERA for short. It is a long name.

It is a provincial human rights and housing agency founded in 1987. I'm here to talk to you about the amendments to the Tenant Protection Act, legislation that affects 1.5 million households in Ontario.

Before I begin my main remarks I feel compelled to comment on the process of these hearings. Bill 119 contains amendments to over 70 pieces of legislation, and yet hearings were called only Friday to set aside two days

in which to get public input about everything from dog owners' liability to conservation. It is certainly efficient, but along the way true public consultation and effective democracy seem to have been dispensed with.

Efficiency is something this government takes great pride in, and the operations of the Ontario Rental Housing Tribunal are a testament to that commitment. As of September 30, the tribunal has very efficiently processed 46,104 applications to evict. In that same nine-month period, almost 30,000 of those eviction applications were granted by default order. That is, there was no hearing and the tenants were evicted by tribunal adjudicators, based solely on the landlord's word. Thirty thousand households in nine months were ordered removed from their homes with the stroke of a pen with no opportunity to have their say. These tenants were charged, tried and convicted in absentia. It is efficient, but it is barbaric.

One amendment to the Tenant Protection Act has called for even greater efficiency in the process of rendering people homeless. Trained adjudicators will no longer be required to sign off on those default orders. Instead, clerks or, as they are referred to in the amendments, "default order officers," would have that task. The default rate has already risen from 56% in 1998 to 64% as of last month. According to documents that were partially released to CERA under the freedom-of-information act, the tribunal's goal is to secure a 70% default rate.

Last Wednesday, in response to questions about the amendments, the minister said, "We're for the tenants who pay their rents on this side of the House. We're for the tenants who are law-abiding and deserve quiet enjoyment on this side of the House. What side is that party and that member on?"

Well, I'll tell you what side I'm on: the side that values fairness and due process over efficiency and expediency, the side that believes removing someone from their home is a profoundly serious act with devastating consequences, an act that can only be carried out after careful deliberation by people qualified to make such a decision. What the minister seems to be saying is that someone who has not paid their rent on the first of the month is not in any need of protection because they have crossed the line. How does the minister feel about a farmer who misses one month's mortgage payment? Has that farmer too crossed to the other side? Well, not according to the banks. They usually try to find out the circumstances before hauling in a bulldozer.

Mr Rosario Marchese (Trinity-Spadina): Not always.

Ms Ramsay: Usually. I said "usually," not always.

What I can tell you, after 14 months of communicating with 500 tenants a week, is that the minister's remarks are patently offensive and bordering on hateful. Through the early intervention project, an eviction and homelessness prevention program—and there are excerpts attached; you should have handouts of that—CERA has heard from thousands of tenants about their experience of the tribunal. There are a host of reasons why a tenant

might need the protection of the law and, yes, 80% of eviction applications are for non-payment of rent. Assuming the landlord is telling the truth about non-payment, don't you want to know what arrangements the tenant tried to make to repay? Don't you want to know why the tenant has not paid? Could it be they were foolishly withholding a portion of their rent because they'd gone without hot water for six months? Could it be that they had to fly to a distant city to bury a parent and had discussed the whole situation in advance with the on-site superintendent only to find the owner feels differently? Could it be that after living there for 20 years without incident, the landlord has suddenly decided to evict them for persistent late payment where, coincidentally, the tenant's neighbour is paying \$1,200 and she is still paying \$850?

1540

It's no secret that the legislation has provided an incentive to evict, as vacated units can be rented at maximum rents. Any application can be made. The question is, what does the tribunal do with that application? Is justice served when the tribunal issues a default order to evict for \$100 in arrears six days after the landlord files the application? Is there no difference between someone who prefers to make their BMW payment rather than pay rent and a widow whose world and finances are temporarily upside down? Ironically, if that first tenant misses a payment on his car, the car will not be taken away until a series of letters, phone calls and attempts at renegotiated payments have been pursued. The widow, the family where illness has struck, the student who has missed OSAP payments or the man whose job was declared redundant is given no such opportunity under the Tenant Protection Act. The amendments to the act offer none of the real protections that have been suggested to the minister and the chair and tribunal staff time and time again. These amendments further punish and demonize tenants.

A few days after the legislation was introduced, the tribunal sent out letters with the latest efficiency enhancement, the forms merge program to "address the needs of clients who serve notices or file applications with the tribunal in large volume." Each year, the tribunal's efficient machine churns out enough eviction orders to fill the SkyDome to capacity. The expedient processing of those evictions will probably result in catching the "tenants from hell," but will also shatter the lives of tens of thousands of people who no longer have a place to call home. Where do those people go and how much does it cost us economically and socially? Some people, if they're lucky, will slump on the couch of a sympathetic friend or relative. The alternative is the hostel system. This year, in Toronto alone, hostel services estimates that 6,000 of their guests will be children.

In conclusion, I would ask this committee to remove the amendments to the Tenant Protection Act from Bill 119. Thoughtful and substantial changes need to be made to this legislation. The amendments currently on the table are an insult to all 1.5 million tenant households and an

affront to Canadians' notions of justice. The entire act requires a thorough legal and constitutional review before it can be brought back as a stand-alone bill.

The Chair: Thank you. That leaves us about two minutes for questions. Rotation will start with Mr Caplan.

Mr David Caplan (Don Valley East): Ms Ramsay, thank you very much for your presentation. I thought it was very thoughtful and quite excellent.

You mentioned earlier that there have been suggestions made "to the minister and the chair and tribunal staff" time and again for changes to the Tenant Protection Act which would provide in fact real protections. Maybe you could enlighten us all with some of the suggestions you have made for strengthening the act to protect tenants.

Ms Ramsay: Sure. One of the suggestions we made early on was that the Ontario Rental Housing Tribunal communicate directly with tenants. What we've found in our project is that almost a third of the tenants are not receiving copies of the notice of application. Of course, the other problem is that once they receive them, they don't understand them, but that's another issue. That was one of the recommendations that was made based on our research and our interviews with tenants.

Obviously the forms are confusing. That doesn't require a legislative amendment, but we've now heard from the tribunal for two years that changes will be made to the notice of hearing, and they haven't been made.

There are a number of situations that we come across quite regularly called "retaliatory applications" where a tenant has, for example, applied to the tribunal for abatement because of repair issues or because of harassment issues. Very often, right on the heels of that, the landlord will make an application to the tribunal for eviction. There's a pretty clear correlation between those things. The tribunal doesn't acknowledge there is such a correlation. There are a number of changes that need to be made in the act that would allow these cases to go directly to a hearing, so the tenant can then come forward and say, "Look, this is the sequence of events that happened."

I thought it was ironic that the only change that was made in terms of the amendments was to allow people who'd been accused of drug use to have a hearing, and that's OK. People who use drugs should also get to go to a hearing but what about the rest? I couldn't understand why that was. It was absolutely clear that people on drugs needed to have their say. I thought, well, what about people who are called "persistently late" and people who are saying they haven't paid, even though it could be an administrative error?

It's clear there are a number of different kinds—persistent late payment and personal use applications. It happens all the time. It's a fairly easy thing to say, "I actually need it for me or my family," and then if there's no hearing, there's no substantive proof and the tenant's gone. I think a hearing might clear up some of that. Those are some of the suggestions.

The Chair: Thank you very much, Ms Ramsay. We appreciate your taking the time to come and start off our hearings here today.

ROBERT MCPHERSON
DAVE CALLAGHAN
GORDON MCLEOD

The Chair: Our next presentation will be from Mr Robert McPherson.

Mr Robert McPherson: Mr Chairman, may I ask a question before I start?

The Chair: Certainly.

Mr McPherson: The next three people, myself, Mr Callaghan and Mr McLeod, are speaking on the same thing. It would be more expedient for us all to speak together and then for questions to be asked at the end of all three of us. Just so we might answer some questions before—

The Chair: Any objections from any of the committee members? That's fine. Your two colleagues are free to join you.

Mr Levac: Just a clarification then, Mr Chairman—

The Chair: We'll divide the speaking time equally.

Mr Levac: OK. Thank you.

Mr Joseph Spina (Brampton Centre): I'm just trying to understand the timing of this, and it's in response really to David's comment. How are we timing this?

The Chair: Instead of three, I'm assuming from Mr McPherson's request that instead of three 10-minute submissions, they want to combine their submissions.

Mr Spina: Oh, OK.

The Chair: And only because we have a gap afterwards, I'm prepared to do that. I'm not prepared to have this as a precedent. Normally each stands on their own, but because there is a gap—

Mr Marchese: For efficiency purposes.

Mr McPherson: Yes. That way, before you ask me questions, he might answer them and so and so forth.

Mr Marchese: We understand it.

Mr Spina: OK. So we're looking at about 30 minutes—

The Chair: We're probably down to about 28 and a half now, but away we go.

Mr Spina: I'm sorry. I didn't mean to do that.

The Chair: Mr McPherson, please proceed.

Mr McPherson: Good afternoon, ladies and gentlemen. My name is Robert McPherson. I'm here today to talk about the proposal in Bill 119, the reduction of red tape, to dismantle the Theatres Act of Ontario, specifically the removal of projection licensing.

It seems strange to me on two counts that this is being done: (1) Why were the people with licences never asked for any input into the removal of them? (2) I cannot see any way this helps companies cut "red tape" to make doing business easier.

I'm a member of local 173 of the International Alliance of Theatrical Stage Employees. I passed my

examination for a licence in August 1981 and joined the union in March 1982. I have been employed at the same location, the Bloor Cinema, since September 1981. To pass my exam, I had to apprentice under a licensed projectionist for 1,000 hours with no pay. The idea of removing projectionists' licences is not new. It has been an ongoing battle with the theatre companies; in fact, in 1991 and 1994 the same questions were raised. Our union responded with a brief to the Honourable Marilyn Churley, and at that time it was decided to keep licensing for the welfare of the public.

A few things have changed since 1991, but most things are the same. The projectors, delivery systems and automations are the same as in 1991. The things that have changed: the theatres are getting larger, up to 30 screens, and public safety is a greater risk. How, you say? Well, let me tell you.

A projectionist's booth can be a very dangerous place. The light source in a projector is a xenon ball. It is a xenon gas and a quartz bulb under immense pressure, so much so that clothing that is provided for their handling is almost bulletproof. To strike or light this bulb, a 50,000-volt jolt is sent through it. Once lit, it runs at about 100 amps. There are transformers, rectifiers, exhaust fans, projectors, sound racks, spotlights, slide machines, automations and more. This is just in one theatre and they all require some kind of electricity. Multiply this by 10, 12, 30 screens and the danger is much greater.

There are, at any one time, between one and 30 projectors running. These are machines with gears, belts and many moving parts. As part of their birthday parties, some young children were allowed into the projection booth to see how it worked. At the request of our union, the companies stopped such practices because of safety concerns. As you can see, there are many dangers in a projection booth.

Another I would like to talk about is film or the new polyester Mylar film. This film is indestructible. This film cannot break and is supposed to be safety film, which means it does not burn. This was proven wrong last year when a projectionist in Kitchener walked into his already running booth and discovered the film burning away in the projector. With his quick action the fire was put out.

1550

The other claim, that the film will not break, is very true and it leads to more dangers. This is a trailer for the Blair Witch Project. This is the new stuff that is out nowadays. I'll show you, it will not break. It shouldn't anyway. It stretches before it breaks. This is the old stuff we used to use. You can just break it. You should be able to break it with your fingers, but it breaks much more readily and, as you can see, easily. I'll clean that up.

It has been said that if you wrap this around car bumpers, you could tow one of the cars. Please note that this film runs at a foot and a half per second or 90 feet a minute. There are cases of film jams where entire projection systems have been pulled over, platters

dragged across the floor and rollers ripped out of the wall. Can you imagine if your arm or your hand got wrapped up in this and, God forbid, around your neck?

As you can see, theatres can be very dangerous for the untrained, the unlicensed and the public if the Theatres Act is dismantled. The Theatres Act is in place for public safety, not to defer business. Safety is my number one concern. Remember, the new Cineplex Odeon at Warden and Eglinton has a capacity of 10,000 people a day. Is their safety not first and foremost?

Mr Dave Callaghan: I'm Dave Callaghan. I have something to address besides the safety issues. I'll start with a couple of remarks here.

It can be easy to conclude that simply because we are living in a high-tech day and age that the film projectionist must surely also be superfluous by now, along with a number of other occupations from the past that have been replaced by new technologies. Perhaps the government believes this idea is true. It may be simply a case of housekeeping for them, eliminating from the books regulations that are considered unnecessary once the occupation they govern is thought to be obsolete.

Cinema Paradiso isn't a megaplex, but on the other hand, reality is more than the megaplex. I believe I can demonstrate that this idea of obsolescence is incorrect, since it is based on an incomplete understanding of the present-day exhibition industry. I can begin with a profile of this industry during the past decade in Ontario, highlighting the ongoing role served by film projectionists meeting the needs of this industry.

For the most part, the participants in the industry fall into one of two diametrically different camps. I can conclude with a recommendation based on this difference that I believe can better serve the real needs of today's industry than Bill 119.

The fundamental way that things fall out is that there are the major theatre chains, and they have names like AMC, Famous Players, Loews Cineplex. Everyone is familiar with those. But there are other players in this industry as well. There are small businesses that operate independent theatres, like the Bloor Cinema, the various festival cinemas, the Fox, the Revue, the Music Hall and so on. Besides these small businesses, there's another group in the industry that are, if you like, the film distributors and the head offices of the various exhibitors. They operate screening rooms where there are certain issues that I will explain in a moment.

The final element of the industry are the various film festivals which, as each year goes by—25 years ago we had the Toronto International Film Festival and this year it seems every week there's a new one: the British Film Festival, the Jewish Film Festival, the Italian Film Festival, HotDocs, Inside Out—it goes on and on.

The projection concerns of the last three groups I mentioned, the small businesses, the film festivals and the screening rooms, are quite different from what is required by the major chains. The consequences of projection not working properly in these other situations are quite different from what happens from a business

perspective, even where you look at the consequences for those major chains. For example, a small business may have one screen. If there's a projection problem and they can't run the show for some reason, that's a loss of 100% of their receipts for the day. A major chain has hundreds of screens and if one screen goes down, that's not even 1% of the day's receipts.

You could look at the issue of projection problems as well in a major cinema chain where they base their business on many repeat screenings of a film, usually over a minimum two-week period. If a screen goes down, they can issue a pass for another day and someone can come back. There's lots of time to do that.

Imagine the situation in a screening room. Screening rooms are operated to promote the industry. This is where the media may go to watch the movie to be able to write their review. If there's a projection problem and they can't see the film, they may miss a deadline and then it comes time, the film opens and everything is concentrated on that opening weekend, so the film's distributor stands to lose that review, which is part of the promotional campaign for the film on the opening weekend that it be there. The box office receipts on the opening weekend are about as good as the entire run gets, so every review is a factor in maximizing box office and time is of the essence. They don't have time to come back necessarily.

Film festivals are somewhat like screening rooms. They have a limited number of screenings and these have become marketplaces now. A producer can face several possible financial losses resulting from a lost screening. It can be everything from the initial sale and arranging distribution of the film to marketing and promotion of the film to the wider public. If it doesn't play at the festival, what might have been a prizewinner at the festival, which would be part of that marketing campaign, suddenly what happens is that no one sees it and it doesn't even qualify.

As well, one of the things that happens at the film festivals is that the filmmakers actually attend. It's not like the main chain theatres where mostly it's just the public and they have somewhat lax standards in what they might be willing to accept in the presentation. But the people in the industry demand the top performance of their pictures done to the true industry standards. My argument would be that in all these situations, if you look at the resources of the major companies, they have technical people on standby, they have a certain amount of automation in the systems and they would argue, "Why do we need people who are trained as craft projectionists, with apprenticeship and all the rest, when all we need is someone to thread the projector?" I almost think that their argument is not that there isn't a place for this but that "There isn't one that we can use."

The professional projectionist's licence should represent and should be proof of a professional qualification because it did involve, up until September 28, 1995, an actual apprenticeship. There was a three-member panel of the Ontario Labour Relations Board that heard all these same arguments and they issued a written ruling on

that date that said in section 17 of that ruling: "It is apparent to us that the licensing provision in the Theatres Act is not a frivolous requirement. The process by which projectionists are licensed is not a pro forma one but has the hallmarks of acquiring a trade or craft."

Outside of the major chains, all the other elements in the industry, because of various things, like it's a small business. You can't pay technical people to sit by to help you out; you rely on the services of a professional craft projectionist. The film festivals, the screening rooms, it's all the same; these are all manual operations, absolutely no automation. Sometimes, still to this day—on October 19 this year I worked at the Loews Cineplex screening room which has two machines, manual changeovers, and the projectors are probably about 30 years old. That's common for these screening rooms. So the idea of being able to function as a competent craft professional is still here today.

People might say, "Well, what about the digital cinema that's out there?" I would say this is so premature, with all the issues the industry has to resolve. There are two proposed systems that could do digital cinema. The entire industry hasn't even settled on one yet. So any company that goes out and says, "We're going to invest in this," at the cost of these systems, that's one of the issues to work out. I understand it's roughly \$100,000 to buy one of these systems. So to convert a 10-screen theatre, it's a \$1-million outlay. Someone is going to have to come up with this, and that they haven't worked out. So digital cinema is a non-starter at this time, and I believe it is still necessary to have professional people.

I can make some recommendations here and then I have one final matter to bring up. Given the entire scope of the industry and the course of this industry for the foreseeable future, I believe it's premature and excessive to eliminate projectionists' licences as a proof of professional competency at this time. It's plain that this industry functions in two ways that are so different that it might appear that a single solution cannot satisfy both sides. Nonetheless, I believe a solution exists that recognizes reality and still works for everyone involved.

A solution would be to amend the Theatres Act in the following way: on the one hand maintain apprenticeship, an examination and licence for the craft professional within those elements of the industry where professional competency still has meaning and value. You can also then amend theatre licensing to recognize what is happening anyway with regard to the employees of the major chains. Those employees are not expected to practise projection as a craft, and for the limited purpose of little more than threading a projector, it would be permitted as a condition of the theatre licence that they don't have to have apprenticeships, examinations and licensing. That would seem to me to solve the entire situation.

I'll mention one other issue. It's a condition under the current Theatres Act: "No person shall exhibit, distribute or offer to distribute or cause to be exhibited, distributed or offered for distribution in Ontario any film that has not been approved by the board."

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It's also under the section about projectionists that "the director may suspend the licence of a projectionist if he or she has contravened this act or the regulations." What that in essence says is that if something shows up at the theatre that doesn't have a censor band or certificate or whatever you want to call it, it should not be run. If I were to run it and someone came in and inspected the theatre, I could not be working tomorrow. I could be suspended for that.

On the night of October 14 there were two screenings: *Pay It Forward*, a Warner Bros picture, and *Bamboozled*, which is a release by Alliance. Both of those pictures arrived for two-for-one sneak previews and there was a certificate with each of those movies. Unfortunately, there was a trailer on each one where there was no certificate whatever. What are we to make of the idea of eliminating the licence and the penalty, which is suspension of the licence and the ability of a person to engage in a livelihood? That seems to me to be an effective way to monitor compliance with the classification system. What can I say? No certificate? Who might even bother to do this? I know I could lose my licence. If there's no penalty, part of the monitoring of this is being eliminated, and I don't know if that has really been considered.

Just one final example of what can come up as far as practising as a craft professional. This past weekend I worked as part of the Access Japan 2000 cultural event sponsored by the Japanese consulate. What I had to do just this past weekend was run a film print that must have been at least 20 years old. It took me longer to revise that print and prepare it for running than it did to actually watch it. This was a print that even had a wet splice in it. In the old days, that was how you did it. It went to tape splicing. Here's a print that I'm expected to be able to run, and I say that is a craft professional type of responsibility. It should be part of my competency to do that, and yesterday I ran 20-year-old film. The people who are trained by Famous Players or Cineplex Odeon are not competent to do this. What we're doing is eliminating a job qualification as well.

Mr Gordon McLeod: My name is Gordon McLeod. I'm the director of engineering and technical services for Entertainment Equipment Corp. We're based in Los Angeles, Washington, Toronto and Buffalo. We're the fourth-largest service corporation in North America servicing cinemas. I'm also on the committee of the SMPTE, which is the Society of Motion Picture and Television Engineers, and we have finally released to the industry a training manual for the craft of projection. It is approximately three and a half inches thick.

At the recent trade show called Show East in Orlando, Florida, we spent over 12½ hours meeting with Eastman Kodak and Dolby Laboratories to try to draw up standards, because one of the problems that is happening across the world now is that equipment being installed in theatres has a requirement on it from the Underwriters Laboratories or CSA that it be operated by professionally

trained people only. That is stamped on the nameplate at the back, and their installation permission from these standards organizations is based on the fact that it will be operated by trained professionals. If a body chooses to do away with a standard for the training of these people, then the obligation of the liabilities on the manufacturer's part is going to be increased.

Presently, in Europe we're also preparing guidelines that are going to actually have a European standard and one licence for all of Europe for projectionists under the current EC. It was my concern that there is a liability that goes with this equipment, that it is designed for professional installations only and is marked as such. A lot of electrical authorities now are even getting concerned with these standards being used for these large digital sound systems. Voltages exist in them now that are fairly well lethal and require a higher classification of wiring standards than had been previously employed. Thank you.

The Chair: Thank you very much, gentlemen. You've used 20 minutes of your presentation, so that would give us about three and a third minutes for each caucus. We'll start the rotation with Mr Marchese.

Mr Marchese: Were you consulted at all before these changes were made?

Mr McPherson: No.

Mr Marchese: They didn't bother calling you to say, "We're about to change something because we think it's necessary"?

Mr McPherson: No.

Mr Marchese: They operate that way, by the way. The assumption that has been made with this change is that anybody can do your job. Is that basically it?

Mr McPherson: Yes.

Mr Marchese: Therefore we can save some money, and if there happens to be no union as a result, that's even better?

Mr McPherson: Yes. Per se, getting rid of licensing I don't think will get rid of the union, because we're very qualified to do our job. As they presented, at their screening rooms in Cineplex head office, Universal, they call us to run them. They don't want their people to run them because they know they can't do the job. They still call us to run them. What licensing does is make sure that the people are trained to do a job.

Mr Marchese: I understand.

Mr McPherson: In Ontario, hairdressers have a licence, auto mechanics—

Mr Marchese: I understand that, Rob. I'm on your side. Why is it that the government wants to do this, do you think? What's the point?

Mr McPherson: That's what I'd like to know. I have no idea.

Mr Marchese: The big folks who have the large screens, 10, 15, 20, whatever, they call you guys on a regular basis?

Mr McPherson: Oh, yes. We're there all the time.

Mr Marchese: And there are people there who can do that job at the moment, who are managing?

Mr McPherson: There are managers. Right now, they still train their, I call them, candy bar staff to come up and thread the projectors and start them. But once they've started them, and now in some of the complexes they start by themselves, they're gone. They go downstairs, there's nobody watching and they leave. When we're there, we are cleaning up their messes and maintaining the equipment so nothing happens.

Mr Marchese: Because there are safety questions that you raised earlier on.

Dave, you were proposing some changes that effectively leave the situation as it is, where you have licensing, and the big chains can keep on hiring these guys who just have to thread. But your point is that that's not a problem, because they keep on calling you anyway, so basically things would be as they are. So why remove the licensing?

Mr Callaghan: Someone in management in one of these companies said, "We can't do the festival-type situations." They know there's more to the job. I look at this and say, if they want to take on the liability issues of simply training one to thread the projector, because they're out to try and improve their bottom line, go ahead. But to say that therefore there's no recognition of people who have craft status would seem to me to be going further than we need to go.

Mr Marchese: You're also suggesting that if they do this, it doesn't cut red tape at all but rather will create different problems. If they go ahead with this, it will not be what they pretend to do in the act, which is to reduce red tape to promote good government for better management, but rather it will have the opposite effect.

Mr McLeod: It will involve other government levels in the safety standards of the equipment they're installing because it's all based on a premise that there are professional people operating it.

Mrs Julia Munro (York North): Thank you again for coming here today to give us some insight into this. I want to ask two questions. I'm going to go first to Mr McPherson.

You mentioned at the beginning that this had been done, that there had been some initiation of possible change back in the early 1990s. I wondered if you could explain briefly for us what motivated the conversation at that time.

Mr McPherson: The idea at that time—it's very simple—was to remove licensing, therefore remove the requirement we had at the time to become projectionists, therefore remove the union. Presumably, there would be no more union jobs. It was the film companies that were trying to go to the government to have it removed so we would lose our licences so anybody could do it, and therefore the union would be out. That was my understanding of why it was done.

Mrs Munro: All right. I want to come back to Mr Callaghan. You mentioned something about, and Mr Marchese made reference to it, some kind of amendment, because clearly what you've demonstrated here today is the fact that your skills are very much in demand. Could

we just clarify or go over the suggestion you had for an amendment?

Mr Callaghan: Would you like me to just repeat it?

Mrs Munro: If you can, or if you could just add any further explanation to it.

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Mr Callaghan: In a way, what I'm thinking about here is that we could simply put into the law in writing what's actually happening now in any case. As I see it, we could maintain the existing system for those people who intend to practise this as a craft, have a proper apprenticeship. What happened in 1996 was that they eliminated any requirement to serve any amount of time. So there was a licence, but to read the letter of the law, you could have gotten a licence today and gone back after 1 o'clock in the morning and gone back after lunch, and if you could somehow do the test, you were considered to be capable of the same performance on the job, to the same standard I'm capable of. Someone could go in and get the licence in that circumstance. I've been doing this for more than 20 years and, as I say, I was working on film even yesterday on 20-year-old film.

I suggest that whatever requirements there are with regard to licensing theatres, like the exit should be such-and-such and conditions of this kind, and they have to observe that their classifications are monitored and so on—you don't sell restricted movie tickets to people who are 13 or whatever—another condition in there could be that this would be permitted. There would be very limited things these people could do. They can thread the projector and perhaps refocus it and so on. In fact, we have language of this kind in the current collective agreement. So we have it, and we may be ahead of the government here. That would accommodate the needs of the major chains, where they don't want to have to train and be, like myself, capable as a professional; they don't need that in their business. The other half of the business all needs it.

You could think, "We can't find one solution here, can we?" and I'd say no, we can't. What they do is hire people who are able to do this, and they can do duties in the theatre, and then another duty becomes to thread the projector, and that's basically what they're doing. If the government were to say something like, "Tomorrow all you PhDs out there who put in all this time, or all you medical doctors, we'll just eliminate that licence; there's somebody who wants to open a medical clinic and, well, brain surgeons are expensive, so let's not have this degree"—why do we have to do something like that to eliminate what amounts to a certificate, a diploma or anything else? The province has jurisdiction on education and training and such, and that's what my certificate is.

What's being proposed is that now I have no qualifications at all, when I think I can demonstrate that it still exists. Let's amend the Theatres Act, the theatre licensing. That we could do, and it would accomplish what the big chains want and it would also accomplish what everyone else needs.

Mr Levac: I'll try to do this quickly in rapid fire so we can get some quick answers out. In 1991 you said that was proposed. It didn't happen, did it?

Mr McPherson: No.

Mr Levac: The second question is, is there anything else in the act, in Bill 119, that you feel under the Theatres Act changes needs any work besides the ones you've mentioned as projectionist and the definitions?

Mr McPherson: I think it should be left the way it is. We just got hold of this and went through it, saw the problem that was going to affect us directly and are speaking to that issue. The other stuff we have not delved into.

Mr Levac: You mentioned the liability. Do you think the companies then will see that as an increased liability? If I heard you correctly, since they're not going to be licensed people and since they're not going to have the supposed training you're referring to, then the companies will just simply raise their liability, because they're assuming that because there are not licensed people, something is bound to go wrong?

Mr McLeod: Their insurance would probably increase, but the liability also will exist when the various electrical and fire inspectors come in to certify the installation of equipment, whether the level of the people operating it will be satisfactory for most of it to still pass, because their CSA or their UL certificates are based on being operated by a professionally trained person.

Mr Levac: A member on our side, the member from Sarnia-Lambton, Ms Di Cocco, indicated in one of her questions that the xenon bulbs and the 50,000 watts going through the system were an extremely important issue, a very strong health and safety issue that permeates beyond projectionists.

Mr McPherson: Do you mean one of these?

Mr Levac: Yes.

Mr McLeod: They are a regulated item even for destruction when they're used. They cannot be disposed of in landfill, garbage; they usually have to be returned to manufacturing.

Mr Levac: Given that safety issue in terms of it going beyond the projection room—it goes into the theatre, as you mentioned, 10,000 people; it goes into the malls in which these places are located etc—what do you think of a person who made the comment, "Why are we worried about this, because all we have to do is flick a switch off and on?"

Mr McPherson: Tell them to come and see me sometime.

The Chair: Thank you very much, gentlemen. I appreciate the three different viewpoints you brought and the time you took to craft some proposed amendments as well.

SOUTH ETOBICOKE COMMUNITY LEGAL SERVICES

The Chair: Our next presentation will be from the South Etobicoke Community Legal Services. Mr Hale, good afternoon. Welcome to the committee.

Mr Kenneth Hale: Good afternoon, Mr Chairman and members of the committee. My name is Kenneth Hale. I'm the lawyer-director of South Etobicoke Community Legal Services, a community legal aid clinic located in southwest Toronto.

I'm here to speak about the amendments to the Tenant Protection Act that are proposed in Bill 119. As I understand some other speakers have mentioned, they've found the process to be ridiculously quick for the kinds of serious matters the committee is dealing with. I don't really understand why the people of Ontario don't have more of a chance to find out what's in legislation and consider it and come up with some clear thoughts on it before we're rushed down to committee hearings while the bill gets rushed through. Having said that, I've tried to do my work over the weekend and look at what I thought really needed to be said about this bill, and that's why I'm here.

When I first heard the name "red-tape bill," I tried to imagine what it was that the government was talking about with red tape, so I looked it up in the Canadian Oxford Dictionary. The dictionary says that "red tape" is "excessive bureaucracy or adherence to formalities, especially in public business."

Tenants facing evictions who deal with the Ontario Rental Housing Tribunal are quite familiar with excessive adherence to formalities in the public business of determining whether tenants have a place to live. In order to be allowed to go to their hearing and contribute to the process of deciding whether they're going to lose their home, tenants have to wade through a document that's called Notice of Hearing, which is basically incomprehensible to most people. If they get through it, they discover that they have to file a written dispute within five calendar days. If they don't get this dispute in, they're going to lose their home without having an opportunity to be heard.

I think this would be the kind of red tape the people of Ontario need relief from, but nowhere in the Red Tape Reduction Act do I find any mention of the dispute and this excessive adherence to formalities, which makes me think that the government thinks that certain kinds of red tape that apply to certain people are just fine. Because the government didn't really deal with what we see as the most serious instance of red tape in this bill, it makes us wonder what your motives really are.

I suggest, if you're really serious about reducing red tape, amend the bill and put in an amendment to the Tenant Protection Act that deletes section 177, which requires a written dispute, and then when people get a notice of hearing they'll know they have a hearing and they can go to their hearing and say their piece and be

heard by the adjudicators and defend themselves if they want to.

Having said that, I looked at a lot of the other changes to the Tenant Protection Act. There's quite a bit in there. A lot of them look fairly offensive, but I must say, like everyone else in this province, I haven't had a whole lot of time to really think about all the details of all of them. In fact, some of them may even turn out to be beneficial for tenants. But we don't really know how the adjudicators and the courts are going to interpret them, so it's really hard to say whether they're going to have any effect at all.

There is at least one change that I think is a direct attack on some of the most vulnerable people in the province, and the committee should recommend to the Legislature that it not proceed with it: the proposed change in the definition of "landlord."

One hundred years ago the Ontario Legislature realized that disputes between landlords and tenants were special kinds of disputes that required speedy, just resolutions. They passed something called the Landlord and Tenant Act, which allowed such cases to be dealt with outside of the normal stream of commercial litigation, which even 100 years ago was in somewhat of a state of backlog. Twenty-five years ago the Legislature realized that residential landlords and tenants needed specialized legislative provisions and they enacted part IV of the Landlord and Tenant Act, which recognized the vital interests that residential tenants have in their homes and started to move away from the strict commercial law principles that had governed landlord-tenant relations up to that time. In 1997, the Legislature tried to accommodate these same sort of ideas within a new decision-making structure. They enacted the Tenant Protection Act, which everyone claimed had these same protections which had been built up over the last 25 years, and it was just a new decision-making process and a new structure.

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But for some reason, the government is now proposing that a whole bunch of tenants should be thrown back into the 19th century. They are proposing that disputes between some residential tenants and their landlords not be dealt with by the Ontario Rental Housing Tribunal or not even be dealt with by the summary procedures under the Commercial Tenancies Act. They are proposing that certain kinds of residential tenants have their rights determined by the courts in the regular stream of commercial litigation. Any of you who are familiar with commercial litigation in the Superior Court know that's the home and the founding place where red tape was invented. I don't really think it's in anyone's interest to send more residential tenant disputes to the civil courts. Despite the fact that the courts have been making strenuous efforts to clear out the red tape, it's still there. That was one of the main arguments the government had for bringing in the Ontario Rental Housing Tribunal: the courts have too much red tape. So why are they turning their back on that principle for thousands and thousands of tenants?

Who are these tenants? If you thought that you were passing the Tenant Protection Act in order to cause rents to escalate crazily, well, it's been an unqualified success. Unfortunately, tenants' incomes haven't kept up, and the government hasn't been as successful at growing the incomes of people in the bottom fifth of the income scale. You've cut the welfare rates. You've refused to give people disability pensions. You've frozen minimum wages. You're attacking collective bargaining. This means that tenants' incomes are not rising anywhere near as fast as rents are. What this means is that many individuals and families can't afford to rent a house or an apartment; all they can afford to do is rent a part of a house or an apartment. Whether they rent one bedroom out of a three-bedroom apartment or whether they rent the upper floor of somebody's rented house, this is their home, this is what they can afford.

Unfortunately, they don't have any direct relationship with the owners of the property. The only relationship they have is that with their landlord, the person who rented the space to them, and that person, in turn, is the tenant of the person who actually owns the premises. There is nothing in the law that says there is anything wrong with this. It seemed we had restrictions on allowing people to profiteer from this situation by dividing things up and renting them for more than they're renting, but that protection is pretty well gone too. But there is no real reason in the world to do what the government is proposing to do, which is exclude landlords of tenants who rent from other tenants from the definition of "landlord" in the Tenant Protection Act.

The people who rent these places are tenants. They pay rent in return for the right to occupy their rental unit—that makes them a tenant under the Tenant Protection Act—but with this amendment, they would have no landlord. Any rights they would have would strictly come from the contract they have with their landlord, and that contract is only to be enforceable through the Superior Court, not the Ontario Rental Housing Tribunal.

If there is no provision in the contract requiring notice of termination, then they don't have to get an eviction notice before they get evicted. If the contract doesn't specify heat being provided, then there is nothing they can do if their children are freezing. If they actually do have rights in a contract, the Ontario Rental Housing Tribunal will refuse to enforce those rights for them.

Of course, when the tribunal turns them away, they are not going to be going down to Bay Street and hiring counsel to litigate in Superior Court. They are going to just go away, put up with the indignity and humiliation of losing their home, losing their property or whatever it is—whatever we do when we don't have a place to go and resolve our disputes. We don't generally expect people in this society to just be kicked around and abused without offering them any kind of realistic remedy.

On the other side, we shouldn't set up situations where people have the opportunity to take advantage of others without having any fear of legal consequences. When there are legal consequences to your disputes, you gen-

erally try to keep your disputes within civilized bounds because you know there are legal remedies if you don't. But the government is proposing that a large sector of the tenant population just be sent out into this legal no man's land where there are no constraints, and I don't think that's acceptable. I think the committee should really carefully look at this idea and reject the idea.

The Ontario Rental Housing Tribunal is a fact of life. It's there. It needs to be open to as many tenants as possible. We shouldn't have a group of people, especially people toward the bottom end of even the tenant population, who can't get any determination of their issues at the Ontario Rental Housing Tribunal. If this committee is looking at cutting red tape, I think it should be trying to improve the way the tribunal operates, not finding ways to keep people out of it.

I am asking that you reject subsection 6(1) of the bill and that the tribunal continue to deal with these kinds of cases on the merits of the individual case, and not excluding people as a class from its operation.

The Chair: Thank you, Mr Hale. Actually, we've gone over time but it was an important point that you were making, and I wanted you to have the opportunity to finish your brief. I do appreciate your raising it with us, and we'll certainly look into it further. Thank you for taking the time to come before us here this afternoon.

GREATER TORONTO TENANTS' ASSOCIATION

The Chair: Our final presentation this afternoon will be from the Greater Toronto Tenants' Association, Paul York. Good afternoon, Mr York. Welcome to the committee.

Mr Paul York: Thank you. This was hastily prepared because I was called late Friday and I just got the message this morning. This is being pushed through fairly fast. I don't know why that is, but I will try to address it.

The Greater Toronto Tenants' Association is a coalition of tenant associations which formed last year in response to the more draconian aspects of the Tenant Protection Act, including the fast-tracking of evictions, which we feel violates the right of a tenant to a fair hearing and diminishes security of tenure. We mainly deal with rent review, actually, not evictions. But in the course of doing rent review I've come across many eviction cases because, when you organize a building, you come across tenants who are being evicted because of high rents, and so we try to address those.

This bill, the Red Tape Reduction Act, Bill 118, I believe it is—what is it?

The Chair: Bill 119.

Mr York: Bill 119 is a further eroding of our already diminished rights. The provision of that bill that speaks to tenants, which allows for the fast-tracking, we think should be rejected.

Statistically, about half the cases are default—56%, I heard. Perhaps that is part of the government's rationale

for further fast-tracking, to make the process faster and more expeditious to clear up the tribunal's heavy case-load of rent increase and eviction applications. It should be noted that, in my experience anyway, in the experience of GTTA, the vast majority of applications are made by landlords, not tenants. This statistic, instead of compelling you to fast-track the process more, should compel you to look at positive changes you can make to the TPA.

The provisions contained in Bill 36, David Caplan's bill, did away with the requirements to dispute an application in writing, required tenants to be served by a third party, and set an expiry date of six months on a notice of warning to terminate. Members of this committee, including Mr Gilchrist, I recall, actually spoke in favour of some of these procedural amendments while criticizing other parts of Bill 36. Yet Bill 119 doesn't provide the remedy that Bill 36 would have. It goes in the opposite direction. It seems to rob the tenant of the right of a fair hearing.

Security of tenure, the right to live in one's home without fear of arbitrary eviction, is a fundamental right which the government certainly ought to do everything within its power to protect. But we find this system is making many mistakes and is violating security of tenure in terms of demolition to make way for condominiums, in terms of fast-tracking evictions.

The appointment of default order officers is a frightening thought. We've already lost courts and judges to the TPA, replaced with political appointees, some of whom are fair within the confines of law, others who are not. The clerks at the three tribunal offices that we go to a lot frequently make mistakes in scheduling and processing claims. I can see them making the same sort of mistakes with these evictions, except instead of a wrong hearing date, which we can live with, the result will be children and seniors on the street. Even one mistake of this kind is too many.

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I was speaking with a Tory MPP recently who told me Bill 119 is intended to only speed up the process for getting rid of criminals and drug dealers, a sensible sounding argument if that were the only rationale behind it, but what I've seen is that Bill 119 has a broader scope, allowing for faster evictions of any tenant that is not present, tenants who very often were never served, never aware that an eviction is occurring until they receive the writ of possession. In fact, I knew a fellow who was the head of a tenants' association that was facing demolition and that's what happened to him. He was never served and now he's gone.

I asked the Tory MPP if this bill could be used by unscrupulous landlords to evict good tenants. He was mystified by my question. Why would a landlord do that? I told him to get higher rents on the vacant unit and to evict tenant leaders or those who were simply asking for their rights. I recalled an arrears judgment that I went to the set-aside for. The man was a senior from Russia. He did not speak English at all. He did not dispute the ap-

plication in English within five days, obviously. There was a default judgment against him. He turned to his tenants' association which, fortunately, spoke Russian—one of our member buildings. We helped him get a set-aside hearing. He produced and we produced at the trial the cancelled cheques. The landlord withdrew his application. But this man was lucky because the tenants' association was there to help him. I can imagine many others falling between the cracks. They've called me. I've heard these stories of people for whom it's too late. I'm afraid that Bill 119, the way it is now, would result in more unfair evictions and more violations.

A major problem with the Tenant Protection Act, which we see every day in rent review, is the conflicting mandate it seems to have. Section 171 talks about having a fair hearing, but it also decides it's a need for an expeditious hearing. Adjudicators have denied many requests for adjournments because they felt compelled to weigh in more heavily on the side of the expeditious argument. I feel that a new adjudicator, somebody who is not seasoned, would feel compelled to go with the expeditious argument more frequently, and certainly that is the case already. I'm afraid that with the default order officers, as they're called, or the SWAT team, as you've called them, that it's simply a rubber-stamp exercise for them. They won't weigh the pros and cons. They won't give it a fair—they won't think of what's correct or just. It's a rubber-stamping exercise for them.

Once the eviction order is in, it's very hard to get a set-aside. We help tenants run around and get set-asides all the time and this is only because the tenants' association exists. What about those people for whom no tenants' association exists, who don't know that a legal clinic exists to call them to get that kind of help?

So we're asking: don't make this situation worse than it is. We feel that it will backfire. A million tenants of Toronto are already being awakened by the effects of the TPA. Perhaps in drafting this you're assuming that the tenant population will be in a state of slumber for another few years, that you can accommodate the landlords a little more. I think that's quite a gamble. This is playing with peoples' lives. I don't think the tenants are going to be in a state of sleep much longer.

We think the Tenant Protection Act is a failure. It didn't meet any of the tests of, when Al Leach drafted it, what he said it would succeed at, except making the system faster. It did succeed at that. But it didn't build new housing. We don't think that this mistake should be compounded. We'd like to see some positive changes to the TPA, and this is not one of them. So we agree with Mr Marchese. Instead of finding faster ways to evict families, the government should freeze rents for two years and also reject the provisions in Bill 119 that are offensive. Thank you for the opportunity.

The Chair: Thank you, Mr York. That leaves us about two minutes of questioning. This time in the rotation, it's the government.

Mr Spina: Thank you, Mr York, for coming forward and speaking. Mr York, I think you indicated—it is Mr York, is it not?

Mr York: Yes.

Mr Spina: You indicated that one of the concerns was that if an eviction order went through that there would be, basically, an unqualified individual that would be putting it through, sort of thing?

Mr York: I don't trust the clerks at all. I'm telling you—

Mr Spina: Pardon me?

Mr York: I do not trust the clerks down there. They make mistakes a lot. It's because there is a heavy case-load and it's very easy to make mistakes.

Mr Spina: You indicated also that, in the past, it was the tribunals that were essentially authorizing the final eviction notice, and you said that in some cases, because they are political appointees, they work, and in other cases they don't work. Could you elaborate on that a bit?

Mr York: Without generalizing too much, my experience has been that some of the younger ones, or the ones that have a landlord background—there is one fellow who used to work for a landlord law firm—tend to give unfair judgments, whereas the older ones that have been there before the TPA are fairer within the confines of the law, some of them.

Mr Spina: So would it be fair to say that if you remove the bias from a tribunal, because it is a political appointment, your concern is that the clerks or the staff could make errors because of the volume of work? Essentially, though, those people in that staff are far more experienced and would be more objective, would they not, in issuing the order or rejecting it? I think also that if there was an error that surfaced, that was discovered, there is plenty of opportunity, is there not, for the tenant to make an appeal?

Mr York: No. I don't believe that there is a lot of opportunity for the tenant to make appeals because the system is so fast right now and this amendment is going to make it faster. The tenant has to know how to do a set-aside, and this is a complicated procedure. If, for whatever reason, they didn't have time or ability to do the written dispute, how are they going to do the set-aside without help or instruction? There's not too much help out there. Most of the tenants are on their own.

The Chair: Thank you, Mr Spina, and thank you very much, Mr York. I appreciate your taking the time to come before us here again this afternoon.

With that, the committee stands adjourned until 3:30 on Wednesday.

The committee adjourned at 1638.

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Official Report of Debates (Hansard)

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Journal des débats (Hansard)

Mercredi 1^{er} novembre 2000

**Standing committee on
general government**

Red Tape Reduction Act, 2000

**Comité permanent des
affaires gouvernementales**

Loi de 2000 visant à réduire
les formalités administratives



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LEGISLATIVE ASSEMBLY OF ONTARIO

ASSEMBLÉE LÉGISLATIVE DE L'ONTARIO

STANDING COMMITTEE ON
GENERAL GOVERNMENTCOMITÉ PERMANENT DES
AFFAIRES GOUVERNEMENTALES

Wednesday 1 November 2000

Mercredi 1^{er} novembre 2000*The committee met at 1558 in room 151.*RED TAPE REDUCTION ACT, 2000
LOI DE 2000 VISANT À RÉDUIRE
LES FORMALITÉS ADMINISTRATIVES

Consideration of Bill 119, An Act to reduce red tape, to promote good government through better management of Ministries and agencies and to improve customer service by amending or repealing certain Acts and by enacting two new Acts / Projet de loi 119, Loi visant à réduire les formalités administratives, à promouvoir un bon gouvernement par une meilleure gestion des ministères et organismes et à améliorer le service à la clientèle en modifiant ou abrogeant certaines lois et en édictant deux nouvelles lois.

The Chair (Mr Steve Gilchrist): I call the committee to order. I'm sure the other members will be arriving shortly, but we have representation from each of the three parties. My apologies to the audience members and witnesses. Unfortunately, the rules of the House preclude our sitting until routine proceedings have ended, as they just have. I think in order to accommodate everyone, we'll probably be looking at eight, eight and a half minutes per presentation, but I'll try and be flexible, depending on the actual content and the questions from each of the three caucuses.

KENSINGTON-BELLWOODS
COMMUNITY LEGAL SERVICES

The Chair: Our first presentation will be from Kensington-Bellwoods Community Legal Services. Would they come forward to the witness table, please. Good afternoon and welcome to the committee.

Ms Barbara Hurd: I am representing Kensington-Bellwoods. My colleague Tracy Heffernan was called away on a family emergency and couldn't attend today, so I'll be presenting her deputation.

Thank you for hearing us. I'm going to focus on—

The Chair: Forgive me, could you introduce yourself for the purposes of Hansard?

Ms Hurd: My name is Barbara Hurd and I'm representing Kensington-Bellwoods Community Legal Services.

I'm going to focus on two issues related to the proposed amendments to the Tenant Protection Act: first, the

issuing of default orders and, second, the proposed changes to the definition of "landlord."

The purpose of a red tape bill is to address procedural issues, not substantive ones. I would argue that the proposed changes to both the process of issuing default orders and to the definition of "landlord" are in fact substantive changes which do not belong in a bill of this nature. Moreover, these are draconian measures that will substantially reduce the rights of tenants to security of tenure in what is, after all, their home.

The current system allows the Ontario Rental Housing Tribunal to issue default orders evicting a tenant should the tenant fail to provide a dispute in writing to the tribunal within five calendar days. This means that if the tenant is lucky enough to have overcome the hurdle of understanding the convoluted notice of hearing to ascertain that a written dispute is required—and few people, lacking either education or English language skills, will manage this—they must either have access to a fax machine or be physically able to deliver their dispute so as to meet the five-day deadline. It is unlikely to be met through the regular mail.

The good news for landlords, of course, is that many tenants don't manage to file a dispute and instead become part of the 64% of tenants receiving an eviction based on a default order. Issuing a default order is a legal decision. It could result in a tenant losing their home. It could render a tenant homeless. Few decisions could have a graver impact on a person. In issuing a default order, the adjudicator relies solely on the information provided by the landlord. Given the gravity of such a decision, it is to be expected that an adjudicator will examine carefully the information provided by the landlord and, in the event of any discrepancies or inconsistencies, a default order will not be issued. In other words, this is not a decision that should be made by a clerk; the consequences are simply too grave.

Rather than erode tenants' rights further, and given the focus of a red tape bill on procedural issues, I would like to propose an amendment that would reduce some of the red tape that tenants currently confront. This would be a simple amendment: Get rid of the written dispute requirement entirely or extend the time in which it may be filed. Not only would this reduce red tape, it would reduce the number of default orders issued and therefore the number of adjudicators required to issue them.

The second issue I would like to address concerns the proposed change to the definition of "landlord" under

subsection 6(1) of Bill 119. Our clinic is located at College and Bathurst and covers a catchment area that stretches from Bloor Street to Lake Ontario, from Ossington Avenue to Spadina Avenue. If you think visually about this area just west of Queen's Park, you will recognize that there are very few apartment blocks. The rental housing consists primarily of houses converted into apartments, and rooming houses.

Increasingly, tenants in our area are unable to afford a rental unit on their own. This is the result of vacancy decontrol, skyrocketing rents, cuts to welfare and the failure to increase the minimum wage to meet the cost of living. Thus, many tenants seek out other tenants with whom they can share their unit. Often the head tenant collects the rent from the under tenant and pays it to the owner. Approximately 70% of the calls we receive at our clinic are from tenants in shared accommodation situations. Approximately 30% involve a head tenant-under tenant relationship.

Under the current definition of "landlord" in the Tenant Protection Act, we can advise the under tenant that the head tenant is their landlord. Thus, if the relationship between the head tenant and under tenant sours in any way, the under tenant cannot be evicted without cause and a modicum of due process. This is a very basic right. All tenants need to be provided with some safeguard so that they cannot be evicted from their homes without notice or reason. Subsection 6(1) of Bill 119 would erase this right for a substantial number of tenants in Ontario.

If the prevention of homelessness is on the agenda at all—and unfortunately we have seen little evidence of that to date—then this government should be aware that these two proposed amendments to the Tenant Protection Act will contribute directly to an increase in the homeless population in Toronto. Thank you.

The Chair: That leaves us about three minutes for questioning. We'll start with the Liberals this rotation.

Mr David Caplan (Don Valley East): I'd like to thank you, Barbara, for making the presentation on Tracy's behalf. I thought it was very good. One of the areas you covered was the whole area of default. The Tenant Protection Act was proclaimed in 1998. I understand defaults in fact have risen. Do you have any evidence of the fact that default orders have been increasing from 1998 to the present day?

Ms Hurd: The basis on how I would answer that is I believe they have. I know the Centre for Equality Rights in Accommodation has been tracking that quite closely. They've got a very good project of keeping track of applications made to the tribunal by landlords, and I was able to take advantage of looking at some of the materials they brought here on Monday to show that the default rate is increasing.

Mr Caplan: What does that mean for tenants in Toronto and in Ontario?

Ms Hurd: It's very significant. It could mean that they don't understand. It indicates that the process is not serving them and that they may lose their homes in the process. A lot of them don't know how to pull themselves back from the brink of losing their homes.

Mr Caplan: So people are losing their homes in six days? That's pretty quick.

Ms Hurd: Yes, that could happen.

Mr Caplan: I have the workload report from the Ontario Rental Housing Tribunal. It shows very clearly that since the tribunal started tracking on July 17, 1998, there were over 125,000 applications for eviction. In that time period, there have been, I would say, over 70,000 default orders issued in the case of eviction. That's very high: 70,000 people have lost their homes without even having a hearing.

Ms Hurd: Right.

Mr Caplan: Have you had any experience in trying to get set-asides of default orders?

Ms Hurd: Yes, they're not something you can get automatically. First you have to get an adjudicator at the tribunal to look at the situation and then to give you—the decision process is, first, will you get a set-aside hearing, and then once you get to the set-aside hearing you have to prove that you didn't get served or that you couldn't make it to the hearing date and that you couldn't file your dispute. So it's a two-stage process, and you may not get the hearing at all.

Mr Caplan: It sounds very bureaucratic to me.

Ms Hurd: Yes.

The Chair: Thank you, Ms Hurd. I appreciate your taking the time to come before us, and I appreciate your crafting that amendment as well for our consideration.

Ms Hurd: I think I'll remain sitting, because I'm on the next presentation as well.

The Chair: OK, a little exceptional, but we'll indulge you.

FEDERATION OF METRO TENANTS' ASSOCIATIONS

The Chair: You're now representing the Federation of Metro Tenants' Associations?

Ms Hurd: That's right. We also contacted the committee to ask if we could make a presentation. You know who I am. I am now sitting as the chairperson of the Federation of Metro Tenants' Associations, which was founded in 1974. Our membership is comprised of tenants' associations, individual tenants and others who support our aims. Our broad purpose is to organize and educate tenants in the greater Toronto area.

We've been involved in all tenant legislation in Ontario since our inception, and in the last 10 years or so we have operated a hotline to advise tenants. We produce publications such as the Tenant Survival Guide and have trained front-line workers of community agencies to recognize the warning signs of an impending eviction with the aim of preventing their clients from being evicted. Both the training manual and the survival guide are subtitled "Helping Tenants Cope with the Tenant Protection Act."

Having had only a brief opportunity to study and prepare a submission on this bill, my remarks won't be extensive. The amendments seem to aim at making the

Ontario Rental Housing Tribunal more efficient, clarifying some rules and procedures. I would like to speak about the changes that tenants need and want, which we told this government about in the Tenant Protection Act hearings in 1996 and 1997 and which have been submitted to housing minister after housing minister and bureaucrat after bureaucrat since then, all of whom have referred tenant advocates back and forth between the Ontario Rental Housing Tribunal and the Ministry of Municipal Affairs and Housing, resulting in no one listening to tenant concerns. These concerns are many, but with the limited time we have here I will confine my remarks to a couple of those concerns.

As to disputing a landlord's application, if the government were interested in reducing red tape and bureaucracy they would look at the tenant dispute mechanism. In the past, tenants would be notified that a hearing will be held and that they could attend in person or dispute in writing. If they didn't show up, a default order would be signed. If they did show up, they could ask for a hearing before a judge or settle the matter with the registrar.

Under the Tenant Protection Act, a tenant receives a form called a Notice of Hearing, so the tenant thinks that he or she has a hearing and can attend on that day and make their case—a logical assumption. But that is not what the Tenant Protection Act provides for. Its aim is to ensure that tenants do not get their day in court. If the tenant does not dispute in writing within five days of receiving the notice, there is no hearing and tenants arrive on the day they believe a hearing is scheduled to find that there is no hearing, the decision had been made days ago. There is a statement on the form that warns of the cancellation of the hearing if no dispute is filed, but for anyone with limited literacy this message is almost incomprehensible. Having been informed that an order has been made against them, they then have to run around and apply for a set-aside and serve the landlord notice of the set-aside, which may or may not be granted, which Mr Caplan and I were discussing. Is this not a waste of time and resources for the tenant, the landlord and the tribunal? Is this not unnecessarily bureaucratic and complicated?

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Your committee heard from the Centre for Equality Rights in Accommodation, which discovered that a 70% default rate is a goal of the Ontario Rental Housing Tribunal, confirming for us the observation we have made all along, that the process of disputing an eviction is intentionally exclusionary. For the tribunal, no hearing is a good hearing. The government does not want tenants to defend themselves, and in that way they help landlords evict tenants so landlords can take advantage of the other major plum in the Tenant Protection Act: vacancy decontrol, where rents can be raised legally to whatever the market will bear. Those people on assistance or low wages are facing unaffordable rents and are forced to live in substandard housing or shelters for the homeless.

I wanted to speak on the seizure of belongings by landlords once an eviction has been carried out by the

sheriff. In this matter, more time and more red tape would help to protect tenants. When the sheriff puts you out of your home, you have only 48 hours to remove your belongings. If you don't, your landlord owns them, thanks to the Harris government. In the past, you had 30 days. If the landlord makes himself unavailable for two days, a tenant can lose all their belongings, including identification, passports, personal papers and mementos, irreplaceable photos, income tax papers, not to mention furniture, food and clothing. Two days is not much time to find the landlord, movers, trucks, storage, child care, pet care, and at the same time find a place to live.

If this were a long-term tenancy or a family, a lot of property could be lost and would take a long time to replace. In addition, low-income tenants would find few places to live that they could afford without having to deprive themselves in drastic ways.

The red tape reduction bill seems to fine-tune a lot of different matters in the Tenant Protection Act, much of which the tenant community has not sought out. Tenants appreciate clarity and simplicity and want, at minimum, the government to look into the complexity and confusion of the dispute process. They would also like a change in the ferocious efficiency of the act that allows the landlords to seize their goods after two days. We would like to see the end of vacancy decontrol, which has given a green light to landlords to pressure tenants out of their homes. The Tenant Protection Act punishes tenants and unduly rewards landlords.

Other sources have raised serious concerns about the Tenant Protection Act and the favouritism of the tribunal toward landlords. Parkdale Community Legal Services has produced a report, using the tribunal's own statistics, to show that the tribunal operates for the benefit of landlords. It can be found on their Web site at www.parkdalelegal.org.

CERA, the Centre for Equality Rights in Accommodation, was here two days ago and presented you with tribunal statistics on default rates and the tribunal's stated goal of a 70% default rate. If you are really interested in a tribunal that is mandated to serve both landlords and tenants fairly and efficiently, then you should read these documents.

We believe that the whole Tenant Protection Act and the operation of the tribunal need to be thoroughly overhauled to establish and protect the rights of Ontario's three million tenants.

The Chair: Thank you, and that gives us about—I'll be generous and say two minutes, Mr Marchese, for questions.

Mr Rosario Marchese (Trinity-Spadina): Ms Hurd, thank you for the submission. You make the point that the government does not want tenants to defend themselves. I'm assuming the Conservative members would not agree with that, but I'm assuming there's a basis upon which you make that claim. What is that basis?

Ms Hurd: The very short period and the very unclear process of disputing. If that's the start of the process, and if people miss out on that and the whole process gets

rolling, they're very much at a loss to stop the process. So when you look at something like that, if that's the start of the process and the time periods involved are so short and the decision so drastic, it's what we call gate-keeping. Especially if they've said, "We want a default rate; we have 70% default as a goal," that's shocking. You would think, for justice and fairness, they would be aiming for a goal of hearings so that both sides could be heard, so the tenants being faced with the loss of their home, their security and their stability would be able to defend themselves.

The Chair: That's our time. Thank you very much, Ms Hurd. We appreciate your double presentation.

CANADIAN WINE INSTITUTE

The Chair: Our next presentation will be from the Canadian Wine Institute. Good afternoon and welcome to the committee.

Mr Roger Randolph: Good afternoon. My name is Roger Randolph. I'm president of the Canadian Wine Institute. I'm clearly here to address schedule P of Bill 119, the Wine Content and Labelling Act. Thank you for giving the Canadian Wine Institute the opportunity to provide input on this important act.

The Canadian Wine Institute is a privately funded trade organization that is active nationally and internationally on behalf of its members, who represent 85% of all domestic wine sales and over 95% of wine exports. The total retail value of national and export sales is approximately \$780 million.

Through our association with the Wine Council of Ontario, many of whose members are also members of the Canadian Wine Institute, we have been kept abreast of developments regarding the new Wine Content and Labelling Act.

The board of directors of the Canadian Wine Institute is supportive of the provisions of the act, which are generally consistent with the existing Canadian General Standards Board national standard for wine which was published in June 1996, and amendments to that standard, which are now being reviewed in conjunction with the development of national appellation standards for VQA and other Canadian wines made from 100% Canadian-grown grapes.

Perhaps the most important provisions of the standard that impact on or will be impacted upon by the act are those relating to rules of origin. While many wines already comply with these rules, the sector has set 2002 as the date when all wines produced in Canada will be compliant. In descending order, the main content aspects of these rules, which are in keeping with practices elsewhere in the world, are as follows. In order to shorten this, I'll just say that the first three categories—estate bottled, vineyard designation and viticultural area—are all existing categories in which the wines must be made 100% from grapes grown in Canada, in the vineyard designated or in the viticultural area that's been designated.

Two new provisions are provincial designation—any wine with a provincial designation must be produced 100% from grapes grown in Canada, 85% of which must have been grown in the province named—and the other important new development is country designation—any wine with a country designation must have been produced from 75% grapes grown in the country named, for example, product of Canada.

Wines without a geographic designation: Wines that are made or finished in Canada but do not meet any of the above criteria must be labelled "cellared by" followed by the winery name and the location name in Canada, from imported or from imported and domestic wines, with the majority content named first. This was a compromise reached with the grape growers in completing the existing national standard and is already being used.

In Canada, the revolution in wine making, which spans the incredibly short period of only 12 years, has produced a succession of gold medal and double gold medal winners at the most prestigious wine shows in the world. Vineyard acreage, which declined dramatically to well below 10,000 acres following the Canada-US free trade agreement, has been, and is continuing to grow at a significant rate. I estimate present wine grape acreage in Canada at 20,000 acres, which I believe is a historical high. It is a truly remarkable achievement in any context, whether Canadian or worldwide, that the Canadian grape and wine sector will have developed to such a degree that in the space of 14 years, that is, by 2002—hardly a blip in wine growing terms—it will be in a position to meet all of the requirements of the above rules of origin on a commercially viable and sustainable basis.

Our contribution to the wine trade is recognized internationally, not only from a technical perspective but also politically. Canada is an initiator and founding participant of the New World Wine Group, which is comprised of Canada, Argentina, Australia, Chile, New Zealand, South Africa, the United States and Uruguay. As a result of wine sector initiatives of the respective participants, the governments representing the group are close to signing a mutual acceptance agreement that will liberalize wine trade among those signatories and preclude the application of any technical trade barriers related to each other's wine making and labelling practices.

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International trade obstacles faced by the wine sector are numerous and are a constant threat to its continued health. We are, therefore, especially pleased that the provisions of the new Wine Content and Labelling Act are trade-friendly and consistent with the image we have portrayed of ourselves to our MAA partners. We would like to reiterate, therefore, our support of the Wine Council of Ontario and others who are advocating the adoption of the new Ontario Wine Content and Labelling Act.

There is one other point we would like to address, with your permission, Mr Chairman, which is in regard to the type of language used in the act.

There is no doubt we would all agree that wine is an agricultural product, with the distinction that it is perhaps

the only agricultural product that continues to undergo biological change even after it is bottled. It is therefore very much a living product and is not the result of an industrial process, much as the Europeans would have the world believe otherwise of wines not made in Europe. The custom, however, of using terms and descriptions that are indicative of an industrial process is relatively widespread in the New World, and if it didn't give the Europeans the idea of referring to our wines as "industrial," it certainly plays into their hands.

In the wine sector, we are making a conscious effort to avoid industrialisms when we talk about our product. This is not an attempt to dress our wines in finery to which they are not entitled but to use the agro-biological lexicon that is inherent in the product we make.

With regard to the new Wine Content and Labelling Act, we would urge that if at all possible the word "manufacture" and its variations, which in English and in translation has strong connotations of an industrial process, be changed for the word "produce" and its variations, which in English and in translation is the most widely used internationally when referring to the making of wine. It is important to note that the European wine-producing countries only use the word "manufacture" when referring to New World wines. Thank you.

The Chair: That has used up our time, but I certainly appreciate your making the presentation and particularly the amendment in your last paragraph.

Mr Randolph: My apologies for taking the full 10 minutes. I was hoping for questions.

The Chair: Actually, I think you took the full eight. As I said, because of the rules, we're unfortunately going to have to make each presentation a little shorter because this is the only day we have to hear from people.

ONTARIO TRUCKING ASSOCIATION

The Chair: Our next presentation will be from the Ontario Trucking Association, Mr Barrie Montague. Good afternoon and welcome to the committee.

Mr Barrie Montague: I'm going to help you out—a very short presentation.

The Chair: That would be a big help. Thank you.

Mr Montague: I'm Barrie Montague, the vice-president of the Ontario Trucking Association, with special responsibility for safety and operations.

OTA presently has over 1,700 members and affiliates that represent all segments of the trucking industry. Its members employ more than 140,000 people and generate revenues of more than \$7 billion.

OTA has an interest in the HTA as it applies to the allowable weights and dimensions for commercial vehicles, in particular, the proposed amendments to section 110 of the HTA.

In the early 1980s, an extensive weight and dimensions study was carried out in which all the provinces participated. The result was a national agreement on minimum standards for weights and dimensions and, more importantly perhaps, the study provided perform-

ance standards for the operation of commercial vehicles in such things as their turning capability, their off-tracking and their rollover threshold. These standards will be used to evaluate the suitability of various vehicle combinations, both those that existed at that time and possible future ones.

Shortly thereafter, the eastern provinces started a series of discussions to harmonize the weights and dimensions regulations in all those jurisdictions and to consider gradually eliminating some vehicle configurations that did not appear to conform to those previously agreed upon national standards.

After much study and analysis, in which the industry heavily participated, OTA is pleased to acknowledge that as a first step Ontario and Quebec have signed a memorandum of understanding on an agreement to harmonize the rules as they apply to the movement of vehicles between the two jurisdictions. The trucking industries of both Ontario and Quebec are in full support of the proposals. This agreement will maintain the productivity of the industry, which will obviously be of significant assistance to the manufacturing, mining and forestry product industries of Ontario. This agreement has been achieved without increasing either the overall dimension of any vehicle combination or the gross vehicle weight allowed on a vehicle for a given number of axles.

Moreover, the performance standards that were agreed upon as long ago as 1984, I think, will be met. It will allow vehicles to be used safely and more productively in two-way moves and eliminate some empty-trailer movements, thereby reducing, hopefully, the number of trucks on the highway.

In addition, it will gradually phase out some vehicle combinations currently allowed in Ontario, those combinations being detrimental to the infrastructure. It has been estimated this will save the Ontario taxpayers \$100 million a year when this agreement is fully implemented, with less damage to the infrastructure.

The changes to the HTA proposed in the bill will allow MTO to implement the agreement speedily through a system of permits which would be strictly enforced. The permit system is necessary to allow certain configurations to be operated for their full economic life. It is anticipated that eventually the permit system will be removed. Moreover, the changes will allow the province to consider possible new vehicle combinations which would be beneficial to the Ontario economy at large. These would be evaluated on a trial basis against the standards which have been nationally accepted.

OTA urges that the proposed amendment be approved so that MTO can implement the changes as soon as possible to allow carriers to purchase new equipment. Many carriers have delayed equipment purchases for some time, awaiting the outcome of this agreement.

That's really all I have to say, and thank you.

The Chair: Thank you very much, Mr Montague. Unless there are any pressing questions, if you don't mind, to help us get caught up and back on schedule, thank you very much. I appreciate your taking the time to come before us this afternoon.

INTERNATIONAL ALLIANCE OF THEATRICAL AND STAGE EMPLOYEES

The Chair: Our next presentation will be from the International Alliance of Theatrical and Stage Employees. Good afternoon and welcome to the committee.

Mr Nelson Cross: Good afternoon. My name is Nelson Cross. I'm the president of local 173 of IATSE. With me is Dominic Marconi. He is the business agent for local 303, Hamilton.

Our concern is the potential elimination of projection licensing under Bill 119 and that's why we're here today to talk to you. I'm not going to read 100% of this. I've timed it and I know it goes too long. I'd like to leave room for questions.

We used to have just over 300 members and now we've got down to around 160. This is due to previous provincial legislation and hard bargaining. There was an unfortunate five-month lockout by Cineplex Odeon in the fall of 1996. That resulted in quite a number of job losses, but prior to that we had a 90-year history of no labour conflict with our employer. In September 1995, we made presentations to the Ontario Labour Relations Board, resulting in the reaffirmation of our craft status. In February 1996, the Honourable Norm Sterling introduced legislation that eliminated the requirement for serving apprenticeship hours prior to undertaking projectionists' exams.

Our organizational objectives are to ensure adequate employment of our membership, addressing health and safety issues within the workplace, resolving workplace conflicts and improving the employment conditions of our members via the collective bargaining process.

Our members, despite the lack of any government legislation dictating a minimum number of apprenticeship hours prior to writing the Ministry of Consumer and Commercial Relations, theatres branch, examinations, typically serve a two- to three-month theoretical and practical training program.

Since the elimination of apprenticeship hours prior to writing the projectionists' exam, the level of training provided by employers to the—we call them non-bargaining unit employees in the collective agreements. They are basically the people who are either management or supervisors who look after the presentations when we're not there. Typically, theatres run 96 hours a week. We are limited under contract to 40, so a majority of the hours are run by non-unionized individuals. They do have problems, some of them very rudimentary: circuit-breakers that don't work; they trip, shutting off shows. It just shows a lack of basic understanding of the trade.

Although our employers would apparently have you believe that operating current projection booth equipment is comparable to inserting a VCR tape into a player or a DVD disk, it's far more complicated than that.

We have addressed a number of areas. Number one would be the high-pressure xenon bulbs. The ones that are currently used are considerably more unstable than ones that were used just a few short years ago. The size has more than doubled. They were a 1-to 2-kilowatt size;

now they're a 4- to 6-kilowatt size and even higher than that in some locations. The reason, to quote my employer, is "Big screen, big sound." The screens are so large that you need a larger bulb with a higher output. As you get into a higher output, you can imagine that there is a higher temperature that goes with it. The dangers of a higher temperature around oil possibly leaking from the projectors and a dirt and dust combination are potential fire hazards.

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The other thing too is that the bulbs are more inexpensively made now than they were a few years ago, and the potential for explosion—I think I've had at my complex in the last two years eight blow up in use, which creates quite a lot of damage to the equipment. Luckily, so far no one has been seriously hurt by any explosions outside of the lamphouse environment. No one has had a bulb, to the best of my knowledge, blow up in their hands or anything like that, but the potential exists because of the manufacturing methods.

We have a high-voltage system. We're running a three-phase 220 volts into the projectors. There are high-voltage capacitors and igniters that are used to ignite the actual xenon bulb, the bulb that's filled with xenon gas to give you your bright light on the screen. A concern from the public standpoint is a safety consideration. To my understanding, most projectors could be outfitted with a safety interlock so that once the bulb extinguishes, the house lights come up so the people are not sitting in the dark. Unfortunately, the exhibitors have chosen not to put that on as an option, so typically, if a bulb fails during a presentation, the patrons are sitting in the dark. It's not so bad in the theatres that were built in the 1960s and 1970s because they're typically flat. Today's theatres are what they call stadium or sightline seating. You have stairs. Someone going down the stairs in a darkened environment to attempt to notify management or staff of a problem could be in a serious situation.

As I say, we're only there for less than half the time. When our members are there they're typically doing maintenance to the equipment on an ongoing basis to try to keep the equipment running. The people who are running it when we are not there unfortunately are not as well trained and time-wise just can't do it.

Flammable film stock: We have a video, a trailer. I believe Robert McPherson was in on Monday and showed you how it wouldn't break. This is a video of the same trailer that he ignited in his garage yesterday. We won't show all of it. It's about a minute and a half long. I asked if I could do a live demonstration, but apparently not. There we go. This was in no way altered or doctored at all. You can see the barbecue lighter that Rob used to start the film. He simply coiled it up in an aluminum foil pan. This is supposedly called "no-burn" film. It's not no-burn. It's slow-burn. It does burn. In your packages you'll find a two-page report of a fire that occurred in a theatre in Kitchener last year. I guess we can stop the tape.

The other thing we would like to talk about is some of the exhibitors' arguments for eliminating licensing. There

is information here about the possibility of doing training or licensing through another process, perhaps with the Ministry of Training, Colleges and Universities skills centre or MCCR regional offices. One of the problems they're complaining about is the cost of bringing people down to Toronto to test them. There are other ways to do it. Perhaps the examination is not relevant to today's equipment and standards. We're ready to help update the exam, if need be.

Finally, the last is digital. This seems to be a big push. "Hey, we're going to have digital, we're going to have DVDs, so let's get rid of licensing right now." Most industry experts would say that's 10 to 15 years away. You're looking at \$100,000 per screen. In my complex I have 12 screens; 12 times \$100,000 to renovate, on top of \$44 million which they spent two years ago to build the complex. The revenues are just not there right now. This year in particular box office receipts are down. I think everyone is aware of the situation financially with Cineplex Odeon: a US\$650-million default perhaps sometime later this fall. AMC is not building any more theatres; Famous Players Newmarket is the last complex. They're not building any more. The investors have said, "Enough is enough. Let's see a return." So I don't really see the situation of digital coming up quickly enough to warrant changing the legislation right now.

The Chair: You've timed that perfectly. You have used up your time. I think you indicated that same trailer was for Blair Witch 2. I wish they had burned the entire film before I went in to see it last week, but that's another story.

Thank you very much. I appreciate the detail and I'm sure the members will have an opportunity to read it in its entirety. Thank you for coming and making a presentation before us here today.

CANADIAN LIFE AND HEALTH INSURANCE ASSOCIATION

The Chair: Our next presentation will be from the Canadian Life and Health Insurance Association, Mark Daniels. Good afternoon and welcome to the committee.

Mr Mark Daniels: Good afternoon, Mr Chair. The submission we've put before you, and I think I've moved around to most members, consists of two pieces: a thin piece and a fat piece in blue covers. I'll just talk to them in my allotted time, or less.

This submission provides comments on the proposed amendment to the province's Insurance Act regarding viatical settlements set out in schedule G of the bill.

A word or two about these things: a viatical settlement allows a person to sell his or her life insurance policy to a viatical settlement provider. The person selling the life insurance policy is the viator and gets a cash payment from the settlement. This person gives up ownership of the policy in return for that cash payment and the payment is less than the full amount of the death benefit of the life insurance policy. Typically, the viator has a terminal illness, with 24 months or less to live.

Viatical settlements are currently illegal in Ontario because section 115 of the Insurance Act prohibits the "trafficking" of life insurance policies. Under these proposals, section 121 of the Insurance Act would be amended to allow persons to be exempted from the trafficking provision by regulation. At the moment, in Ontario persons with a terminal illness do not require access to viatical settlement mechanisms to access their life insurance benefits while still alive. They already have access to something called living benefits, widely available in many countries today. Living benefits in fact were first introduced in 1988 here in Toronto by a leading insurer. The insurer undertook a compassionate initiative that has become known as accelerated living benefits for the terminally ill. Other insurers quickly followed this example and, as a result, most life insurance companies now grant requests from terminally ill insured to receive, during their lifetime, a portion of the death benefit of their life insurance contract.

It's important in this context to know that the balance of the face value of the policy, in the case of living benefits, remains payable to the beneficiary of the policy. That is, unlike viatical settlements, living benefits do not involve discounting the policy and passing the ownership over to a third party.

Viatical settlements are currently illegal in the majority of Canadian jurisdictions. In the US, the viatical settlements marketplace has developed and become quite active in recent years. In part, this can be attributed to the more limited use of living benefits options by insurers in the US and I think perhaps, more importantly, to the reduced availability of public health care services in the US, which is to say that terminally ill patients there may require substantial financial resources to obtain medical and hospital care.

The US viatical settlement market has been characterized by widespread fraud and abuse of viators, including insufficient disclosure and payments that constitute a much reduced percentage of the face value of the policy. Really, it's that concern that brings us in here.

Another problem area underlined in the US experience involves privacy. Viatical settlement providers and their investors are compensated through the payment of the purchased policy's death benefit. To ensure prompt notification of the death of the insured and submission of claims forms to the insurer, the viatical industry tracks the health status of those insured individuals. This has led, as you might well imagine, to significant complaints about insensitivity and the need to limit contacts between viatical companies and the insured individuals.

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In addition, concerns have developed over the identification of viators to unlicensed secondary market investors in viatical settlements. The viatical industry maintains that these investors need to be assured that the viatical settlement transaction is legitimate, and having the identity and address of the viator provides this assurance. Critics have argued that there are no standards imposed on persons wishing to become an investor in

viatical settlements, which raises the concern that unscrupulous investors may be tempted to treat the insured in an insensitive manner or, indeed, dare I say, worse.

Given the extremely problematic nature of the US experience, and in order to avoid a repetition of the problems that are demonstrated by that experience, it is our industry's view that it is not prudent to rush ahead with the viatical settlements proposal contained in Bill 119. The extensive experience of abuse has attracted a great deal of concern and attention by US insurance regulators and the press. The seriousness of these abuses can be seen more clearly from a perusal of the articles contained in the attached fat annex, which is only a sampling of publicly available press in the last six months. I would urge you to cast your eyes on it; it is a horror story in the making.

In the Ontario context, we believe a more responsible approach is to develop a robust system of regulation that will avoid the negative effects that are evidenced in the US experience before making such transactions permissible under Ontario law. The point is, those consultations need to occur before a law permitting viatication is passed, in order to provide time for careful and sober reflection on the complex regulatory issues involved.

Therefore, we urge the standing committee to recommend that schedule G be removed from Bill 119. This would permit the government to introduce a separate bill on viatical settlements, which would allow prior development of a rigorous regulatory model and permit due attention to be given to the important issues involved.

If the standing committee does not wish to adopt that recommendation, as an alternative, we urge you to recommend in your report to the Legislative Assembly that schedule G of Bill 119 not be proclaimed into force until the standing committee has had an opportunity to review and approve the regulations on viatical settlements that would be made pursuant to the amendments contained in schedule G.

The Chair: You've timed that perfectly. I do appreciate the detail that you've given us here. Thank goodness we've got over a week to consider proposals before we come back for clause-by-clause. You've given us some good reading material for that so-called week off. Thank you very much for your presentation here today.

MOTION PICTURE THEATRES ASSOCIATION OF ONTARIO

The Chair: Our next presentation will be from the Motion Picture Theatres Association of Ontario. Good afternoon, gentlemen. Welcome to the committee. I wonder if you might introduce yourselves for the purpose of Hansard.

Mr Norman Stern: Thank you. My name is Norman Stern. I'm the president of the theatre owners' association of Ontario. This is Jim Foote, who is a director of our association.

For many years this association has been trying to eliminate the licensing of projectionists. This has been an

issue across the country and many of the provinces have already de-licensed projectioning. BC, Alberta, Manitoba and Saskatchewan go back at least 10 years now where there hasn't been any licensing. On the east coast, they are all under review—I think one now in Nova Scotia has gone through—and they are all in the process of doing this de-licensing.

Licensing came about a long time ago because there was a danger in safety. Because of the difference in technology today, the safety issue is taken out of this equation, even though the IATSE union representative said there is a chance of fire. It used to be nitrate film where there was a serious fire threat. Now the fire is down almost to nothing, with automatic shutoffs, safety firewalls and what have you, and all of this is already regulated with inspectors who go around on a regular basis checking that everything is done in a proper manner. So this is almost a redundant thing at this point.

The equipment has changed so much at this point in the technology that the exam for licensing is really outdated and not of much value any more. The exam basically trains people how to repair equipment, that type of thing, which isn't done by projectionists anyway. There are outside companies that are hired on a regular basis to repair and maintain the equipment, and they visit theatres on a regular basis or whenever the need arises.

It's a very costly process for theatre owners to license projectionists. There's a training period and there's travel time to Toronto, because usually the licensing could only be done in Toronto and only at a specific time up at the censor board, and it was a very inconvenient process for everybody.

Our association takes the stand that we're spending many hundreds of thousands of dollars on this equipment and we aren't going to allow anybody in to these projection booths who's not qualified, because with the damage they can do from a financial point of view it just doesn't make sense for us not to train the people properly.

What we've found in some of the smaller towns is that we've been limited by who could apply to become projectionists. Because you needed a licensed projectionist in the booth to do the training of other projectionists, they sort of controlled the system, and when you got into smaller towns there would only be maybe one projectionist and he would either not want to do it or not be co-operative in lieu of protecting his own job. So that became an issue and stopped a lot of people who wanted to apply for this kind of apprenticeship, and it didn't allow them to do that.

There's a settlement in place now with the two major chains, Famous Players and Cineplex Odeon—I think it's also in place with AMC—for the projectionists, and I think it extends for another two or three years. It's not the aim of our association to not use union projectionists; we just want to have the right and the freedom to use the best person for the job at a reasonable rate and not be held hostage in a lot of these cases.

Over the history of licensing, there was at one time a ridiculous requirement of 800 hours to train a projectionist. A projectionist can realistically be trained in about a 40-hour period to run these machines and do it in a safe, capable manner. So we've had roadblocks along the way. I think, as you'll see, the other provinces demonstrated, going back 10 years, that there haven't been any safety issues that I know of. There haven't really been any fires or anything, and we have a 10-year history to that point.

Another issue, and you'll see it in the submission, was revenue. It's the last page, "Costs Associated with Projectionist Licensing." We train around 200 people a year for this, to do this training process. Many dollars are spent through the training and the licensing itself, in the neighbourhood of about \$300,000 a year, and the government receives a fee of \$26,000 to do this. I think that just offsets the cost of doing the licensing.

Our association's position, in summing up or recapturing our proposal here, is that we don't feel anything would be sacrificed by de-licensing the projectionists. Theatre owners are extremely responsible in running their operations, and from a cost and convenience point of view it would really help us as an organization.

The Chair: Thank you very much. You're bang on your time, but I appreciate your coming and bringing your perspective to our hearings here today.

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VINCOR

The Chair: Our next presentation will be from Vincor, Mr Bruce Walker. Good afternoon and welcome to the committee.

Mr Bruce Walker: Good afternoon, Mr Chairman and committee members. Thank you for inviting me here today to provide input on Bill 119, specifically schedule P, which deals with the subject of wine content and labelling in Ontario.

The Wine Content Act represents an important framework which has provided, and will continue to provide in the form it's taking in the new Wine Content and Labelling Act, the Ontario winemaking industry with clear direction with regard to the manufacture, bottling and labelling of wine in the province.

Following the free trade agreement 12 years ago, both grape growers and wineries took advantage of a co-operative government funding program to replant vineyards and retool production facilities in order to remain competitive going forward in a market environment which was in a rapid state of change. Consumers were increasing their demand for table wines, and wine-producing countries from around the world were aggressively responding to that demand here in Ontario.

During the relatively short transition period since FTA, which is only 10 or 11 years, the Wine Content Act has enabled Ontario wineries to produce quality wines at a range of different price points to compete in the Ontario marketplace, which has been, and will continue to be, our primary market, given access limitations to foreign

markets. While the Vintners Quality Alliance, or VQA, was established in 1989 as our premium 100% Ontario wine appellation system, and has successfully demonstrated our ability to produce world-class wines, the Wine Content Act also allowed our wineries to produce and market blended wines, utilizing up to 75% imported wine with Ontario wine to enable us to compete with the low-priced, imported, subsidized table wines which had open access, and continue to have open access, to the Ontario marketplace through the LCBO.

Most of these popular blended Ontario brands have significantly increased their local per cent grape content as the newly planted and replanted Ontario vineyards have come on stream with the preferred grape varieties the consumer is demanding. Presently most of the popular Ontario white blended brands contain 85% to 100% Ontario grape content. These are the whites, brands like L'Ambiance, Domaine d'Or, Entre Lacs, French Cross, Spumante Bambino. Brands we're all familiar with and that have been around for a while and continue to do large volume are now in most cases 100% Ontario. In fact, the current aggregate average of Ontario content for all wines bottled by Ontario wineries exceeds 50%. That's on the low end; it could be as high as 60% with last year's crop, for which we took the entire crop of 44,000 tons, over 35,000 the previous year. The aggregate content of Ontario wines continues to increase, so any reference to 30% minimum should be taken in the context of an average of 60% or thereabouts.

Since premium red grape varieties have been slower and later, obviously, to come on stream in Ontario vineyards to satisfy a recent market shift to red wines, the increased content for red blends has been slower to materialize, ie, we haven't had the red grapes out of our vineyards yet to fulfill our needs. Ironically, perhaps, the success and growth of VQA wines, which is a good thing, has limited the availability of quality grape varieties to satisfy the needs we have for our popular Ontario vinifera blended brands such as Peller Estates, Jackson-Triggs and others that you're familiar with, where we have Chardonnay, Sauvignon Blanc and Cabernet Sauvignon, requirements for those big, successful popular brands that do sell instead of imported wines in this province.

Many Ontario wineries have signed long-term contracts with specific growers to ensure that their forecast needs will be satisfied and to provide an assurance to the growers that there will be a return on their vineyard investments. We at Vincor have all of our growers under contract with long-term contracts and provide to some of our growers interest-free loans for plantings, replantings and commitment to those plantings.

It's estimated that Ontario wineries which purchase from independent growers are currently contracted for 60% to 70% of their projected grape requirements. So what I'm saying is, three quarters of the growers out there growing 70% of the grapes are contracted. Not surprisingly, the majority of the contracted growers operate larger, more efficient, profitable vineyard operations and

therefore are consistently producing the premium quality grape varieties to meet our market needs.

Just a reference to the Ontario Grape Growers' Marketing Board and Wine Council of Ontario negotiations and working together over the last few years: in anticipation of the sunset of the current Wine Content Act in December 2000, the Ontario Grape Growers' Marketing Board and Wine Council of Ontario created a working task force, which met over an 18-to-24-month period in 1996 to 1998—and I at that time was chair of the wine council, so I was at every meeting—with the goal of developing an industry strategy which would provide a seamless transition into the new millennium, and which would serve the interests of both growers and wineries, ensuring a viable, sustainable Ontario wine industry for generations to come.

At the end of this process, a strategic plan document was issued. I've included that in the package so you can go through it. It was developed jointly by us with an independent facilitator outlining a roadmap of fundamental agreements on strategic priorities going forward. While we were unable to finalize implementation timing, we both agreed that the Ontario Wine Content Act should be replaced by the national wine standard, which was published in June 1996. When I say "replaced by," the current Wine Content Act that's in play here as the new act in fact is a full reflection of the national wine standard, which both of us agreed was where we should go. What we didn't agree on was timing.

The grape growers wanted it to happen the day after the sunset, which would have been January 1, 2001. We said we needed a transition period because there still weren't enough grapes in the ground. We agreed to disagree on that one, and we really couldn't find common ground. But with the additional grapes, that would have allowed us to achieve the 75% content so we could still call all of our wines "Product of Canada." After further negotiation, we, the council, proposed 2005 as a drop-dead deadline date when we could get content and labelling to comply with the standards. The growers said, "No, let's do it January 2001."

In response to a formal request recently from Sandra Lang, deputy minister, MCCR, as part of a larger process established by this government to develop a long-term strategic plan, we agreed to April 2002 with immediate implementation of the labelling, so that as our inventories run out, we're in. In fact, I know in our case and in Andres's case, the two larger wineries, those labels are on the shelf today and are starting to flow into the system. So we're there.

While those wineries with large, established blended brands believe there is significant downside risk to sales volume in this immediate change, they are prepared to take that risk now in order to get on with the development of a new strategic plan, which will come out of the current government-endorsed-and-driven strategic planning process where all stakeholders are at the table, and which we are confident will serve the long-term interests not only of the growers and the wineries but on behalf of

this sector of the agricultural and industrial base of the Ontario economy.

Most of our members are also growers, including ourselves. We are aware that many independent growers have concerns and issues that need to be validated and which are open for us to discuss and work together toward a mutually satisfactory resolution. We have great confidence in the prospects for a sustainable future for this agricultural-based industry and are passionately committed to ensuring it achieves its full potential.

The Chair: Thank you. Again, you've timed it perfectly. We appreciate your taking the time to make a presentation before us here today.

Mr Walker: Any questions? I have some more folks from the wine council, as well.

The Chair: I know we're going to be hearing from a few more people immediately.

HENRY OF PELHAM
FAMILY ESTATE WINERY
WINE COUNCIL OF ONTARIO

The Chair: It's my understanding that Henry of Pelham has indicated they're willing to share their time with the wine council or vice versa. Perhaps they'd do that now. Good afternoon. Welcome to the committee.

Mr Paul Speck: Thank you very much, Chair and committee people. I'm Paul Speck, president of Henry of Pelham winery and chairman of the Wine Council of Ontario. Linda Franklin is the executive director of the wine council. We're going to combine into one presentation to keep this tight.

As you know, the amendments to the Wine Content Act are included in Bill 119, and this is the part of the bill I wish to address today. The Ontario wine industry supports the amended act, which comes forward after more than two years of discussions with growers and wineries. The act and the accompanying regulations reflect many of the common principles in our discussions.

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Firstly, the act includes a greatly increased domestic content for wines labelled "Product of Canada" and "Product of Ontario." The old Wine Content Act required our industry to have 30% domestic content to call wines "Product of Canada." This rule was put in place to help our industry deal with the aftermath of free trade, when most of the grapes we were using to make wine had been ripped out so that fine wine grapes could be planted. To help us weather this transition without going out of business, the Wine Content Act allowed our industry time to replace and replant fine wine grapes. As our new plantings came on stream, we raised the domestic content of our wines so that today many of our non-VQA wines are 100% domestic content and, taken in total, our wines are now over 60% domestic content.

Our industry has completed a really remarkable transition successfully, and the new Wine Content and Labelling Act recognizes this transition in its new content

requirements. These new provisions are in keeping with national standards now in development. New acres of wine grapes have been planted in sufficient quantities to increase the domestic content in our non-VQA wines from 30% to 75%. This change has happened in an amazingly short time for an agriculturally based industry. We are very pleased that the partnership between the government and the industry has allowed this transformation to take place so rapidly.

VQA wines will continue to be 100% domestic content and our industry will continue to put increased VQA wine sales in the forefront of our plans for the future, along with new winery development and new plantings of fine wine grapes. It is important to recognize that our industry sees its future in the production of ever-increasing volumes of VQA wines. These wines represent the greatest source of growth in our industry today, and a great deal of the industry's focus, from grape planting to winemaking to sales and marketing, is directed to the long-term success of VQA.

In fact, we need virtually every premium grape currently planted, plus every available acre of land in Niagara that can grow grapes to be planted with vinifera grapes over the next few years in order to reach our goals for the future growth of VQA and our domestic wine portfolio. Right now the VQA represents just 20% of our market, and we expect that percentage to grow in the years ahead.

As we continue to grow the VQA category, we also intend to hold a significant portion of the market in other categories, including the most competitively priced segment of the market, which represents a great deal of wine sales. We need to be in the marketplace with value-priced wines that offer a chance to replace low-cost imports in consumers' shopping carts. Some of these wines will also be 75% to 100% domestic content, while others will use a blend of domestic and imported content to create price points and taste profiles that appeal to consumers who might otherwise buy foreign wines such as Piat d'Or or Kressman.

By building the VQA and our domestic portfolio with our fine wine grapes and using import and domestic content to develop competitively priced wines that can beat the imports at the low end of the market, we can ensure that every grape planted in Ontario has a home and that our industry grows from currently \$300 million in sales to \$1.5 billion in sales over the next 20 years.

The act and its regulations will help clarify the range of wines we offer by providing greater clarity in labelling to help consumers understand what is in the bottle of wine they buy in Ontario. Again, these changes put Ontario in the forefront currently of what's being considered at the national level for all Canadian wines, and they are changes that our industry is already implementing in Ontario and British Columbia.

A minimum domestic content of 30% will be required for wines that are labelled "Cellared in Canada." These are wines that do not have sufficient domestic content to be considered "Product of Canada." The new labelling

provisions will mean that these wines will carry the words "Cellared in Canada from imported and domestic wines" on the front labels, giving customers a clear indication of the origin of the product in the bottle.

Under the national standard being finalized, "cellared in" wines in the rest of Canada will be able to have as little as 1% domestic content, but in Ontario the minimum domestic content is higher. In that way, we can ensure a long-term home for grape varieties which are not needed for VQA wines or wines that are "Product of Canada."

These are often our most competitively priced wines, and they compete with high-volume, highly subsidized imports. The term "cellared in" was chosen for these wines as part of the development of a national standard. It was the result of a great deal of compromise and discussion among 40 individuals and organizations represented at the national standards table.

As well, the new act removes from the industry the purchase quota. This was unprecedented in agriculture in Ontario.

It is our belief that the amended act represents a fair approach that will set an appropriate foundation for our industry in the future. Without question, our industry is facing challenges at the moment, including the fact that our market share has declined by 6% over the last three years in our home market.

As a result, we are working with the government, the LCBO and the growers to develop a strategic plan for the industry. This plan will help us turn that trend around and create growth rivaling growth in the other wine producing regions such as Australia and California. Ultimately, growing our market by convincing more consumers that Ontario wines are the best wines, the best option for quality and value, is the best guarantee of long-term success and health in our industry.

Once finalized, we will be sharing our strategic plan with all our stakeholders and using it as the basis for our future success. In the meantime, the new Wine Content Act is an important step forward in creating a stable environment for growth. On behalf of the industry, I urge you to support this act.

Thank you very much for letting me have the time. If there are any questions, I'll be happy to answer them.

The Chair: Did you wish to add anything, Ms Franklin?

Ms Linda Franklin: I think Paul has done a terrific job of summarizing our position. Just two quick points for emphasis. The act is absolutely in line and consistent with what we're doing nationally right across the system: government, industry, growers and liquor boards. It's forward-thinking and it deals with labelling so that consumers know exactly what's in the bottle, which seemed to be the big issue really around the old Wine Content Act requirements. We're very happy with it, and it's part of a long process of consultation.

The Chair: Thank you very much for making your presentation today, and particularly for helping us out of our time bind.

CLINIQUE JURIDIQUE COMMUNAUTAIRE
DE L'UNIVERSITÉ D'OTTAWA
UNIVERSITY OF OTTAWA
COMMUNITY LEGAL CLINIC

The Chair: Our next presentation will be from the University of Ottawa Community Legal Clinic.

M. Michel Landry : Bonjour, monsieur le Président, membres du comité. Mon nom est Michel Landry. Je suis avocat-directeur de la Clinique juridique communautaire de l'Université d'Ottawa. I have with me Mr Peter Keen, who is a student caseworker from the tenant division. Also, we have Guy Régimbald, who is the student responsible for our being here today.

Le but de notre présentation est de vous offrir notre expérience et nos recommandations pour les modifications à la Loi sur la protection des locataires. Nous sommes au tribunal à toutes les semaines et donc on a une bonne connaissance du processus. On va adresser trois points en particulier aujourd'hui. Le premier est la question des dommages; le deuxième, le droit à réintégrer le locataire et lui remettre possession des lieux.

If time permits, we would like to address a third issue, which is not in the proposed amendments. In the context of the red tape bill, the purpose is to reduce administrative formalities, and we must look at changing or amending the written dispute mechanism that's in place right now and the burden of proof on default judgment.

Le premier point est le droit aux dommages. Nous supportons cette modification aux articles 34 et 35 de la Loi sur la protection des locataires. Celle-ci vient clarifier la compétence ou le droit non équivoque du tribunal d'adresser la question de dommages subis par le locataire.

Le tribunal se donne raison, ce droit en vertu de la clause fourre-tout qu'on a dans l'article, c'est-à-dire l'alinéa 34(1)5 et 35(1)e, qui est de « rendre toute autre ordonnance que le juge trouve appropriée. »

Pourquoi ce changement ? Il y a plusieurs raisons : d'abord, parce que ce droit existait dans l'ancienne loi, la Loi sur la location mobilière, or the Landlord and Tenant Act. Les tribunaux accordaient antérieurement sans équivoque des dommages en vertu du même article fourre-tout avec les mêmes mots : accorder toute ordonnance que le tribunal juge appropriée. Il est clair qu'en créant la Loi sur la protection des locataires, vous aviez, en tant que législateurs, l'intention de maintenir ce droit, d'où l'utilisation du même langage dans la nouvelle loi.

Troisièmement, pourquoi ce changement ? Parce que le tribunal du logement est très divisé. À toutes les semaines on entend parler qu'un tribunal décide d'un côté et décide de l'autre côté qu'on a le droit de donner des dommages. Donc, il faut vraiment clarifier cette situation-là, parce qu'on a des décisions qui sont différentes. Qu'on soit à Thunder Bay, qu'on soit à Windsor, qu'on soit à Toronto ou à Ottawa, on arrive avec des décisions différentes. Certains tribunaux disent ne pas avoir le droit, d'autres avoir le droit. C'est clair selon nous, en vertu de la loi, qu'on a le droit.

1710

Donc, pour une question d'équité et pour une question administrative, pour régler ce problème-là, nous suggérons fortement, tel que recommandé dans les modifications présentées, de modifier le 6(6) et le 6(7) de l'annexe K de la Loi de 2000 visant à réduire les formalités administratives.

Mr Peter Keen: I'm going to be making some submissions on the changes in subsection 6(8) of schedule K, which are obviously the changes to the Tenant Protection Act.

The changes I'm referring to are the changes that would add an additional remedy to the act. This section would allow the tribunal to put a tenant back into possession if that individual had been illegally evicted. The problem with this change as it's currently proposed is that it's never going to be available as a practical matter to tenants in this province.

There's a very, very low vacancy rate in the province. You can see that from some articles we presented at tab 7 of our written submissions. Because of this, rental units are very, very quickly re-rented. They can be re-rented in a matter of days, certainly in a matter of weeks. It normally takes two or more months to get a hearing for a tenant to apply to the tribunal. If the tenant applies, you're usually looking at a hearing at least two months away.

The remedy that is proposed in the act is an excellent remedy. We do support the remedy being introduced but, unfortunately, it's only available if the rental unit has not been re-rented. As a result, the remedy is never going to be available on a practical basis, because every time you come to a hearing, the place will always have been re-rented.

The only way to make this remedy available practically is to allow the remedy to be issued on an interim basis. In our submissions on pages 16 to 18, we have proposed some wording that would allow this remedy to be issued on an interim basis. That wording is summarized on page 19. Those are my submissions on that point.

I did have a comment. This was raised earlier when Ms Hurd from Kensington-Bellwoods was here. She was questioned on the default rate. In tab 12 of our submissions we've got a copy of the CERA report. On page 4 of that, it indicates that the default rate is over 50%. There was a recent article from the Toronto Star, I believe—that is under tab 11—entitled "Easier Evictions 'Buried' in Bill." They report the default rate as 64% in this last year. In the previous year it was substantially lower; I believe it was 9% lower than that. So there is an extremely high default rate currently in the province.

The Chair: We have about two minutes. This time I'll go to the government.

Mr Joseph Spina (Brampton Centre): Merci, Monsieur Landry. I gather from the tone of your English that it is fairly good in understanding. I appreciate your presentation.

We had a presentation the other day that mentioned the concern that rather than the tribunal actually issuing the notice as part of this, it would be done basically by staff to sort of speed up the process, if you will. The concern they indicated at that time was that staff would be prone to errors because of a backlog, as opposed to a tribunal actually issuing the notice.

I countered for the sake of the discussion, really, that one of the things we get criticized for—that any government, frankly, of any stripe, is criticized for—is that people in these tribunals are in fact political appointments and might be biased one way or the other, whereas the staff that works with these notices day in and day out would have perhaps a fairer understanding.

I just wondered what your opinion would be on those issues.

Mr Keen: We are definitely concerned about that section. As to whether there is a bias, I believe the individual members are appointed for a number of years. The members who are appointed as members of the tribunal are judicial officers. They are given statutory powers to make decisions over individuals' lives. Taking these powers and putting them in the hands of a staff member, in our opinion, is a very dangerous precedent to be setting.

The Chair: Thank you very much. That's used up our time. I appreciate your making the trip down here and the thoroughness of your presentation.

PARKDALE COMMUNITY LEGAL SERVICES

The Chair: Our next presentation will be from Parkdale Community Legal Services. Good afternoon, Ms Mahoney. Welcome to the committee.

Ms Elinor Mahoney: Thank you very much. As my brief is being passed out, I'm sure after listening to some of the depositions today you'd all like to join me in putting our feet up, having a glass of wine and watching a good movie, but instead, all of us have to be here a little while longer.

I'm here today to talk about the tenant provisions of Bill 119. I'm here today representing the Tenant Advocacy Group. I'm going to focus on some of the problems that we see with Bill 119, but I want to draw your attention to the first section of our brief, which talks about the sections of the act that we are in support of. That's on pages 1 and 2 of the brief. But I want to focus mainly on the problems that we see in an attempt to get the government members to urge the withdrawal of a couple of the proposals that are in the bill.

Two amendments proposed by the government go beyond the scope of red tape, in our opinion, and in our view they take away the tenant rights of a sizable number of people in Ontario. Subsection 6(1) narrows the definition of "landlord" to exclude head tenants who share accommodation with other tenants. By implication, then, it excludes these other tenants from enforcing their rights as tenants under the Tenant Protection Act. The

kind of situation you see is where a tenant rents a house or a large apartment and then casts about to find other tenants to help share the rent. It happens a lot, particularly in student housing.

In situations where every tenant's name is on the lease and the landlord is collecting rent from each tenant separately, these amendments will not affect those tenants. But in many cases, the other tenants are not given the choice of having their name on the lease, or else, for administrative ease, the landlord wants everybody to pay the rent to a head tenant and deal with the head tenant exclusively. In that case, the head tenant recruits the roommates, collects the rent and then writes one cheque to the landlord every month.

In that case, what obligations should the head tenant have to the other tenants and what rights should they have as renters who are faithfully paying their rent every month? We see that the government amendments would relieve the head tenant of any obligation to the people he is sharing his or her accommodation with. The head tenant, then, would be free to lock out another tenant or to raise the rent, without any regard to the rent rules established by the Tenant Protection Act. In other words, a head tenant would have a flexibility currently denied to landlords under the Tenant Protection Act.

The under tenants, as I will refer to the other tenants, would have no remedy under the Tenant Protection Act for anything. They could not be reinstated following a lockout and they could not obtain a return of illegal rents or an order prohibiting harassment. Instead, they would be treated as though they were guests, not paying tenants, which, in our view, they are.

1720

The issue here is not whether the landlord of the building who rents to the head tenant should have any special obligation to these people that the head tenant has chosen. That much is fairly clear, that the landlord is twice removed from that situation. But the question is, in case of a dispute, should there be a mechanism to get these under tenants before the tribunal in case mediation fails? We say yes, there should be. If you vote for these amendments, there won't be. There won't be any way these people can use the only body that has jurisdiction to deal with tenant disputes to deal with their own tenant disputes. We ask you therefore to vote against this amendment or to withdraw it.

We also want to point out that subsections 6(21), (22) and (23) permit head tenants to charge their roommates key money, seize penalties, and it actually permits them to make money from renting out to other tenants by charging a total rent to the other tenants that is higher than the landlord is allowed to charge to the head tenant. Once again, it's giving a head tenant a flexibility and escape from the law that landlords do not have in Ontario now. We can't see any public policy argument in support of this, and in fact we haven't heard any in support of it. We're asking you to withdraw this because we see it places tenants in a very precarious position when they are forced to rent accommodation on a shared basis. It denies

them an opportunity to resolve disputes in an appropriate manner and it creates a situation that might allow exploitation by head tenants of other tenants. We don't see this one as deserving of support.

I'd like to spend just a couple of minutes in also urging you to accept some additional amendments. You've heard from our friends at the University of Ottawa. I think their proposal is a very good one. They have an interim measure with respect to an illegal lockout situation that would therefore prevent the landlord from re-renting until the case could be heard. I think that would be in everybody's best interests.

There are also some amendments we'd like to suggest that are not in the bill at all that we think ought to be in the bill. One of them is with respect to enforcing the law where a landlord has evicted a tenant legally but will not allow the tenant access to pick up his or her goods. The law says the tenant has 48 hours to do that. Quite frankly, we think that's a little short, but that's what the law says. What we've discovered is that some landlords just will not let the tenants in to pick up their belongings after they've been locked out by the sheriff. We think this is appalling, but in fact it's not even an offence under the act for a landlord to refuse to allow the tenant in. The law says the tenant should be allowed to get in and get their goods and the landlord says, "No, I'm not going to let you in," and there's no law, there's no way of enforcing this by the tribunal, and it's not an offence under the act.

We'd like to see your committee consider drafting its own amendment and adding it on to Bill 119 that would make it an offence for a landlord to deny entry to a tenant and, secondly, would increase the 48 hours to a more reasonable basis. We would also like to see you draft an amendment, if it's possible, that would give the tribunal jurisdiction in this so that the tribunal would be able to help the tenant assert their rights under the act.

The final thing I'll mention concerns the notice of hearing. You've heard a lot about it from other people and I'm not going to repeat what is now common knowledge, that is, that tenants do not understand the notice of hearing and some tenants are getting default judgments against them because they don't understand how to prevent that from happening.

I've included in our brief a copy of a draft notice of hearing that we submitted to the ORHT in good faith, and their correspondence and ours in return. There seems to be a delay in dealing with this. It doesn't seem to be a priority of the tribunal. So we are coming to you to say, can you just abolish the need for a written dispute and go back to the previous method? We think it's fairer and we don't think it will result in more hearings, but we think what it will result in is tenants having an opportunity to choose whether to have a hearing, whether to pay the rent or whether to be evicted. If you look at what we are proposing, we're proposing that the tenants be given a clear notice that if they wish to dispute, they have to appear at a certain time and place and indicate so to a clerk or perhaps one of these quasi-adjudicators that's being promoted from the ranks. At that point they either

pay the rent, they mediate or they say they're going to dispute, or else a default order is issued against them. But that way they don't show up on the day of the hearing expecting that they are going to have a hearing and discover that in fact they've already been evicted. We think this is the way to clear some red tape for tenants, and I think that would be a good thing to do.

Thank you for the amendments that we listed on the first two pages that we do like. We hope that you will consider voting against the amendments to take away the rights for tenants in shared accommodation and consider adding some protections to tenants after they've been evicted so that they don't lose their belongings to landlords. Thank you very much.

The Chair: Thank you, Ms Mahoney. We've actually gone overtime, but we appreciate the thoroughness of your presentation and your balanced presentation.

FAIR RENTAL POLICY ORGANIZATION

The Chair: Our next presentation will be from the Fair Rental Policy Organization of Ontario. Good afternoon and welcome to the committee.

Mr Vince Brescia: Good afternoon, Chair and committee members. Thank you for the opportunity to address the committee today. It's good to see you all. My name is Vince Brescia and I am the president of the Fair Rental Policy Organization.

FRPO is the largest association in Ontario representing those who own, manage, build and finance residential rental properties. Our membership includes a diverse range of owners and managers, from those with one small building or a few units up to the largest property management firms and institutional owners and managers. It also includes our colleagues and partners in the industry, including service providers, suppliers and industry consultants.

I'm going to do my best to cover off some of the issues which we have uncovered in reviewing the legislation in the brief time we've had a chance to look at it. I have handed out written copies of what I'd like to cover off. I don't think I'm going to be able to get through most of it, so what I'm proposing to do is cover off a few of them and leave you with the written copies to review.

I'm going to go first to the proposed amendments to sections 34 and 35 of the legislation. These proposed amendments grant new authority to tribunal adjudicators to order a landlord to pay a specified sum to the tenant as compensation for costs the tenant has or will incur in repairing or replacing the tenant's property that was damaged as a result of the landlord's breach. FRPO does not support these amendments and I'd like to give you a few reasons why we don't support them.

Firstly, there's no equivalent provision under the Landlord and Tenant Act, the previous legislation, for these types of damages. The jurisdiction for awarding damages should remain with the Superior Court or Small Claims Court. The section provides for payment for

prospective damages rather than limiting the claim to actual, reasonable, out-of-pocket expenses. The section does not account for the depreciated value of the property for which the compensation is being provided. The section does not contemplate any insurance proceeds that the tenant may receive or otherwise be entitled to either through its insurer or the landlord's insurer and in fact encourages litigation by insurers or tenants against landlords.

We also believe that these amendments may be unconstitutional insofar as they purport to delegate a power to award damages to tribunal members who are not section 96 judges under the Constitution Act, thereby removing that power from the exclusive jurisdiction of the judiciary.

The amendments provide no requirement for tribunal members to consider common law principles for damages such as foreseeability, causation and mitigation.

We believe it is inconsistent and unfair that the tribunal should be adjudicating contract issues for tenants, on the one hand, while at the same time forcing landlords to go to Small Claims Court to recover out-of-pocket expenses. Currently, we are not entitled to go to the tribunal for such out-of-pocket expenses as arrears of rent, prospective lost rent, utility costs, NSF cheque charges, replacement key costs, last month's rent, amounts owing by guarantors and so on. We'd ask that you not pass these particular components of the legislation.

The amendments to section 35 provide the tribunal with the jurisdiction to allow a tenant to recover possession of the rental unit where a landlord has altered the locking mechanism. However, the amendments do not address those circumstances in which the landlord has deemed the unit to have been abandoned. These subsections should be amended to provide that the tenant must first pay any arrears of rent up to the date on which the locking mechanism was altered before taking effect.

1730

With respect to the amendments to sections 52 and 54 of the act, I won't read what I've written out for my proposed presentation but suffice it to say that we're very supportive of these amendments. The way the legislation is currently drafted, it doesn't allow condominium developers, who in an interim period want to lease their units before they can sell them, to provide notice on behalf of purchasers. This affects the feasibility of condominium development, and I don't think any of us would like to see that because that's actually a very important supply of rental accommodation in the province right now. About a quarter of all condominiums are rented, so we wouldn't like to see condominium feasibility impacted.

The amendments to section 72 would provide for an eviction order to become void where the tenant pays the amount owing. However, we are concerned that in these circumstances the payment by the tenant should be made by a means whereby the landlord will definitely receive payment. It's not an uncommon issue for this to crop up.

In other words, payment within these sections cannot be made by an uncertified cheque. We would like to ask that you amend the proposed legislation and add a new subsection to the effect that it requires payment by means of cash, money order or certified cheque where we can show that the cheque has cleared the tenant's account. That last clause is necessary because stop payment orders can be put on a certified cheque.

Given the onus on time here, I'm going to try and move as quickly as I can. I'm going to skip right ahead to the last element. I'll leave you to read the rest.

I'll just talk about proposed section 83.1. The current situation with the legislation is that an order expires within one year of being issued. FRPO is opposed to a six-month expiry date for an eviction order. We believe the expiry of such an order should remain consistent with those of orders for possession of all types of other things. This proposal will have the effect of dissuading landlords from entering into repayment plans with tenants that extend beyond five months. Therefore it would be detrimental to tenants and would likely force housing providers to reconsider their policies for giving tenants a second chance and the opportunity to make up arrears over time. This is in addition to other factors that negatively impact on the appeal of repayment plans and second chances, including the recent increase in sheriff's fees which massively increase the cost of enforcing evictions.

Secondly, this proposal doesn't account for a situation where an eviction order may not be enforceable for an indeterminate period after being issued, for example, when it is appealed to the courts, which could take several months. Therefore, we'd like to ask you to consider not passing that particular element of the legislation.

Thank you for your time, and I'd be happy to answer any questions if we have any time.

The Chair: I'm afraid we've used the full slot, but I thank you very much for making your presentation before us. I'm sure we'll all have time to read the balance of your submission in the next few days.

COALITION ON THE NIAGARA ESCARPMENT

The Chair: Our next presentation will be the Coalition on the Niagara Escarpment, Ms Linda Pim. Good afternoon and welcome, Ms Pim.

Ms Linda Pim: Thank you, Mr Chairman and members of the committee.

The Coalition on the Niagara Escarpment is pleased to have this opportunity to present our views on the amendments before you that pertain to the Niagara Escarpment Planning and Development Act. I am a member of the coalition's board of directors and I've been asked by our president, Bruce Mackenzie, to appear before you on his behalf.

Very briefly, the Coalition on the Niagara Escarpment, or CONE, was founded 22 years ago, in 1978, and

currently has 24 member organizations. These are both province-wide conservation groups such as the Federation of Ontario Naturalists, the Bruce Trail Association and the Sierra Club, as well as escarpment-based community groups such as the Beaver Valley Heritage Society and the Bruce Peninsula Environment Group.

We are strong supporters of the Niagara Escarpment plan as the premier tool for protection of the escarpment from excessive and inappropriate development. We monitor the implementation of the Niagara Escarpment plan by the Niagara Escarpment Commission, as well as engage in public education activities. We were the recipients of the Lieutenant Governor of Ontario's conservation award in 1995.

In June of this year, our coalition made a written submission on these amendments as a result of a posting on the Environmental Bill of Rights registry. We support, or have no objection to, most of the amendments proposed here to the Niagara Escarpment Planning and Development Act. Most of the amendments are of what we usually call a housekeeping nature.

However, I would like to bring to this committee's attention one very troubling amendment proposed in this package. I believe you will find it on page 102 of Bill 119, under the heading "Order to stop work, etc." It is proposed that section 24 of the act be amended to allow for stop-work orders to be issued if a person undertakes any development in the Niagara Escarpment that contravenes a development permit issued by the Niagara Escarpment Commission.

We strongly support the availability of stop-work orders as a tool to halt activities that have not been sanctioned by a Niagara Escarpment development permit. Making this power available to the commission, which is the minister's delegate in these matters, is long overdue and we applaud it. Without this power, terrible damage can be done to the Niagara Escarpment and the only recourse is to pick up the pieces after the havoc has been wrought. It's a lot easier and cheaper to undo or remediate environmental damage soon after it starts than when it's long over and done with.

However, we object strenuously to the limitation of the power to issue stop-work orders to only a subset of developments that are in contravention of the act, namely those where the minister or his or her delegate has "reasonable grounds to believe that the contravention is causing or is likely to cause a risk to public safety or significant environmental damage." In our view, there is no justifiable reason to limit stop-work orders in this way. If the development contravenes the act, it contravenes the act, and it must be subject to a possible stop-work order. There must be no equivocation or room for interpretation here. The limitation of this clause to contraventions that are likely to cause public safety risks or significant environmental damage appears to us to legitimize some developments that are in contravention of the act, in other words, those that are judged not to cause risk to public safety or not to cause significant environmental damage. The limitation leaves the minister

or his or her delegate powerless to stop violators of the act.

We are very concerned that a decision-maker, whether it's the Niagara Escarpment Commission or the commission's staff director or the minister, would have the responsibility of assessing whether a development is in violation of the act, is causing or is likely to cause significant environmental damage.

Just by analogy we have to ask ourselves, would society accept a decision by police not to lay assault charges against someone who causes a black eye in another person because it was not a significant injury? As we all know, you don't need to have broken bones or a concussion before your assailant can be charged with assault. Just as an assault is an assault, a violation of an escarpment permit is a violation of an escarpment permit. There should be no room for discretion on the part of the party that's enforcing the development permit to stand in judgment of what is "significant" environmental damage.

I'd like to give you a real-life example which I have seen with my own eyes. A couple of years ago, a landowner in Mulmur township in Dufferin county received a development permit from the Niagara Escarpment Commission for something pretty typical that the commission deals with: a house, a driveway and a septic system in a rural area on the slopes of the escarpment. It was a typical permit with a number of standard conditions issued by the commission, but instead of putting up a typical driveway, say five metres or 16 feet wide, the landowner created what was virtually a 400-series highway up the Niagara Escarpment. There was tremendous destruction of large trees and other vegetation and massive grading of the land, yet the Niagara Escarpment Commission was powerless to stop him.

It's entirely possible that under the proposed amendment, the minister's delegate, which is usually the commission, could decide that the damage was not significant, that the trees and vegetation would grow back over time and not to issue a stop-work order. As it turned out in this case, the landowner was quite mortified by what his contractor had done in his absence and was very co-operative in trying his best to restore the landscape to its original condition as much as possible, although that was very difficult to do.

Other violations of Niagara Escarpment development permits may seem environmentally benign but often they are not. Let's say that a permit is granted to build a house within a certain building envelope on the escarpment. Let's say that the owner decides to shift the location of the house or add another 1,000 square feet to the house after the commission has issued the development permit. Such changes to what a permit allows could, for example, affect the stability of escarpment slopes or encroach into designated environmentally significant areas. The minister or the Niagara Escarpment Commission need the unfettered ability to issue a stop-work order regardless of what the violation of the permit is. This will not always mean that the development is stopped for all time—and I'd like to emphasize that—it may simply mean that the

work is stopped until the landowner and the commission can sort out the problems and, we would hope, come to a resolution of the matter.

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In closing, then, I would respectfully request that the committee consider amending the proposed new subsection (6.1) under section 24 by eliminating the words "and the minister has reasonable grounds to believe that the contravention is causing or is likely to cause a risk to public safety or significant environmental damage."

I would respectfully remind the committee that the Niagara Escarpment is a United Nations World Biosphere Reserve. We have not only a provincial responsibility but also a national and indeed international responsibility to ensure that it is not subject to unnecessary environmental damage. Thank you.

The Chair: Thank you very much, Ms Pim. That used up our full time, but I certainly appreciate your bringing another section of the act to our attention here today.

DUNDURN COMMUNITY
LEGAL SERVICES

HAMILTON MOUNTAIN LEGAL
AND COMMUNITY SERVICES

McQUESTEN LEGAL
AND COMMUNITY SERVICES

SOLUTIONS FOR HOUSING
ACTION COMMITTEE

The Chair: Our next presentation will be from Hamilton Mountain Legal and Community Services. Good afternoon and welcome to the committee.

Mr Tom Cooper: Thank you, Mr Chair, for the opportunity to present to the standing committee this afternoon. My name is Tom Cooper. I actually represent McQuesten Legal and Community Services. I'm joined here this afternoon by Jay Sengupta, with Hamilton Mountain Legal and Community Services; Peter Hutton, with Dundurn Community Legal Services; as well as Judy MacNeil, who's the executive director at Dundurn Community Legal Services. We represent the three community legal clinics in Hamilton as well as SHAC, which is the Solutions for Housing Action Committee, a coalition of housing providers, housing services, tenants and interested citizens concerned with affordable housing in the Hamilton area.

We're probably going to echo some of the concerns you've already heard this afternoon, but we believe it represents some of the grave and wide-ranging concern across the province with the proposed changes to the Tenant Protection Act.

In our view, the suggested changes to the Tenant Protection Act contained in Bill 119 represent a lost opportunity. While a few of the changes suggested do offer useful clarification on some issues, such as pointing out when an order is voided, we are disappointed in the direction this government has taken on others, such as

leaving subtenants in this province without any protection under the law and allowing for the signing of default orders by so-called "default order officers."

Tenants and their advocates have been highlighting the difficulties faced by tenants in the application and hearing process since the act was first put in place. We have been asking for relief for tenants on a variety of issues, including the following:

Tenants do not receive the notice of hearing and application documents which signal the beginning of the hearing process. We have asked that the tribunal ensure service of these documents by sending them to tenants directly and not relying upon the landlord to do so.

The notice of hearing is a confusing and poorly drafted document. It is not immediately clear to those receiving it, particularly those with poor literacy skills, that a hearing is not going to be held if a written dispute is not filed. Tenants for whom English is a second language similarly have difficulty understanding the document.

Under the Landlord and Tenant Act, tenants could dispute a landlord's application in person. Tenants are now required to file a dispute in writing, again something very difficult for tenants whose literacy and language skills are weak.

The five-day window for filing a dispute, which includes weekend days, is far too short to allow for mailing. Tenants are forced to fax or file the dispute form in person. Many tenants with limited income cannot afford to pay for a fax or take time away from work to attend at a tribunal office to file in person.

Tenants who have been locked out by landlords who have taken the law into their own hands and who have ignored the processes outlined by the Tenant Protection Act have no way of getting timely relief from the tribunal. Tenants and their advocates have been asking for changes in tribunal procedure to address this inequity to no avail thus far.

This government has ignored these issues and others raised by tenants and instead we have a set of proposed amendments, some of which open up the process for further inequitable treatment of the tenants of this province.

This committee has already heard from the Centre for Equality Rights in Accommodation. The Hamilton area legal clinics have undertaken, in conjunction with that group, a project to assist tenants in manoeuvring through the system. Our efforts have revealed that many tenants are not served with the originating documents on the date that the landlord has told the tribunal they will be served. Some tenants are not served at all. Others who have been served do not understand that their right to be heard depends on filing a written dispute within a certain time frame, as that information is buried among numerous other details in the notice of hearing.

Members of this committee should note that the current system is inaccessible to many tenants already. A study undertaken by seven post-industrial countries including Canada, the International Adult Literacy

Survey, concluded that approximately 47% of Canadians between the ages of 16 and 69 have literacy skills that are at or below level 2 on a five-level scale. In Hamilton that number is 60%. People at level 2 are described as being able to read, but not well, and we've attached some documents to illustrate. What this means is that about 60% of people living in the Hamilton area would require assistance with these forms.

Our objection is also based on the changes in the housing market. This system does not operate in a vacuum. The statistics in our part of the province are a reflection of the situation province-wide. We have attached a rental market report prepared by the Canada Mortgage and Housing Corp for the Hamilton area. It shows significant drops in vacancy rates and increases in housing costs. According to the CMHC, the city of Hamilton experienced the highest rental market increases for two-bedroom apartments in Canada. I'll repeat that: Hamilton had the highest rent increases in Canada last year. Simply put, the city of Hamilton and its surrounding area is in a rental housing crisis. The consequences of eviction for tenants on fixed or low incomes are severe. What is necessary is a thoughtful and balanced evaluation of the tribunal and its processes and changes that provide the tenants of this province with real protection, not some of the changes proposed under this bill.

We are disheartened by the fact that the government has not addressed the need for real change in the application and hearing process and introduced these amendments in their stead. We ask that tenants' concerns be reflected and taken more seriously in any amendments of the Tenant Protection Act.

As we indicated at the outset, we are particularly troubled by the proposed amendment which would allow the tribunal to allow a default order officer to make a default order as if they were a tribunal member. This amendment represents more than a mere housekeeping item. It would allow a clerk, rather than a trained adjudicator, to make an order that would result in the loss of a tenant's home. We are very concerned that applications will be rubber-stamped and tenants will lose their homes in the rush toward a more efficient system. This amendment could only be considered an improvement and an efficiency if the goal of the Tenant Protection Act was the eviction of tenants rather than their protection.

Given all of the other problems that tenants are currently experiencing with the written dispute procedure, the one thing that the current system does not need is an easier way to ensure that a tenant does not have an opportunity to be heard when the issue at stake is whether they will be able to remain in their home. To suggest that procedural safeguards such as a set-aside motion are available after the fact provides little or no comfort to tenants. Our experience in the southern district office has been that set-aside motions are granted sparingly.

Ontario Rental Housing Tribunal hearings in Hamilton demonstrated how difficult it could be for some tenants

to manoeuvre through the complicated bureaucratic system currently in place. One family who did not speak English as a first language showed up at the tribunal office on the scheduled hearing date but had not filed a written dispute because they had not fully understood the requirements of the complicated forms they had received. They found out that a default order had already been issued against them. They filed a motion to set aside the default order, but at the hearing held into the motion the adjudicator denied the tenants' motion to set aside the default order and have a full hearing into the landlord's application. The motion was denied because they had failed to convince the adjudicator that they were not reasonably able to participate. The adjudicator determined that the non-English-speaking tenants could have shown the documents to somebody who spoke English and had a written dispute filed on time. This is the reality that many tenants face in our province.

A thorough and balanced review of the Tenant Protection Act needs to take place, instead of amendments that ignore legitimate tenant concerns and which further erode their right to fair treatment. We thank you for the opportunity to come before you and provide input this afternoon.

The Chair: Thank you very much for your presentation. We've actually gone a bit over time, but we appreciate your taking the time to come before us here today.

1750

ONTARIO NEW HOME WARRANTY PROGRAM

The Chair: Our final presentation this afternoon is from the Ontario New Home Warranty Program. Good afternoon, Ms Howard, and welcome to the committee.

Ms Judith Howard: Mr Chairman, members of the committee, my name is Judith Howard and I'm the manager of the policy group and legal counsel at the Ontario New Home Warranty Program.

I am pleased to be here today to make submissions before this committee regarding the proposed amendments to the Ontario New Home Warranties Plan Act by section 15 of schedule B of Bill 119. I prepared a letter detailing our submissions which is being distributed, I believe, to each of you.

In brief, first of all we support all the proposed amendments to our act under Bill 119 and we urge you to adopt them.

Second, we urge you to pass and proclaim these proposed amendments in force before the Condominium Act, 1998, is proclaimed in force. As you may know, the Condominium Act, 1998, received royal assent but has not yet been proclaimed in force.

The first proposed amendment to our act would make the Ontario New Home Warranty Program's annual report available to the public, including all of the warranty program stakeholders, as soon as it's submitted to the Minister of Consumer and Commercial Relations.

We will no longer be required to wait until the report is reviewed by cabinet and tabled with the assembly. Our annual report contains valuable and current statistics and other information about the warranty program in addition to the required financial reporting. Our stakeholders, especially consumers and builders, will be better served with an earlier release of our annual report to the public, and the information, of course, that's contained in it.

The second, third and fourth proposed amendments all amend section 14 of our act. They will reduce the risk that purchasers' rights would inadvertently be limited or even curtailed. Section 14 of our act was repealed and re-enacted as a consequential amendment to the Condominium Act, 1998, which received royal assent, as I mentioned, but has not been proclaimed in force.

Upon close review of the new section 14, three inadvertent errors were identified. Bill 119 aims to correct these errors in time to prevent any harm to consumers. Bill 119 contains three proposed amendments to this new section 14. The first of the proposed amendments is a drafting correction, basically, and, put simply, the word "or" was inadvertently omitted between two clauses.

The second proposed amendment would enable the warranty program to continue to provide warranties to homeowners whereby damages for financial loss are available, as compared to damages for remedial work alone. If this amendment is not made in time, warranties such as the warranty providing for financial compensation for delayed closing would be at risk.

The third proposed amendment to section 14 of our act will enable the warranty program to ensure that warranty coverage continues to be provided to successors in title of purchasers of new homes as it has been since our inception.

To summarize, the Ontario New Home Warranty Program supports all the proposed amendments to our act under Bill 119 and urges that the amendments be passed

and proclaimed in force before the Condominium Act, 1998, is proclaimed in force.

I thank you for your time and I think I'm before the 10 minutes so I'm available for your questions.

The Chair: You certainly are. We've got about three minutes before the 6 o'clock close. It would be to the Liberals if they wish to ask a question.

Mr Dave Levac (Brant): Thank you for your presentation. It's probably the first time we've been able to ask any questions around the table, because of presentations, but I will ask this: is there anything in the Condominium Act that will cause any difficulties if it's enacted beforehand, or are you talking in reverse, that we need to take care of Bill 119 to ensure that the Condominium Act is seen in the way it was written?

Ms Howard: Yes, I think the second option is the one we are referring to, Mr Levac. Basically, when the Condominium Act, 1998, was passed, it contained a consequential amendment which totally changed our section 14, and it had three inadvertent errors in it. If these errors are not corrected before the Condominium Act is proclaimed in force, there are risks involved to consumers if that order isn't followed. That's why we're very concerned that Bill 119 be proclaimed in force before the Condominium Act is proclaimed in force.

Mr Levac: So this is red tape correcting red tape that didn't get corrected the first time. Close?

Ms Howard: No comment.

The Chair: I certainly appreciate your coming here before us this afternoon. Thank you for your presentation.

With that, committee, we stand adjourned until 3:30 two Wednesdays from now.

The committee adjourned at 1757.

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First Session, 37th Parliament

Assemblée législative de l'Ontario

Première session, 37^e législature

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Mercredi 15 novembre 2000

**Standing committee on
general government**

Red Tape Reduction Act, 2000

**Comité permanent des
affaires gouvernementales**

Loi de 2000 visant à réduire
les formalités administratives



Chair: Steve Gilchrist
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LEGISLATIVE ASSEMBLY OF ONTARIO

ASSEMBLÉE LÉGISLATIVE DE L'ONTARIO

STANDING COMMITTEE ON
GENERAL GOVERNMENTCOMITÉ PERMANENT DES
AFFAIRES GOUVERNEMENTALES

Wednesday 15 November 2000

Mercredi 15 novembre 2000

The committee met at 1536 in committee room 1.

RED TAPE REDUCTION ACT, 2000

LOI DE 2000 VISANT À RÉDUIRE
LES FORMALITÉS ADMINISTRATIVES

Consideration of Bill 119, An Act to reduce red tape, to promote good government through better management of Ministries and agencies and to improve customer service by amending or repealing certain Acts and by enacting two new Acts / Projet de loi 119, Loi visant à réduire les formalités administratives, à promouvoir un bon gouvernement par une meilleure gestion des ministères et organismes et à améliorer le service à la clientèle en modifiant ou abrogeant certaines lois et en édictant deux nouvelles lois.

The Chair (Mr Steve Gilchrist): Good afternoon. I call the committee to order for our final day of hearings and clause-by-clause consideration on Bill 119. Obviously the protocol is to do this section by section. Mr Marchese has indicated he would like to make all of his comments up front, so I'll ask if there are any amendments to section 1. Any debate? Mr Marchese.

Mr Rosario Marchese (Trinity-Spadina): Thank you, Mr Chair. I appreciate the generosity of the Chair, as usual, in terms of allowing me to make the remarks that I want and need to make. I'll do that in the beginning and then at the end, of course, I'll be as brief as I need to be in order to expedite the affairs of this committee.

I will start by reading from a letter I received from Mohan Srivastava, who writes,

"Dear Ms Stokes,

"I was told that I should send this written submission on Bill 119 to you so that it would be considered by the committee on general government that is discussing the bill this week."

I wanted to read much of what she said because I'm not sure how many of the members had an opportunity to read the letter. As you know, we diligently ask people to make submissions so they would be considered along with everything else we have to read. Given that I didn't think they might have had an opportunity to read it because they're busy members, as you understand—I'm not sure about others—I wanted to put it in for the record so we could consider it as we make these amendments. I support of a lot of what she says. "Mohan"—he or she? It's hard to say.

This person writes,

"Dear Mr Hodgson,

"I am the owner of a small business and can assure you that I recognize and appreciate the importance of reducing red tape. I am also a landlord who rents two suites in a house that I own."

I'll skip certain parts because you don't need to read the whole thing.

"...a landlord who rents two suites in a house that I own, and am well aware of the importance of strong legislation that protects the interests and rights of landlords and tenants.

"So why is a businessman and a landlord worried about changes to the TPA? Through my work in one of Toronto's Out of the Cold shelters I have become concerned about the issue of homelessness...."

I was interested in that right away, so I continued reading.

"I know that, like myself, many of the volunteers who have supported the Out of the Cold shelters over the past decade are starting to wonder if we're doing the right thing. As the number of people using the shelter system grows each year, many of us now believe that our efforts should not be directed at temporarily alleviating the difficulty of life on the streets by throwing a bun and a blanket at the problem.... Parts of Bill 119 do the exact opposite—they will certainly open the tap further and force more people on to the streets."

"Lack of public consultation" is one of the things that the writer is against.

"When I learned that Bill 119 included proposed amendments to the TPA, I was eager to make a submission to the committee that would be holding public hearings. As someone who is both a businessman and a landlord, yet who has some insight into the difficulties faced by the poor and marginalized in this society, I felt that I had something to offer to your deliberations. I was stunned to learn that opportunity for such submissions had already passed and that there had been only a few hours scheduled for them. This is not the 'common sense' that the government had promised to Ontarians: instead, it is a transparent attempt to sneak through a large amount of controversial legislation with a minimum of public input.

"I am told that there is still an opportunity to make a written submission, so I am taking advantage of this final opportunity." I'm happy this person did that.

"Failure of purpose: I have obtained a copy of Bill 119 and am struggling to understand how some of these proposed amendments fulfill the stated purpose of Bill 119—'to reduce red tape, to promote good government ... and to improve customer service.'"

"The Ontario Rental Housing Tribunal is not burdened by red tape." I agree with that. "In processing several thousand eviction applications each month, securing 'default orders' on well over half of them, this tribunal is a testament to bureaucratic efficiency." In other words, this tribunal is doing a good job of kicking people out of their homes, and I suppose you want to make it better. But the person has made, I would say, a very sound observation that the tribunal is very proficient. "Granting a hearing to people and families struggling to make ends meet is not 'red tape'; it is due process to which all citizens should be entitled."

"It cannot be 'promotion of good government' to weaken a piece of legislation whose stated purpose is to protect tenants." There's so much more. I'm almost tempted to read the whole thing, but I'll have to skip certain paragraphs and get to other points.

"Even if illegal drug activity is taking place in a rental unit, it may be done by someone other than the tenant who signed the lease. If no one else in our society suffers the risk of losing their home when someone else uses their property for illegal drug activity, then why should the poor and marginalized suffer this penalty?" which is something you are including in this red tape bill.

It goes on to say other things: "Which leads us to the final stated purpose of Bill 119: 'to improve customer service.' It is clear to me that this bill recognizes the landlords, and not the tenants as its customers. How is a tenant better served by amendments that increase the likelihood that they will be evicted without a hearing, that make it more likely that the decision will be made by a single untrained clerk, and that reduce the minimal recourse that they, the soon-to-be-evicted tenants, currently have? If you're going to make these amendments to the TPA, then surely in the name of transparency and good government, you should also amend the name of the act to the 'Landlord Protection Act' or to the 'Rental Profitability Act.'" I think this person is right and we said as much when we debated the Tenant Protection Act, but the government doesn't listen to us.

"Why not sever the TPA amendments from Bill 119? I encourage you to consider dealing with the proposed amendments to the TPA separately from the rest of Bill 119. A good government has nothing to fear from public consultation on important issues."

I wanted to say that I agree with the submission a great deal and tell you that even we, as an opposition, as small a caucus as we are, with very few resources, are left to our own instincts to be able to react to some of these things. I'm the critic for housing. I'm not a critic for all of these things that you have included. There are 77 bills, I believe, that you're amending. So imagine how difficult it is for us, as an NDP caucus, not to have the resources to at least provide some critical remarks about

the things you are doing, let alone a public that doesn't have a clue what you are doing—doesn't have a clue, would never have a clue, would be informed very late about some of the changes that might affect a constituency. By the time they are aware of the changes you're making, they simply don't know what to do.

The person said that they're against the process that you have initiated to make these amendments. The person says that if you want to make the changes to the TPA, you should do it separately so that it would become a transparent process and it would permit people who have an interest in these things to come and make submissions, as they should.

We had two days of hearings on the changes made in the red tape bill. I think it's shameful that the government continues to make many changes in this form. It's shameful because it doesn't give the opposition or the public an opportunity to be critical, to offer changes or amendments. It doesn't give them an opportunity to be heard. I think it's wrong. What you are doing as a government is profoundly undemocratic, and more and more people are beginning to see that.

I want to read for the record from another group who made some good suggestions regarding schedule K of Bill 119. They are submitted by the Homeless Action Group. These are some observations they made.

"The Tenant Protection Act and the Ontario Rental Housing Tribunal process have made it more difficult for low- and fixed-income tenants such as seniors and students to remain in their present accommodations. Rents have increased by as much as 20% over three years in Toronto and eviction rates have grown from 9% to 12% since June 1998 when the TPA came into effect...."

"We would like committee members to remember that 80% of eviction applications are for non-payment of rent. There are many reasons for which tenants can fall behind in paying rents, but at base it is due to inadequate income. Please keep in mind that according to Statistics Canada one third of children in Toronto are in families living below the poverty line. Picture single parents and working poor parents trying to juggle expenses to pay the rent and cover food and other bare essentials. It is no wonder that families are one of the fastest growing homeless groups."

"Several sections of schedule K, Bill 119 have the potential and even likelihood of sending eviction rates and homelessness rates even higher. Bill 119 redefines 'sublet' and amends section 140 of the TPA which prevented a rental unit from being sublet to one or more tenants for a rent greater than that lawfully charged by the landlord. This opens the door to rent increases in the case of sublet arrangements."

"Section 62 provides that notices of eviction will be heard by the tribunal in 10 rather than 20 days, if 'grounded on' illegal acts and activities. This is particularly disturbing language for several reasons. Minister Clement implied in his remarks in the Legislature that only those breaking the law are affected. However how do we know that a tenant is actually breaking the law?"

There is no requirement for him or her to be charged with an offence. Tribunal adjudicators are acting in the place of judges yet the hearings lack the standards of due process that apply in a court of law. It would seem that a tenant could be evicted merely on the suspicions of the landlord. The reduction in time lag until hearing would result in the eviction of the tenant even more quickly.

"We are very concerned by section 187 which allows ORHT employees to act as default order officers. The default rate has already been very high at least in part because of the inadequacy of the notification process from the tenant's point of view. It rose from 56% in 1998 to 64% as of last month. Allowing politically appointed tribunal adjudicators to sign eviction orders was bad enough. To give employees this power is to further deprive tenants of their right to a hearing. This change will very likely lead to an even higher rate of evictions following default orders and thus to more people made homeless.

"According to section 187 tribunal adjudicators can, giving notice to the parties, amend an eviction application if they think it appropriate and if doing so wouldn't be unfair to any party. This strikes us as giving very broad and undefined power to adjudicators. What kind of amendments and in what situations? Who is to judge fairness? This change would be used in ways very prejudicial to tenants.

"The final change we want to comment on replaces subsection 52(1) of the TPA with a provision that landlords of no more than three units are allowed to apply to evict tenants on behalf of a purchaser of the units if the latter requires them 'in good faith' for his own or his family's use. Since the current rather than future owner makes the application, this will have the effect of speeding up evictions."

1550

It's a bit longer, but I will stop at that. I wanted to say several things by reading them on to the record. One, people have concerns about the changes that are being proposed through this bill. It is, in my way of thinking, wrong to make serious changes of this kind, particularly in a way that hides the real substance of some of these changes by inappropriately calling them "reducing red tape." Some of these people wanted to be heard. What you are providing is one or two days of hearings on most bills. I think, and they've been telling you, it's inadequate. It doesn't give people an opportunity to respond, and even when they come in front of this committee urging you to make changes, you don't listen to them. You haven't made any changes that I have seen—maybe there are some to come; I'm not sure—that in any way respond to the criticism levelled against your government and this bill from the legal clinics. So one wonders what the point is of having hearings when you don't make any changes whatsoever. Why not simply say, "We don't need to have any hearings. We are omnipotent and omniscient. We know what's best for everybody. And there's no point having any hearings, one day or two

days, enough to do in a couple of hours, because we're not going to listen to you anyway."

The poor folks, the Ontario projectionists and video technicians, came making a submission which I thought was very sound in terms of suggested changes. I don't see any amendments proposed by the government to deal with what I heard; I don't know what you heard. But clearly you didn't hear a thing; you weren't listening. So I'm saddened by the lack of democracy that we are getting from this government, but encouraged by some of the Liberal amendments, because they voted against the Rent Control Act we brought in when we were in government, encouraged by the changes because in their modest way they're trying to reach out to the tenants when they couldn't support us when we introduced the Rent Control Act. So I will support most of the changes except one where it appears to be favouring landlords. But I'm always happy to see the Liberals on the same side as New Democrats, fighting for tenants as opposed to landlords.

I'm glad Phil Dewan is on board, the fellow who supported landlords against the Rent Control Act, because I'm sure he's providing some balance to Liberal concerns that they have with tenants and landlords.

So I wanted to tell you I'll be voting against this bill, quite obviously, supporting most of the changes made by the Liberal amendments and decrying the fact that you haven't made any changes based on what we heard. I would say that there's nothing new in this process. We've got three more years for people to learn what you're all about, and we hope they will make changes then.

The Chair: Any further debate on section 1? Seeing none, I'll put the question. Shall section 1 carry? All those in favour? Opposed? Section 1 is carried.

Before we go any further, I was remiss at the outset to not recognize that we've been joined today by Mr Bruce Jamerson, the Clerk of the Virginia Legislature. Good afternoon and welcome to our humble proceedings here.

With that, we'll move on to section 2. Any debate? Seeing none, I'll put the question. Shall section 2 carry? Section 2 is carried.

Any debate on section 3? Seeing none, shall section 3 carry? Section 3 is carried.

Shall sections 1 to 16 of schedule A carry? All those in favour? Contrary? Sections 1 to 16 of schedule A are carried.

Shall schedule B, sections 1 to 8, carry? They are carried.

Mrs Munro, I believe you have the first amendment.

Mrs Julia Munro (York North): I move that subsection 133(2.1) of the Corporations Act, as set out in section 9 of schedule B to the bill, be struck out and the following substituted:

"Exemption

"(2.1) Despite subsection (1), section 96.1 does not apply to a corporation referred to in subsection 1(2) of the Charities Accounting Act.

"Conditions for indemnification

“(2.2) Despite subsection (1) a corporation referred to in subsection 1(2) of the Charities Accounting Act cannot provide the indemnification referred to in section 80 unless,

“(a) the corporation complies with the Charities Accounting Act or a regulation made under that act that permits the provision of an indemnification; or

“(b) the corporation or a director or officer of the corporation obtains a court order authorizing the indemnification.”

The Chair: Any debate? Seeing none, I'll put the question. All those in favour of the amendment? Opposed? The amendment carries.

Shall section 9 of schedule B carry, as amended? It's carried.

Schedule B, sections 10 to 15, any debate? Seeing none, I'll put the question. Shall those sections carry? They're carried.

Schedule B, section 16.

Mrs Munro: Schedule B to the bill, subsection 16(7), subsections 56(2.1) to (2.4) of the Personal Property Security Act:

I move that subsections 56(2.1) to (2.4) of the Personal Property Security Act, as set out in subsection 16(7) of schedule B to the bill, be struck out and the following substituted:

“Removal of collateral classifications

“(2.1) Where a financing statement is registered under this act and the person named in the financing statement as the secured party has not acquired a security interest in any property within one or more of the collateral classifications indicated on the financing statement, the person named in the financing statement as the debtor may deliver a written notice to the person named as the secured party demanding a financing change statement referred to in section 49 to correct the collateral classifications by removing any collateral classification in which the person named as the secured party has not acquired a security interest; the person named as the secured party shall sign the financing change statement and give it to the person demanding it at the place set out in the notice.

“Limiting the scope of collateral classifications

“(2.2) Where a financing statement is registered under this act and where the person named in the financing statement as the secured party has not included words limiting the scope of the collateral classification within the meaning of subsection 46(3) and has acquired a security interest only in particular property within the classification, the person named in the financing statement as the debtor may deliver a written notice to the person named as the secured party demanding a financing change statement referred to in section 49 to add words limiting the scope of the collateral classification.

“Response of secured party

“(2.3) Upon receipt of a written notice under subsection (2.2), the person named in the financing statement as the secured party shall,

“(a) sign the financing change statement described in subsection (2.2) and give it to the person demanding it at the place set out in the notice; or

“(b) provide the person named as the debtor with a financing change statement referred to in section 49 to add a reference to the security agreement or agreements to which the financing statement relates, together with words limiting the scope of the collateral claimed to the collateral described in the security agreement or agreements.

“Interpretation, security interest

“(2.4) For the purposes of subsections (2.1) and (2.2), a secured party is deemed to have acquired a security interest in property when the person named in the financing statement as the debtor is a party to an agreement that grants the secured party a security interest in present or after-acquired property of the debtor of like description or a present or future right to acquire a security interest in such property.”

1600

The Chair: Any debate? Seeing none, I'll put the question. Shall the amendment carry? The amendment is carried.

Shall schedule B, section 16, as amended, carry? Carried.

All those in favour of sections 17 to 20? Opposed? The sections are carried.

Shall schedule B, as amended, carry? All those in favour? Opposed? Schedule B, as amended, is carried.

Schedule C, sections 1 and 2, any debate? Seeing none, shall schedule C, sections 1 and 2, carry? They are carried.

Schedule D, sections 1 to 3, any debate? Seeing none, shall schedule D, sections 1 to 3, carry? They are carried.

Schedule E, sections 1 to 6, any debate? Shall schedule E, section 1 to 6, carry? They are carried.

Schedule F, sections 1 to 19, any debate? Shall schedule F, sections 1 to 19, carry? They are carried.

Schedule G, sections 1 and 2: Do you wish to speak to that?

Mr Monte Kwinter (York Centre): I thought this was under section 115.

Mr David Caplan (Don Valley East): It's schedule G.

Mr Kwinter: So we can speak on any parts of schedule G?

The Chair: Absolutely.

Mr Kwinter: I would like to briefly state my position when it deals with this issue that is covered in schedule G. That has to do with viatical settlements. As you may know, in 1996 I sponsored a bill that provided for viaticals. I think it's something that serves a purpose, but I have some very grave concerns as to the way this is being handled. At the time, in 1996, I think it came to this same committee and the committee decided it was really not in their purview to even discuss it because it was such a basic change to the way insurance was, if you want to use the term, “trafficked,” where people could sell their insurance policies to a third party, who would

discount it, give them the money, because they were either in a terminal AIDS situation or for whatever reason, and then on the death of the policyholder, the purchaser of the policy would get the proceeds.

It was felt at the time by this committee that the implications were so great—not that they were opposed to it—that it should be dealt with maybe by the finance and economics committee, which could then look at it and make sure there were sufficient safeguards.

I think the same concerns are there. I think viaticals serve a purpose. They can be of great benefit to people who can't wait until after they're dead to get the use of the money. That could be very useful. Having said that, there is a long history of problems if there isn't proper regulation. When it gets sort of tacked on to a red tape omnibus kind of bill, and suddenly this basic policy change is implemented without having any real input and discussion as to what safeguards are required, that could create a problem.

I would suggest, and actually I agree with a letter that was sent by the Canadian Association of Insurance and Financial Advisors, that this section either be omitted or, if it is included, that it not be proclaimed until there is sufficient investigation and sufficient safeguards to make sure that people on both sides, those people who are investing in viaticals—there are people who will be approached by people saying, "Here's a good investment. We're going to discount the policy to 80%. You've got a chance to get a 20% return on your income in a relatively short term." In most cases, these people are terminally ill. There's lots of room for fraud and lots of room for people who are at their most vulnerable being taken advantage of if there aren't proper safeguards.

My recommendation would be that this section either be withdrawn at this time or, if it does get included, that it not be proclaimed until a proper investigation, a proper canvassing of the various problems that could develop is done, so we have an absolute guarantee that we protect citizens at their most vulnerable stage.

Mr Marchese: Obviously we had a submission from that group. I'm not speaking to the substance, because I think Mr Kwinter obviously has the experience and knowledge and raised it very fairly here in a way that it should hopefully interest the government members in being somewhat reserved in the position they might want to take.

I don't think they will withdraw it—that's my sense. I'm not sure what the members are discussing there, and I'm not sure how well in tune they are with this issue. But Mr Kwinter raises a way to deal with this issue that permits you to have time to consult people in the field. I urge the members to exercise some independence and support what Mr Kwinter has suggested by way of a process to deal with that. Otherwise, I think the members would again be making a mistake and are not taking into account some of the concerns that have been raised by Mr Kwinter and the group that came to make a deputation two weeks ago.

Mr Joseph Spina (Brampton Centre): Basically this element of the bill, from what I understand, is really

enabling legislation. What it does is allow the Ministry of Finance to get into consultation with the insurance industry to be able to develop the framework by which these viatical settlements can be made. They can't do that under current legislation. What this is really about is removing that barrier.

Mr Kwinter: What this really does is use virtually one clause in a red tape reduction bill to address a very important aspect of the insurance business. The whole point of its being enabling—to me the minute it's enabling it means it's enabling; people can start going out and trafficking in viaticals.

It would seem to me that before that happens—and I don't think we're fulfilling our responsibility if we say, "We'll leave it to the bureaucrats to figure out what safeguards should be there." I think we should, at the very least, have an opportunity to hear from organizations—I'm just subbing on this committee, but I see the Canadian Life and Health Insurance Association has this huge presentation of all the abuses of the viatical market in the United States where it's allowed. You read page after page of news reports talking about the serious problems.

1610

It would seem to me that a red tape reduction bill should be just that: get rid of needless legislation that has outlived its purpose, streamline the process, get to the point where people who are trying to deal with legislation are not put to unnecessary, useless procedures that have been there since the beginning of time and have outlived their usefulness. I have no problem with that.

I do have a problem with a total change in policy that could have a very serious impact on citizens of this province when they are in their most vulnerable state, when they are literally in palliative care or in a position where they're terminally ill and make decisions that are proper for them in the short term but could lead to abuses. To put this in a red tape reduction bill—I can see, if the whole area of viaticals was canvassed and there was deliberation and a bill was passed, and 10 years from now through experience you said, "Do you know what? We put certain safeguards you in, but our experience has shown that those safeguards are no longer required, and as part of red tape reduction we're going to modify it."

I don't see a red tape reduction bill introducing a totally new concept in the way insurance policies are traded. That's really something totally new. Normally the insurance companies themselves are restricted, and now you're providing another element. I have no problem with that, as long as there are safeguards. I do have a problem when it's an add-on to an omnibus bill that covers many ministries and is supposed to be red tape reduction. How can you have red tape reduction on a concept that has not even been fully examined and all the pros and cons of it addressed?

I introduced the bill in 1996, so I'm certainly in favour of viaticals; I think they serve a purpose. Having said that, I think we have an obligation to make sure it's done properly and that we don't create more problems than we're trying to solve.

Mr Spina: Mr Kwinter, this is exactly what we're trying to achieve, and this part of the bill does not end up being proclaimed until a regulatory environment is structured for it and until the framework is put in place. That cannot be done unless it's done in consultation with the industry. As I said earlier, the fundamental reason for this being in this bill is that at this point there is a barrier: viatical settlements are not permitted. It's to address the very people you indicated, who truly are in a difficult situation where they have their money invested in an insurance policy and they require the funds. The new structure, such as it will be struck, would allow them to have access to those funds.

We also must ensure that under the regulatory environment we create a strong and firm enough framework that will not permit the trafficking, as it is called, that was presented to us in a very cogent way by the industry, and we appreciate that. This barrier had to open the door for us to be able to create that framework, that environment. That's why it's in this bill.

Mr Kwinter: Mr Chairman, if I could get assurances from the Ministry of Finance that this section of the bill will not be proclaimed until that investigation and review and that setting out of regulations with input from the industry, I'd have no problem.

The Chair: Do you wish to respond to that, Mr Spina?

Mr Spina: I can give you my personal assurance, sir, that that's what we will be doing.

Mr Kwinter: With respect, I'd be a lot happier if I had the Minister of Finance's personal assurance.

Mr Spina: I'm only the PA to Management Board, I'm sorry.

Mr Marchese: Would it be helpful to have a staff person—because I'm convinced they're not all housing applicants he has here—to comment on this as a way of calming some of the fears Mr Kwinter has?

The Chair: I'd be happy to ask the committee that question, but I want to remind all the members that at 4:30 all questions will be deemed to be put. In fact I was going to suggest that when we're done this debate, if you would like to jump to your page 21, because that will need some input; otherwise, the question will have to be put as written.

Mr Marchese: I'm quite happy to just move along, if that's what you want.

The Chair: OK, if Mr Kwinter is satisfied? Thank you.

Any further debate on schedule G?

All those in favour of schedule G, sections 1 and 2? Opposed? Schedule G, sections 1 and 2, is carried.

Any debate on Schedule H, sections 1 to 4? Seeing none, all those in favour? Opposed? Schedule H, sections 1 to 4, is carried.

Schedule I, sections 1 and 2: any debate? Seeing none, all those in favour? Opposed? Schedule I, sections 1 and 2, is carried.

Schedule J, sections 1 to 5: any debate? All those in favour? Opposed? Schedule J, sections 1 to 5, is carried.

Schedule K, sections 1 to 5: all those in favour? Opposed? Schedule K, sections 1 to 5, is carried.

Now, on schedule K, section 6, with the unanimous consent of the committee—

Mr Caplan: Actually, there were a couple of drafting errors as well in the amendments. On page 6—

The Chair: I will accept the other two that were just drafting errors.

Mr Caplan: You'll accept those?

The Chair: I will accept those.

Mr Caplan: If I could inform the committee then.

The Chair: Perhaps, because of limited time—

Mr Caplan: You want to do the other one first?

The Chair:—I'd ask the committee for unanimous consent to move to page 21. Agreed.

You'll have to read it into the record first.

Mr Caplan: In the section which defines, it says, "fine, fee or cost does not include money that is paid into the tribunal pursuant"—

The Chair: I'm sorry, you'll have to start with "I move."

Mr Caplan: I move that section 182.1 of the Tenant Protection Act, 1997, as set out in subsection 6(25) of schedule K to the bill, be amended by adding the following subsection:

"Definition

"(2) In subsection (1)

"fine, fee or cost does not include money that is paid"—and in the amendment that you have in front of you it says "into." That wording should be changed to "in trust," and I need unanimous consent to be able to make that one change.

The Chair: Do we have unanimous consent? Agreed.

Mr Caplan: Then it continues, "—the tribunal pursuant to an order of the tribunal and that may be paid out to either the tenant or the landlord when the application is disposed of."

The Chair: So it's actually "in trust to the tribunal." Any debate? All those in favour of the amendment? Opposed? It's carried.

If we can revert back to page 3.

Mr Caplan: I move that section 6 of schedule K to the bill be amended by adding the following subsection:

"(1.1) Subsection 1(1) of the act, as amended by the statutes of Ontario, 1999, chapter 6, section 62, is amended by adding the following definition:

"'tenant's property' includes property that the tenant is storing for a third party, for which the tenant is liable to that third party and for which the tenant receives no benefit or reward."

The Chair: Further debate? All those in favour of Mr Caplan's amendment? Opposed? That amendment fails.

Mr Caplan: Well, well, well. I thought we had all of this as well. Shall we move on, Mr Chair?

The Chair: On page 4, I must draw to the attention of the committee that it's an established principle that an amendment is out of order—

Mr Caplan: I haven't read the amendment yet.

The Chair: But I have, and it's beyond the scope of the bill or beyond the scope of the clause under consideration. The reference I would give you is Erskine May, 22nd edition, page 525, or Beauchesne, 6th edition, page 207, or Marleau, page 654. "In an amending bill, the scope of the bill has been interpreted to mean only those sections that the ministry has chosen to amend. Second reading of the bill establishes the parameters of the bill that may be considered by a committee. Therefore, an amendment is out of order if it seeks to amend a section of an act when that section is not open to the bill."

There are actually five amendments that will fall into this category, but I'm ruling that because the amendment found on page 4—

Interjection.

The Chair: I'm just drawing to your attention that that one is out of order.

Page 5.

Mr Caplan: I move that subparagraph 4.1 i of subsection 34(1) of the Tenant Protection Act, 1997, as set out in subsection 6(6) of schedule K to the bill be struck out and the following substituted:

"i the costs that the tenant has incurred or will incur in repairing or replacing property of the tenant that was damaged, destroyed or disposed of as a result of the landlord's breach or breaches of the obligation under subsection 24(1), and"

The Chair: All those in favour of the amendment? It's carried.

1620

Mr Caplan: Two for three. Can we move on, Mr Chair?

The Chair: Please do.

Mr Caplan: Oh great. I move that subclause 35—there is a drafting error here, Mr Chair; it says 35(a) and it should be (a)(i).

The Chair: It actually says 35(1)(a)(i).

Mr Caplan: It says 35(1)(a) and it should be (a)(i).

The Chair: Right.

Mr Caplan: OK. I move that subclause 35(1)(a)(i) of the Tenant Protection Act, 1997, as set out in subsection 6(7) of schedule K to the bill, be struck out and the following substituted:

"(i) the costs that the tenant has incurred or will incur in repairing or replacing property of the tenant that was damaged, destroyed or disposed of as a result of the landlord's superintendent or agent having engaged in one or more activities listed in those paragraphs, and"

The Chair: Debate? Seeing none, I'll put the question. All those in favour of the amendment? The amendment carries.

Mr Caplan: Jeez, will wonders never cease? Maybe and we'll get them all done here.

The Chair: Page 7.

Mr Caplan: I move that subsection 6(7) of schedule K to the bill be amended by striking out "clause," by substituting "clauses" and by adding the following:

"(d.1) order that the landlord return the portion of the tenant's property that is in the landlord's possession."

The Chair: Thank you. Any debate? Seeing none, I'll put the question. All those in favour of the amendment? Opposed? The amendment fails.

Mr Caplan: Hold on. I saw that.

The Chair: There seems to be some discussion here. All those in favour? Opposed?

Mr Caplan: Oh, Mr Galt.

The Chair: The amendment fails.

Mr Caplan: I move that section 35 of the Tenant Protection Act, 1997, as amended by subsection 6(8) of schedule K to the bill, be amended by adding the following subsections:

"Application for interim order

"(3.1) A tenant who files an application under paragraph 4 of subsection 32(1) may make a motion to the tribunal without notice to the landlord for an interim order allowing the tenant to recover possession of the rental unit and preventing the landlord from renting the unit to anyone else.

"Interim order

"(3.2) The tribunal may make the interim order if the tenant provides the tribunal with an affidavit setting out the details of the landlord's conduct that would allow the tribunal to make an order under subsection (3) and specifying whether the rental unit is vacant.

"No interim order

"(3.3) The tribunal shall not make an order under subsection 3(2) if, within the six months preceding the making of the motion,

"(a) the tribunal has made an order evicting the tenant from the rental unit, or

"(b) there has been a mediated agreement to dispose of an application to evict the tenant from the rental unit.

"No hearing

"(3.4) The tribunal shall not hold a hearing when making an order under subsection (3.2).

"Setting aside interim order

"(3.5) If the tribunal make an order under subsection (3.2), the landlord may, at any time before the tribunal hears the tenant's application under paragraph 4 of subsection 32(1) and on notice to the tenant, make a motion to the tribunal to have the order set aside.

"Same compensation

"(3.6) On a motion under subsection (3.5), the tribunal shall hold a hearing and, if it is satisfied that the landlord's conduct would not allow it to make an order under subsection (3), shall set aside the interim order and award the landlord compensation for any costs or losses the landlord has suffered as a result of making the interim order."

This is a very important amendment. It's to protect tenants' possessions and property when there has been an inappropriate or illegal eviction.

The Chair: Any further debate? Seeing none, I'll put the question. All those in favour of the amendment? Opposed? The amendment fails.

Mr Caplan: Oh, have a heart. Shall we move on?

The Chair: Mr Caplan, please.

Mr Caplan: I move that subsections 35(4) and (5) of the Tenant Protection Act, 1997, as set out in subsection 6(8) of schedule K to the bill, be amended by striking out subsection (3) wherever it occurs and substituting in each case (3.3) or (3.2).

I believe this amendment is redundant with the failure of the previous amendment—correct?

The Chair: Yes.

Mr Caplan: So moving to number 10, I move that section—

The Chair: So you're withdrawing that?

Mr Caplan: Why?

The Chair: We'll simply rule that one as out of order. That's fine.

Mr Caplan: I move that section 6 of schedule K—

The Chair: I'm afraid the one on page 10 also affects a section that was not part of the bill, so I'm ruling that the amendment on page 10 is out of order.

Mr Caplan: OK, then I'll move on.

I move that clause 61(3)(a) of the Tenant Protection Act, 1997, as set out in subsection 6(14) of schedule K to the bill, be struck out and the following substituted:

“(a) the amount of rent arrears specified in the notice; and”.

This is a very important protection for tenants where there has been a dispute between a landlord and tenant so that they're not, in fact, being penalized and leading things to the subsequent month; that they're having to make up the arrears that is the subject of the action that has gone to the Ontario Rental Housing Tribunal. I move that amendment.

Mr Marchese: Just a quick question, David. This replaces the section that says the notice to terminate can be avoided by paying the rent that is in arrears under the tenancy agreed?

Mr Caplan: Yes, but say—

Mr Marchese: My concern is that this amendment would appear to favour the landlord by requiring that the tenant, to avoid eviction, pay the amount of arrears specified by the landlord's notice rather than the amount actually owed. That's my concern in terms of what you've done here.

Mr Caplan: No. What you would have is, if it was the amount actually owed—so let's say the arrears happened in a subsequent month or it was brought forward, a tenant would have to pay off both the amount in arrears plus whatever was currently owed as well in order to be able to clear the notice at the Ontario Rental Housing Tribunal, as according to this amendment. The amendment that I propose would deal simply with the application at the Ontario Rental Housing Tribunal.

Mr Marchese: David, let's not debate it, because I don't think they'll support it. Let's vote.

Mr Caplan: It's better for tenants this way.

The Chair: Any further debate? Seeing none, I'll put the question.

All those in favour of the amendment? Opposed?

The amendment fails.

Mr Caplan: I convinced you on that one.

The Chair: With that, I would draw the committee's attention to the fact, that it is 4:30, and under the order from the House at 4:30 on the final day those amendments that have not been moved shall be deemed to have been moved and the Chair shall interrupt the proceedings and shall, without further debate or amendment, put every question necessary to dispose of all remaining sections of the bill and any amendments thereto.

Therefore, they will not even be read. You take your direction from the page number at the top.

The next amendment up will be a Liberal motion on page 12.

All those in favour? Opposed? That amendment fails.

Page 13: all those in favour? Opposed? The amendment fails.

Page 14: all those in favour? Opposed? That amendment fails.

Page 15: all those in favour? Opposed? The amendment fails.

Page 16: all those in favour? Opposed? The amendment fails.

Page 17: all those in favour? Opposed? That amendment fails.

Page 18: all those in favour? Opposed? The amendment fails.

Pages 19 and 20 are out of order.

We've already dealt with page 21 and it was, just to remind everyone, approved.

Page 22 is out of order.

Page 23: all those in favour? Opposed? That amendment fails.

Page 24: all those in favour? Opposed? The amendment fails.

Page 25: all those in favour? Opposed? That amendment fails.

Shall schedule K, section 6, as amended, carry?

All those in favour? Opposed?

Schedule K, section 6, as amended, is carried.

Mr Marchese: Can I recommend we vote on the whole thing right now, unless there are other objections? There's no point. We're just going through the motions, right?

The Chair: Shall schedules K through—

Mr Marchese: No, Mr Chair, I'm serious.

The Chair: I'm doing that. I'm asking the question of the committee.

Shall schedule K, section 7, through to schedule P, sections 1 to 9, carry?

All those in favour? Opposed?

Schedule K, section 7, through to schedule P, sections 1 to 9, are carried.

Shall the title of the bill carry? The title is carried.

Shall Bill 119, as amended, carry? Carried.

Shall Bill 119, as amended, be reported to the House?

All those in favour? Opposed?

Bill 119, as amended, shall be reported to the House.

Thank you all for your participation. The committee stands adjourned.

The committee adjourned at 1631.

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Official Report of Debates (Hansard)

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Journal des débats (Hansard)

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Comité permanent des affaires gouvernementales

Rapport du sous-comité

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au ministère de la Formation
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LEGISLATIVE ASSEMBLY OF ONTARIO

ASSEMBLÉE LÉGISLATIVE DE L'ONTARIO

STANDING COMMITTEE ON
GENERAL GOVERNMENTCOMITÉ PERMANENT DES
AFFAIRES GOUVERNEMENTALES

Monday 20 November 2000

Lundi 20 novembre 2000

The committee met at 1540 in committee room 1.

SUBCOMMITTEE REPORT

The Chair (Mr Steve Gilchrist): I call the committee to order for the first day of hearings on Bill 132, An Act to enact the Post-secondary Education Choice and Excellence Act, 2000, repeal the Degree Granting Act and change the title of and make amendments to the Ministry of Colleges and Universities Act.

The first order of business will be the report of the subcommittee. Mrs Molinari, I wonder if I could impose on you to move that and read it into the record, please.

Mrs Tina R. Molinari (Thornhill): I will read into the record the report of the subcommittee.

Your subcommittee met on Thursday, November 2, 2000, to consider business before the committee and recommends the following:

(1) That the committee meet on Monday, November 20, Wednesday, November 22, and Wednesday, November 29, 2000, in Toronto, to hold public hearings on Bill 132, An Act to enact the Post-secondary Education Choice and Excellence Act, 2000, repeal the Degree Granting Act and change the title of and make amendments to the Ministry of Colleges and Universities Act.

(2) That clause-by-clause consideration of the bill be undertaken on Monday, December 4, 2000.

(3) That an advertisement be placed in the Toronto Star, the Globe and Mail, on the ONT.PARL channel and the Legislative Assembly Web site. That a press release be distributed to as many newspapers as possible in both French and English across the province and that, if possible, the advertisement be placed on an e-mail distribution list to all universities and colleges in the province and to student associations at addresses provided by the legislative research service. The clerk is authorized to place the ads immediately.

(4) That witnesses be given a deadline of Thursday, November 16, 2000, at noon to make their request to appear before the committee and a deadline of Friday, December 1, 2000, at 5 pm for written submissions.

(5) That individual witnesses be allotted 10 minutes for each presentation and organizations be allotted 15 minutes for each presentation. That the clerk will consult with the Chair to determine which requests to appear constitute an organization.

(6) That the clerk will schedule witnesses on a first-come, first-served basis. That if there are more requests to appear than can be accommodated, the clerk will schedule witnesses until the first day is full and the two subsequent days are 50% booked, at which time the clerk will advise the Chair who will consult with the subcommittee members who will make selections of witnesses for the remaining time.

(7) That amendments should be received by the clerk of the committee by Friday, December 1, 2000, at noon.

(8) That the research officer provide a summary of the proceedings to the committee by November 30, 2000, at 5 pm.

(9) That the clerk of the committee, in consultation with the Chair, be authorized prior to the passage of the report of the subcommittee to commence making any preliminary arrangements necessary to facilitate the committee's proceedings.

The Chair: Thank you. Any debate? Seeing none, all those in favour of accepting the subcommittee report? It's carried.

MINISTRY OF TRAINING,
COLLEGES AND UNIVERSITIES
STATUTE LAW AMENDMENT ACT, 2000
LOI DE 2000 MODIFIANT DES LOIS
EN CE QUI A TRAIT
AU MINISTÈRE DE LA FORMATION
ET DES COLLÈGES ET UNIVERSITÉS

Consideration of Bill 132, An Act to enact the Post-secondary Education Choice and Excellence Act, 2000, repeal the Degree Granting Act and change the title of and make amendments to the Ministry of Colleges and Universities Act / Projet de loi 132, Loi édictant la Loi de 2000 favorisant le choix et l'excellence au niveau post-secondaire, abrogeant la Loi sur l'attribution de grades universitaires et modifiant le titre et le texte de la Loi sur le ministère des Collèges et Universités.

ONTARIO CHAMBER OF COMMERCE

The Chair: That takes us to our first presenter. Recognizing that we are a little behind time, it will probably be closer to 14 minutes than 15 minutes for the presentations today, because I don't want to cut anyone off and our rules demand that we end when the House rises.

Our first presentation will be from the Ontario Chamber of Commerce, Mr Doug Robson. Good afternoon and welcome to the committee. Perhaps, Doug, you could introduce your colleagues for the purpose of Hansard.

Mr Douglas Robson: You've just identified me correctly. I am the President and COO of the Ontario chamber, which is contrary to what your written piece says there. We're delighted to be here. Atul Sharma is our chief economist and Karim Nensi is our policy analyst. As I say, we appreciate this opportunity to speak to you today.

Most of you are well aware that the Ontario chamber is a federation of 156 local chambers of commerce and boards of trade. Through our chamber network we represent over 55,000 businesses in Ontario. The OCC represents businesses from all sectors of the economy and businesses of all sizes. As such, we are the largest Ontario-based business association. Our organization is represented in each community through our member chambers of commerce and boards of trade.

The OCC has for some time seen the need for the province to establish a private alternative within the university sector. Today, more Ontarians than ever are seeking to improve their marketable skills by investing in education. Allowing greater change in education not only benefits students but also helps to develop Ontario's competitiveness. This is especially the case in today's new economy industries that appear to be employing a growing share of the workforce.

Accelerated growth within the high-tech sector and the rapid pace of innovation and advancement has meant that businesses of all kinds have had to update their own skills and re-educate their employees about newer methodologies. At the OCC, we believe that this trend will continue and more and more members of the labour force will be looking to upgrade their skills. These anticipated requirements for skilled staff in growth sectors such as automotive, machinery, tool, die and mould, aerospace, information technology and communications exceed the current capacity to train. The rapid convergence of sectors demands ongoing, lifelong learning to retain a competitive edge. With the advent of private institutions in Ontario through this legislation, prospective students will have a greater choice than ever before.

This transition toward a technological marketplace in our economy has resulted in a number of adults already in the workforce seeking to acquire more up-to-date skills through several institutions offering applied and/or technical programs. There is an increasingly growing need for employees to attain a higher level of education in order to meet the high skill levels required by employers locally and globally. This has created a demand for more flexible learning opportunities for individuals to access customized learning at any time and anywhere convenient to the learner.

The proposed legislation will therefore enable working people to access quality education at their convenience.

This may be in the form of programs offered in the evenings or on-line, both of which are initiatives that private institutions may be more inclined to offer.

Other key groups that would utilize institutions which arise from this legislation are mature students wanting to upgrade their education and training and traditional university students who may be attracted to a unique and different method of teaching that would more adequately prepare them for direct entry into the workforce. Such individuals will under this legislation have the ability to direct their education toward building on their long-term goals.

A benefit of private post-secondary institutions would be in their ability to offer in their curriculum a continuous educational system customized to the types of jobs available. This applied learning model would enable learners to progress through a seamless continuum of learning from start to end, with adequate work experience such as co-operative work opportunities and industry certification, ensuring their effectiveness as soon as they enter the workforce. Institutions already in place outside Ontario would also be able to offer courses of study that are entirely based on-line, with an individual's home PC serving, in effect, as their school. As well, other institutions may offer certain courses of study to more conveniently appeal to the working student determined to upgrade his or her skills. These are proven examples of work and study translating into a better-equipped workforce.

This new form of private education is not meant to displace conventional university programs. Instead, this additional choice should be available as a means of helping individuals improve their educational standards. The presence of this option will enrich the opportunities available to students at a time when the ability to compete internationally has never been greater.

Another significant driving force for this legislation, in our opinion, is the fact that it would create the effect of much-needed competition within the university sector. This sort of competition is both beneficial to the student and the institution. The major effect of this competition is a higher level of quality that may be offered to learners. In order to attract students, private institutions would have to offer leading-edge curriculum with proven results and highly motivated staff in a market-based environment.

This model has been available for some time in the United States, with impressive results. Traditional universities are motivated to improve their quality of education due to the newer competition and can take advantage of marketing efforts being undertaken by private institutions increasing the overall market size.

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The establishment of a private institution of any kind has never been an easy undertaking. It is crucial that the government invoke an extensive check-and-balance system to ensure that these institutions do exhibit sound accountability, like any other entity operating in the corporate sphere.

The OCC applauds the government's initiative to establish the quality assessment board. We believe that this board will indeed serve as a critical step in the challenge of ensuring the accountability of private institutions. It is essential that this board review all the applications with the utmost care in the interest of ensuring that Ontario's students have access to the very best quality education. The board's scrutiny in the curricula and management of new institutions is important in securing Ontario's reputation as a first-class provider of education.

Protecting the taxpayer and students are crucial elements of this legislation. Such measures would ensure that students are protected from the institution closing suddenly and that the taxpayer is not paying for the failed institution. The OCC is in accordance with the government in ensuring that students are adequately protected should the institution close. It is important that students are protected from financial and other losses they may incur. A centralized pool or database of student records is also a key measure in guaranteeing students that their investment is protected and that they will receive credit for work they have completed.

Public annual reports of private institutions should be easily accessible to the general public for reference. Further, a standardized and required financial audit procedure should also be conducted annually in the interest of accountability. There must be transparency in the operations of the institution. Furthermore, these institutions should not receive direct public funding.

The OCC would recommend that the board examine ways of ensuring that students are able to switch between public and private institutions seamlessly. This capability for students to effectively transfer between institutions should be added to the legislation.

The OCC believes that in today's meritocratic workplace, employees will be constantly seeking to improve their skill level. The high speed of advancement in today's society has meant that many mature workers have had to upgrade or even change their careers midway through their lives. Thus, institutions providing such opportunities will enable these individuals to seek out better skills and maintain that competitive edge which they require to succeed. Ontario's mission of becoming the most competitive jurisdiction in North America depends on its people's ability to remain competitive. Therefore, these opportunities will continuously and conveniently allow those wanting to acquire valuable skills the ability to do so.

Community colleges will continue to play a vital role in the educational system of our youth. The Ontario Chamber of Commerce supports the move to allow the community colleges to grant applied degrees. We believe that these institutions should be encouraged to upgrade selected programs to meet provincial standards and grant provincially recognized degrees. Because the ministry has the ultimate power in granting this ability, it is important that they initially recognize the work of Ontario's current community colleges.

This legislation may well result in a flood of other institutions from across North America competing to

enter Ontario's new market for this service. However, in Ontario's best interests, it is important to grow and develop Ontario's current capabilities as opposed to opening up the market too quickly. Such measures as expanding the capability of Ontario's current community college system, which are institutions that the average taxpayer is confident in, will smooth this transition. A slow but steady shift to newer and existing external institutions is necessary in ensuring the new system is accepted. The government should bring about this change in a slow and deliberate manner. It is therefore the OCC's recommendation that the government bring about this change in a measured and delayed fashion.

The OCC is firmly in support of this new initiative. We believe such changes will bring about necessary competition within the post-secondary sector. We also believe that as our economy continues to change the ability to upgrade and acquire new skills will remain critical to employees. Such measures will ensure that not only will Ontario's employee pool remain competitive, but so will Ontario's place as the most competitive jurisdiction in North America.

However, the OCC continues to reiterate the notion that in order for such change to be accepted and effective, a number of steps must be taken; first, that the government ensures that such change is completed in a deliberate manner with adequate checks and balances in place, protecting Ontario's learners and taxpayers. We also recommend that the board initially qualify post-secondary institutions, including existing private sector training centres already established and based in Ontario. Such institutions require far less capital expense and place the students and taxpayers at less risk. Once an evaluation of these initial institutions can be completed, then, and only then, would it be prudent to grant outside institutions authority to operate in Ontario.

In the end, the greatest beneficiary of this change will be the people of Ontario. If this change is brought about in an appropriate manner, then proof of its success will lie in the success of our economy.

The Chair: Thank you, Mr Robson. That leaves us about a minute and a half for questions. We'll start with the Liberals, please.

Mrs Marie Bountrogianni (Hamilton Mountain): Thank you for your presentation. Would you consider OSAP administration of loans direct public funding or not?

Mr Robson: I would argue that's indirect.

Mrs Bountrogianni: You mentioned that it should be written into the legislation that if an institution closes, the credits be transferable. You're making the assumption that the programs are similar.

Mr Robson: Excuse me. That's not what we said. We were urging that there be a way of allowing credits to be transferable, period, and we were looking for central record-keeping so that if an institution closed, there would be a reference point for people to go to.

Mrs Bountrogianni: Sorry, that is what I meant to say. I'm sorry if I said it differently. We'll see Hansard.

You're assuming, perhaps, that the students and the programs will be very similar. As you are well aware, the double cohort will cause many more students in our university and college system. It may be practically impossible for students to transfer from a closed, private institution to an open but bursting-at-the-seams public institution. Do you have any suggestion as to how the government can deal with that strong possibility? In Hamilton, in my own riding, three private colleges closed in one year. The ministry did a great job in trying to accommodate the students. I have to admit that staff were excellent, but not all the students were accommodated to other institutions.

Mr Atul Sharma: We're assuming that it would be up to the quality assessment board, as it's set up, that those institutions would not close so quickly. The double cohort is expected I think in 2003-04, around then. I expect that any institution that was allowed to establish should be able to run for at least a few years to accommodate the double cohort.

Mrs Bountrogianni: So would you like that in the legislation? Could that be in the legislation, that no private institution be allowed to close in the middle of the school year, the way the three did in Hamilton? They closed right in the middle of the school year.

Mr Sharma: I said that I don't believe they would.

Mrs Bountrogianni: You don't believe they would. Thank you.

The Chair: Thank you for taking the time to make a presentation before us here this afternoon.

CAMBRIAN COLLEGE OF APPLIED ARTS AND TECHNOLOGY

The Chair: Our next presentation will be from Cambrian College of Applied Arts and Technology. Good afternoon, Dr Marsh, and welcome to the committee.

Dr Frank Marsh: Mr Chair and committee members, it's indeed a pleasure to be able to speak to you today about Bill 132. My particular focus will be around the degrees for college students and ministerial consent.

As you can appreciate, in a knowledge-based economy, the importance of lifelong learning for college students is paramount to those of us who run institutions and to our graduates. What we see currently in the Ontario college system is a system that does not in fact provide progressive certification for people beyond their initial graduation at the diploma level. What they need is new paths to be able to achieve the new learning that they wish.

What our graduates tell us is that their progression is essentially in specialized fields, in the supervision of people. After being out in the field for a period of time, they either become supervisors of specialists or in fact own their own companies.

What industry tells us is that they are essentially missing within many of their organizations the skills of project management, the skills of people management, the skills of business management at the entry level.

An applied degree at a college is applied-based and generally not theory-based, and many of the applied degrees that have been introduced across this country and throughout the world focus on some business knowledge, some human resource knowledge, the specialty studies and an applied research project. These address the requirements of our college graduates as they perceive their progressive certification, and of one of the gaps which industry sees in making itself competitive.

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On the current Canadian scene, in Alberta, applied degrees were brought in some six years ago. That was expanded just two years ago to allow selected colleges and selected programs to offer applied degrees. In British Columbia, through the British Columbia Institute of Technology and through the establishment of university colleges, which were essentially colleges which were extended, applied degrees were made available to college students, so they too have progressive certification. In Atlantic Canada, through the University College of Cape Breton, through the Marine Institute of Memorial University, and through an arrangement between the New Brunswick college system and UNB, applied degrees are available to college students.

In Ontario it's a mixed bag. Without having degree-granting status, colleges cannot offer applied degrees, as you know. In many cases the arrangements that were attempted to be developed between Ontario universities and colleges have not borne fruit. In fact, in our own case we have arrangements outside the province for our students to get the type of degrees they need. These discussions have been progressive. The arrangements have been useful and fruitful for our students, but it's time to bring these degrees home so that the students do not have to incur the cost of moving outside the province or have to study over a longer period of time through distance education to obtain these credentials that they so rightly need and want.

The impact, then, on students: a student who graduates with an applied degree from one of the other provinces and who applies to a multinational company has essentially a better opportunity than a student in Ontario. They bring additional credentials to the table when they apply, and for the most part an employer will look at not only the credentials that you have but the ability and the further credentials that you bring which will allow you to broaden your impact and your service to the corporation. Students in Alberta have it through their degrees. Students in BC have it. Ontario students don't. They're limited by virtue of not having the ability to get applied degrees.

If we were to look at it from a global context, Ontario students who apply to work with multinational corporations are restricted from being able to do cross-border work in Europe and in the US and North America because of the certification that we give. In the international context, if you were to look at institutions like ours throughout the world, in Europe, in North America, in Asia and in the Middle East, the programs are

reasonably similar for institutions of our size. They have degree-granting capability. In fact, many of the courses that they graduate from, with exactly the same standards that we have in place now, have a bachelor of applied science. What we are suggesting in Ontario is that we would add value to the programs we offer to ensure that the standards will be even greater and that the credential will be more powerful than those in these areas.

If we are to recruit foreign students, which many of us try to do throughout the world, the first question is, "What's the credential that you offer? Is it the degree as in the US? Is it the degree as in Europe? Is it the degree as in Australia? Or is it the degree as in one of the other provinces of Canada?" We have to say, "No, it's a diploma." They ask, "How does that fit within the context of what we want to have?" This is a very significant issue, particularly in the Middle East. In the consultancy services, as we try to do work with international corporations throughout the world, what we find is that our credibility in many cases is determined by the credentials that we give. So in fact what we are finding is that our competitiveness in the world is being limited by a limitation that's been established in legislation.

There's a further benefit, and that is—and I go back to what an applied degree is, the components and what it's like: some business, some HR, specialty work in an applied field, and a research project.

Generally, applied research leads to the development of some new process, some new prototype, some enhancement for efficiency or some new development, some product that can be manufactured. In the areas of the north, where I live, in Sudbury, these are very important to building an economy. They're very important to ensure that the resource-based industries are as competitive as possible. They're very important to try to sell these products on the world stage in order to attract and develop the economy. Out of innovation generally comes industry development. Out of innovation generally comes economic development. Out of innovation generally comes economic well-being.

I recommend to you that you support, through Bill 132, a more open policy on the granting of degrees at colleges. I concur that a quality assessment board needs to be established in order to ensure that quality does not slip. It is not the intention of those of us who wish to offer degrees and to change some of the credentials and build on the credentials that we've been giving for the last 35 years to see any quality drop.

The second is a more open policy on ministerial consents. Currently, we are limited when we have arrangements with institutions outside of this province—institutions, by the way, that have charters from the provincial Legislatures of the provinces throughout this country, institutions that are well recognized, institutions that rate highly on the Maclean's list, for what that's worth. But when we have arrangements like that, we cannot offer these programs in Ontario; we have to send the students outside. I would suggest that Bill 132 would address the issue of ministerial consents at least to give greater applicability and greater opportunity for those

institutions that have charters from Legislatures outside of this province to be allowed to offer programs in conjunction with colleges in Ontario.

The Chair: That leaves us about three minutes for questions. This time it will be the NDP.

Ms Shelley Martel (Nickel Belt): Thank you, Dr Marsh. Can you tell me, would there be an additional cost to the college to implement a degree-granting process?

Dr Marsh: Cambrian's perspective on the types of degrees that it would want to offer is really degrees that are on top of its current credentials. So where it offers three-year programs, a further year of study would be required in order to attain the competencies of the applied degree, particularly bachelor of technology, bachelor of applied communications, bachelor of business administration and so on. The additional costs both to the students and to the college would be the costs that would be normal in extending a program by a year. The additional benefits to the students, however, are remarkable.

What I would suggest to you as well is that the additional revenue generation for the college by virtue of having this credential from its other sources, like its international consultancy, its attraction of students and so on, would certainly be a factor that would reduce the cost to the college.

Ms Martel: So do you see that you would have to be hiring more professors to be teaching that extra year?

Dr Marsh: Obviously, yes.

Ms Martel: Do you have a sense of what that cost would be to the college at this point, if you were to extend your three-year programs to four?

Dr Marsh: We would look at it in a limited manner so that the types of degrees we want to offer would be in very particular areas. I know a couple would be particularly in the applied technologies. Depending on our focus, many of the courses I've noticed here, the business HR and so on, are already offered by the college. It is in the specialty areas that you would have to do some additional hirings.

Ms Martel: But you can't give me an estimate right now—

Dr Marsh: I wouldn't be able to give you an estimate of the number offhand. It would depend on the degree and the broadness of it.

Ms Martel: Have you had any discussions with the government about who's going to assume that cost? Do you assume it is going to be you?

Dr Marsh: I've been involved in this one in another area, as you know. There are two ways to do this. One is in some form of cost recovery for the final year, which may not be extensive, through a tuition arrangement. The second obviously is that for a student studying a year longer in a program, one would anticipate there would be some government funds to cover off part of that in the normal manner that it would be for any other program that you would do.

Ms Martel: Have you had any of that kind of discussion with the government to this point?

Dr Marsh: Yes. They're aware that there are costs involved in extending programs. We are currently in the arrangement for a bachelor of applied science in nursing. I think they recognize that by adding the extra year, there's additional cost and they have covered it.

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Ms Martel: They might have for that particular program, I guess, generally speaking, because this is going to now happen at a number of institutions. In your discussions with the government about the nursing program, have they given you any indication of what they plan to do on a broader scale with respect to the other colleges that will be impacted by this initiative?

Dr Marsh: Not at this point.

The Chair: Thank you very much for taking the time to come down from Sudbury and make a presentation. We appreciate it.

Dr Marsh: Thank you.

The Chair: Our next presentation will be from Canadore College of Applied Arts and Technology.

CANADORE COLLEGE OF APPLIED ARTS AND TECHNOLOGY

The Chair: Dr. McTiernan, good afternoon and welcome to the committee.

Dr Timothy McTiernan: Thank you very much, Mr Chair. I too would like to add my support to the provision for applied degrees in Bill 132, and the focus of my comments will be in support of applied degrees.

Our view at Canadore College in North Bay is that applied degrees will meet the needs of Ontario students. They'll also contribute to the knowledge and skills base needed to support regional and sectoral economic growth and competitiveness in Ontario.

Fundamentally, there seem to be three principles that underlie Bill 132: the principle of relevance in post-secondary educational programming and certification; the increasing choice in opportunities for students in their courses of studies and in their ultimate certification; and safeguards for students through assurance of program quality. The bill also speaks to safeguards in terms of the management of funds that are allocated for student financial support.

The bill in that sense addresses the need for Ontario's post-secondary education system to remain current and competitive with international post-secondary programs. The previous speaker spoke well to that. It also speaks to the need for colleges to adjust and modify program contents and standards to best equip Ontario college graduates to succeed in a changing workplace that operates in a global economy—and the previous speaker also spoke well to that—particularly the situation we're seeing now with the transferability of jobs and the transferability of positions across companies that operate internationally as much as nationally, and inter-provincially as much as provincially.

There is also an ongoing need, by colleges and by government in this bill, to ensure that students can be

assured of quality and relevance in their chosen programs to essentially pay back the investment that students make in terms of their own time, money and energy in those programs. In that regard, colleges serve students, business and industry, and our regional and community economic development priorities in a number of ways.

Colleges serve students with access and foundation programs, with skills and trades training, with professional and paraprofessional training, and with high-tech and process-intensive training. As colleges adjust to new workplace realities with professional and paraprofessional, high-tech and process-intensive training and deal with industry in terms of just-in-time training and a broader need for applied research partnerships and, in doing so, deal with regional and community economic development as an active part of the planning and development process in communities and regions and with economic sectors, colleges, in all of this work, ought to and need to remain internationally and nationally competitive.

The provision for applied degrees in Bill 132 will allow Ontario colleges to remain competitive and, bluntly, to regain a competitive edge over those provinces that have already worked with and instituted applied degree arrangements.

The legislation appears to be carefully measured to allow for careful implementation of applied degrees, which is appropriate. The legislation doesn't, in and of itself, speak to the urgency of work in this area but there are a number of factors and situations—again, I'm echoing the previous speaker—which speak to the urgency. I'll use three examples from our own college to underline the benefit and the value of a made-in-Ontario applied degree that can work effectively in colleges, whether they're in the urban or non-urban parts of the province.

Canadore College and a number of other colleges in Ontario have had a long-standing arrangement with New Hampshire College, about to be the University of Southern New Hampshire, where three-year graduates can go to New Hampshire College and, with two further semesters of study in a co-op program, obtain a bachelor's degree in tourism and hospitality administration. I don't know the precise title of the degree, but that's what they end up with.

When the arrangement was originally made, it was a nice paper arrangement with little practical import. We had a couple of students a year go to New Hampshire and get the benefits of the articulation agreement. Currently, we have 30-plus graduates from Canadore College's last cohort of three-year diploma graduates studying at New Hampshire for an applied degree in tourism and hospitality. It's an example of growth in the use of an arrangement that benefits the students. It doesn't benefit the Ontario economy, largely because of the structure of the degree program and the benefits derived.

The degree program involves a long co-op placement with the Marriott chain in the United States. The consequence of that is that most of our graduates end up with high-paying jobs in the hospitality sector in the United

States—good for continental tourism, not particularly good for the development of the Ontario tourism sector. As we work with our community and regional partners to build the capacity in the hospitality sector in Ontario, the opportunity for applying for and being considered for an applied degree in that area would go immeasurably toward us meeting our community and regional development role as well as our student development role.

A second example from areas that we specialize in: we do training in the aerospace sector. In recent discussions with representatives of the aerospace sector, the individual who was representing the Ontario organization we were having talks with identified a gap between engineering degrees and the technology diplomas that we provide that's essentially a knowledge-intensive but technology-intensive gap, and spoke to the value of having some credential, some certification that might fill that gap and meet the burgeoning needs of the aerospace sector. Again, the provision in this bill for applied degrees provides an opportunity for looking at that blend between the knowledge and theory and the technical skills required in new positions in a new economy.

To pick up on a theme that the previous presenter had, in an international context we've had one instance in the past year of a situation where not being able to provide a degree or not being degree-granting has affected our ongoing work on an international project. We were the lead college for a consortium of Canadian colleges, Ontario, BC and Alberta colleges working on a project in Thailand throughout the second half of the 1990s. It was essentially taking curriculum in environmental and other resource areas and translating it and modifying it for use in a Thai institute of technology CIDA-funded project.

At the end of that project, and a host of related projects last year, there was a conference in Thailand to look at follow-up opportunities. We were a key part of the conference. Our Thai partner was very polite and very firm in saying to us that they liked the job we'd done but they no longer considered us a vital or a significant partner and they were happier to deal with the BC member of the consortium that was a degree-granting institution because they had just attained degree-granting status and they saw their partnership base shifting.

I use those three examples from a small college not in an urban centre as compelling reasons why, for us, access to an applied degree would complement very, very well what we do well in our diplomas and certificate programs and what we do well with Nipissing University, which is adjacent to us, in some of our degree-completion arrangements with Nipissing University. We see applied degrees as being good for students but also good for regional economic development and for us meeting our mandate in that regard. Thank you.

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The Chair: Thank you. That leaves us about three minutes for questioning. This time we lead from the government.

Mrs Molinari: Thank you very much for your presentation. It's interesting to hear a theme that's coming

out, offering this option and this choice for students, and it's good for regional economic development and certainly for students being able to access a greater possibility of having degrees. You talked about your relationship with Thailand and not being considered as a partner. When you started that discussion, were they aware that Canadore College did not offer applied degrees? I know it's going to give you more opportunities if your college applies for and is granted applied degrees, and you see that as opening up opportunities. Would you be able to go back to some of those whom you've already made connections with and have good relationships with to open up the doors of that partnership and that possibility?

Dr McTiernan: Yes. I think it would put us on a different basis. Even if we were still in the development process for an applied degree, having the ability to grant it would make a difference. The project started at a time when the institute we were working with in Thailand didn't have degree-granting status. It started in the mid-1990s, when applied degrees were still a discussion point rather than a matter of policy in the Ontario government. So the initial stages of the development of the relationship were quite constructive and positive.

The gap now is in the perception, and this time last year of course the bill hadn't been framed and hadn't been introduced. The gap was in the perception that we were not moving at the same rate that the institute was into degree-granting and into some of the benefits that will arise from that: the engagement with the industry sectors that we will have to work with and will work with in the implementation of applied degrees, and the opportunity for applied research that comes out of that as well. This institute was beginning to develop a strong focus on research and on industry relationships in the research area.

The Chair: Thank you very much. We appreciate your taking the time to come all the way down to make a presentation before us today.

CONESTOGA COLLEGE OF APPLIED ARTS AND TECHNOLOGY

The Chair: Our next presentation will be from Conestoga College of Applied Arts and Technology. John Tibbits, good afternoon and welcome to the committee.

Dr John Tibbits: Thank you very much. First of all, I want to congratulate the government on this initiative. I think there'll be a tremendous benefit for the citizens of Ontario as individuals, and also for the economy.

I'm going to refer to two papers. I wrote a paper, dated September 1999, Ontario's Post-Secondary System: A Vision for the Global Economy, that was submitted to our minister and widely circulated throughout the province. There was a consensus on this paper among the 25 colleges. I'm also going to refer to a speech that I gave in April of this year which is called Applied Degrees for College Programs. In the main paper I talked briefly

about private universities, but my intention today is to focus on applied degrees. I will refer to both papers.

I'd like to start with the key assumptions here. I think it's important in that the key assumptions are in the main paper, the September 1999 paper, and I will quickly go through them. I'll just go through the bullet points.

I think we've reached a point in our society when the expertise of our people is really our most valuable resource economically. That wasn't the case when I graduated from university in the 1960s. I don't think that was the case at the time. You could train an elite. It's becoming clearer and clearer that countries and regions that can train and educate a larger percentage of their population to higher levels will be more competitive. I know in the 1960s you could train the elite in a theoretical university education and that was good; that was a good thing. Now we need to get more people trained to higher levels.

Also, to maximize the quality of our human resources we must make it easier for people to have opportunities for continuous learning and professional retooling. It's very difficult now for college students to move and get upgraded in a university program. In fact, it's extremely difficult.

Not only that, what's happening now is that jobs are changing. Look in our area of K-W, Canada's technology triangle. There are so many more high-tech jobs; there is so much more advanced manufacturing. When I arrived in 1987, and I'm in my 14th year, you could get a good job out of high school. You could get a good job using the unionized workplace in, let's say, one of the manufacturing companies. Very few of these places, like Toyota and Linamar and others, are hiring people out of high school. They're expecting higher levels of training and education and these jobs are requiring a more sophisticated education.

Next point: one of the problems is to ensure a strong pool of talent in these new fields of study. We must provide people with credentials commensurate with the knowledge and skills required to achieve them, otherwise people will have little motivation to choose these fields. I'll talk about that in a moment. We also know we're faced with massive skills shortages, whether it's IT, advanced manufacturing or the trades. I know in our area the number one barrier to economic growth in the K-W, Guelph, Cambridge area is skills shortages.

I think it's quite obvious why you might have that. We have a system that recognizes that the best thing for a high school student to do is to go on to university because that's where you get the degree. That's where the currency of the realm is, in the degree, and I'll make it very clear. I think we have wonderful universities—in our area alone we have three of the best in Canada—but I'm not sure the degree is the only credential we should be recognizing.

I want to talk about why, from a student perspective, I think we should be moving toward applied degrees, tying into those assumptions I talked about earlier. First of all, college students who wish to obtain a baccalaureate don't

get the credit they deserve right now. It is very difficult for our students, and I can tell you that some of our programs are tougher than some of the university programs. I'm not saying all, I'm just saying some. I can give you the example of our robotics program: cut-off mark, 88%. Try to move into a university in Ontario and get equivalent credit. It can't be done. I can speak with some authority. I've been on the board at Laurier for six years. I have some idea of how the universities work.

The applied degrees would give colleges and their students greater prestige and academic credibility. Not only that, it would be greater justice for them. It would also make the baccalaureate more accessible. For instance, take a university like Laurier, where to get a BBA you have to pass calculus. There are a lot of CEOs in our community who do not have calculus and they're doing very well. There's such a heavy emphasis on the theoretical at the universities that it's not fair to some people who may be much more practically focused and yet can't obtain the theoretical degree.

Applied degrees would give greater value to vocational, practical training. We have a unique system in Ontario, but not unique in a sense of being positive. It's really a disgrace that in this province you cannot get a degree for applied learning. Look at Germany, look at the British system with polytechnic institutes. That's the direction we should be going in.

You can take a bunch of sociology and psychology courses and have a degree; you could come to Conestoga and take advanced courses in math, physics and robotics and only get a diploma. The reason that becomes important is that some companies won't promote unless you have a degree, and there is the international. That is a factor. But never mind international; just locally, at Toyota to be a shop floor supervisor you have to have a degree.

You could get a degree with, as I've said, a bunch of general arts courses—I'm not saying anything is wrong with that; I think the liberal arts are excellent—but our students are not getting recognized. We have a lot of people in Ontario who I think are going off and doing degrees in anything because they know that's the currency, rather than coming to a college, rather than going into trades. They believe there's more prestige in that.

I think it also would be a factor as far as fees. The fees would be less in applied degrees. I'm not saying the fees would be the same as they are now, but they certainly would be less than university fees. It would also be easier for the college to attract fundraising dollars. Some major companies in this province, in this country, will not provide capital donations to colleges. They will only provide them to universities.

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I think that applied-degree-granting status would also encourage more and better students to apply for such programs. One of our big issues: our robotics program has a 100% job-placement rate, our electronics programs have 100% job-placement rates, yet there's a shortage of robotics technologists in our area; there's a shortage of

telecommunications, wireless people. Our issue is that we can't attract enough, and we can't attract enough because of the parents. We've done a study in our community, by the way, and there's no question—I can show you the data, that students, parents and teachers believe that the degree is the currency of the realm.

I also know that employers are asking for students with higher levels of applied education and training for these jobs. Why would someone go for four years at Conestoga, another year, and come out with a diploma? If we expect people to have more and more advanced training, they're going to expect to have proper credentials for it. There's no question also that programs that have degree status will generate graduates who are better prepared for continuous education and also further education. It will allow us to partner on a much more equal footing with the universities. It's very difficult now to partner with three-year programs.

Why shouldn't Ontario's post-secondary students have the same kinds of access and opportunities as other students have in Canada and the rest of the world? Our robotics coordinator, by the way, in the last two years has been out in BC helping BCIT develop a robotics program. I mean, this is ridiculous. We've lost him for two years because they want his expertise and we will have our students going out there to finish their robotics degree in BC.

This case for applied degrees, by the way, is not new. One of the reasons I didn't update this paper of September 1999—this has been a long story. When colleges were set up, there was no question that the universities wanted the college system to be lesser. They did not want it to be an equal partnership. Therefore it was focused in a much different way. If you look at the Ontario Jobs and Investment Board report and also the Pitman report, No Dead Ends, it is very clear that the case for applied degrees is very strong. What's going to be happening, and you can see it now with the problems we're having with nursing collaborative partnerships at the universities, is that more and more professions are requiring a degree for entering into practice. Nursing will require one by 2005, and I can tell you it's going to be very difficult to produce the number of nurses you'd need through collaborative university partnerships. It's just not going to happen. So we need to be looking in a number of areas, like nursing, and it'll probably happen in other areas like social work. We should be looking at ensuring that in vocational areas we can broaden the scope and allow colleges to offer applied degrees. I think it makes sense, it's good for the economy and it's good for individuals. It's an issue of fairness and justice. Thank you.

The Chair: Thank you very much. That allows us about two and a half minutes for a question from the Liberal caucus.

Mr Dave Levac (Brant): I appreciate the opportunity and I thank you for the presentation. There seems to be a plethora of colleges approaching us, saying that this is a good idea. I probably support the theory and concept.

I want to go to something you alluded to that I believe is probably a bigger problem that we need to face, and that is convincing people, particularly young people, that skills of the trades are the area they should be considering, beyond just the somewhat myopic view of universities being the be-all and end-all. For instance, in my community the Brant Skills Development Group was formed in order to form partnerships with business, educators, colleges and universities to try to educate students before they start making the choices they're making, particularly at the high school level. I've convinced them to go down to the elementary level. Do you believe that the government should be supporting programs like that in order to help the skills development area grow in nature and stature?

Dr Tibbits: I think we need both a provincial and national strategy to promote skills. It's that big an issue. I think it's been there for a long time and it's becoming a more and more problematic issue because the economy is going so quickly. But I also think that credentialing is very important. It's very hard to convince a university that they should take electricians and move them up through electrotechnology to become electrical engineers. But if you have the proper credentialing, I think what we could do is integrate the trades into applied degree programs. But I do agree with you that we need a provincial and a national strategy to promote skills. There's a huge problem, and you're right, with the parent's, student's and teacher's perception. We did a study in our community about a year ago. We did focus groups, independent third party, interviewed parents, and we had the advantage; they knew it was a one-way mirror. But it was incredible, the perception they had of trades.

Mr Levac: We would support that and look forward to the provincial government helping, because the federal government has given money to this particular group.

The second area I'd ask you a quick question on—

The Chair: Very quick.

Mr Levac: It will be very quick, Mr Chairman. Laurier Brant is an outreach in Brantford of Laurier campus.

Dr Tibbits: Yes, I am aware of Laurier Brant.

Mr Levac: Laurier Brant and Mohawk College have formed a partnership. Is that another area which you would encourage and endorse with regard to the granting of degrees?

Dr Tibbits: Where you can get co-operative partnerships, I think that's a good idea. But I think we have to be careful because the university thrust with Laurier is a liberal arts thrust. I think we also need to put a greater emphasis on the applied side. I think an applied degree is quite different than a theoretical degree. Certainly, I would encourage collaboration, although if you look at Alberta and British Columbia, what happened is both governments at some point in time declared that there were going to be transfer mechanisms. It is going to be very hard to get the universities on their own to come up with collaboration where credits are accepted. It's very, very difficult.

The Chair: Thank you, Dr Tibbits, for coming before us here today.

GEORGE BROWN COLLEGE OF APPLIED ARTS AND TECHNOLOGY

The Chair: Our next presentations will be from George Brown College. Good afternoon, welcome to the committee.

Mr Michael Cooke: My name is Michael Cooke and I am the vice-president, academic excellence and innovation, at George Brown College. Joining me in this presentation is Colin Lock, who's the manager of process development for Visteon Automotive Systems. I hope the members of the committee, like me, are impressed with the high degree of unanimity among the colleges on this. The only other thing we agree on with such unanimity is the fact that the government should be giving us more money for our programs.

Thank you very much for this opportunity to speak to you today about Bill 132. We want to express our strong support for this legislation, which will give colleges of applied arts and technology the authority to confer a baccalaureate degree in applied areas of study.

At George Brown College, we help prepare students for careers in today's and tomorrow's knowledge economy. Our approach is to provide relevant, high-quality learning experiences in preparation for careers in employer sectors where we have expertise and strong partnerships, sectors where employment is not only readily available today, but promises to be so over the long term, sectors where employees are integral to shaping the sector's future.

At George Brown we are currently focusing on the sectors of financial services, graphic design, community services and health sciences, hospitality and tourism, building technologies, information technologies and microelectronics manufacturing.

Our college plans to implement programs resulting in a baccalaureate degree in the applied areas of advanced microelectronics, financial services, graphic design, American sign language interpreting and orthotics/prosthetics.

To illustrate the need, let me cite the example of microelectronics manufacturing for you. Electronics, as you may well know, is the largest industry in the world. Microelectronics is a foundational technology that underpins and drives numerous industries—everything from telecommunications to helpful projects such as hearing aids. Every day we experience microelectronics and we make use of them, whether it's to operate a sophisticated plant or simply to remotely open our garage door.

Interestingly, in the auto industry today more cost is attributed to electronic components than to metal. That's a big change and it's an indicator of how the world is changing and how the workplace needs to change to keep up. Similarly, at George Brown College we have changed and we must continue to change in order to prepare graduates not only for the present, but for the emerging

job markets. No other institution in Canada currently offers an applied microelectronics manufacturing program delivered in live manufacturing facilities such as we have at George Brown.

More than 25 corporate partners have worked with us to develop our advanced microelectronics centre at George Brown College. In this centre, students truly experience the industry. They don't just read about it or hear about it or see it but they experience it in a very hands-on manner. This helps students make good decisions about entering the field and gives the industry the opportunity to get to know them and their potential.

This is a major distinguishing characteristic of the applied baccalaureate degree educational experience: integration on the ground where it is happening.

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George Brown College is also the first college member of the Centre for Microelectronics Assembly and Packaging consortium, a research consortium involving four universities, six microelectronics companies and George Brown College. What we are doing, as I think this example illustrates, and what the universities are doing are complementary, not competitive or redundant. There is not only room but a necessity for both. I could tell you similar stories, if I had time, about each of the other employer sectors that we are focusing on.

As you heard from John Tibbits a few minutes ago, baccalaureate degrees in applied areas of study open new doors for many new students. As a result, a greater number and a broader range of students will complete degree-level studies. This will strengthen Ontario's economy in a whole number of ways. The programs will be highly responsive to employer needs and to the job market. They will be skills-based and prepare graduates for the greater technical demands of the knowledge economy. In the end, more students will be equipped to work in our rapidly evolving knowledge-based economy. The introduction of baccalaureate degrees in applied areas means more student choice and more options for them, more market-current education, more employment-ready graduates, more appropriate recognition of their credentials and smoother transition to further studies.

I'd like to ask my colleague Colin Lock from Visteon to give you an industry perspective on the matter of baccalaureate degrees in applied areas.

Mr Colin Lock: Good evening. My name is Colin Lock. I'm the process development manager for Visteon automotive systems. We manufacture electronic modules for a variety of automotive manufacturers. We end up hiring the graduates from these programs. We fully support Bill 132 allowing colleges the ability to grant baccalaureate degrees in applied areas.

Some of the themes I'm going to talk about have been spoken about here already. Real market growth in electronics is expected to average 19% this year, with automotive growth about 16%. There is a local and worldwide shortage of skilled workers. I personally screened over 500 resumé's last week looking for five additional people. Colleges have proven to be particularly responsive and adaptive to meeting our requirements

for this skilled workforce. Jointly, industry and George Brown College have co-developed surrogate manufacturing facilities, practical relevant courses and strong theoretical courses to meet current and future requirements.

The truth about manufacturing is that industry does not compete on a worldwide level playing field. Our competition pays significantly lower labour costs than we do. What this means is that simple products that can be easily assembled are shipped overnight to low-labour facilities. What is keeping us competitive right now is that the low-labour countries do not as yet have the specialized complex knowledge and training to produce difficult, higher-technology products. We are using this competitive advantage in knowledge and education to offset the disadvantage we have in labour costs. This is a very fleeting and temporary advantage because the knowledge base and experience is increasing at a frightening rate in so-called low-labour-cost countries. What is difficult to do today becomes ordinary to do tomorrow.

By partnering with colleges and universities, this enables us to maintain and increase our knowledge and skill and remain competitive. Colleges have been particularly adept at addressing the rapidly changing industry requirements.

I'm just going to pull some things from my pocket which I carry all the time. A few years ago a pager was not commonplace. I have my personal digital assistant, which wasn't that commonplace last year. Even for a simple thing such as getting into my car, I have a remote keyless. Even to start my car, my key has a transponder in here which is keyed to a module inside my car. If I don't have the right key, my car won't start. None of these existed five years ago. The complexity that's required to develop and manufacture these is sufficient, I believe, to meet degree requirements. If students are not offered the opportunity to have a degree, this will basically shut them out of certain job opportunities.

Earlier a gentleman mentioned that Toyota required a degree for shop floor supervisor. That is our requirement as well. To operate the equipment that manufactures something like this—you can't see it very well, but it's quite miniaturized—requires a degree as well. If you don't have a degree, in our company you will simply not be promoted past a certain level and you will be ineligible to work in what we call foreign service or in foreign manufacturing sites. This is unfortunate, because the skill level is definitely there, but it is a company standard that a degree is mandatory. It is a recognized company standard.

Suffice it to say that we support the legislation that allows colleges to grant baccalaureate degrees. Speaking from industry, we require this because that's how we are going to remain competitive. If we don't do it, I personally am going to be out of a job without skilled workers.

The Chair: Thank you, gentlemen. That leaves us about a minute and a half.

Ms Marilyn Churley (Toronto-Danforth): I have my transponder here and my telephone, which should be off in here, shouldn't it?

The Chair: It absolutely should.

Ms Churley: I see I have one missed call. I finally got rid of my pager because I felt like I was on a leash all the time. There are days, I must tell you, when I feel like I'm going to become a Luddite. These have their advantages but they also, as I'm sure many of you understand, keep us working 24 hours a day. Having said that, I think your demonstration of how advanced we've become in the last five years is quite good and implies as well that we are just going to see many more advances over the next five years.

I wanted to ask you about the costs attached to this. I believe my colleague who was here earlier, Shelley Martel, did as well. Perhaps you could address this.

Mr Cooke: I think the first point is that the costs of this kind of education are cheaper than a degree through a university. For the province, for the students, the cost is cheaper. As Colin has pointed out in his example—and we could cite many others—the opportunity for employment and advancement in employment is far greater. In a medium- or long-term analysis, whatever additional costs are involved, they will certainly be recouped over time and make for more people who can pay taxes, more people who contribute to the economy and to society generally and fewer people are unemployed and so on.

Having said that, I think Shelley Martel's earlier question was around the immediate costs to the college.

Ms Churley: Yes. I'm sorry, I should have specified.

Mr Cooke: There are two answers. Obviously from a college perspective, if we are offering additional programming we would hope that the government either directly and/or, as we've already illustrated in a number of our partnerships, in consort with other interested partners will help raise additional funds for that. Even in a worst-case scenario, what you would see is a shifting of resources within the college to these areas of programming where there's real demand for them and we would move investment away from areas where there isn't the demand.

Ms Churley: That's it?

The Chair: Yes. We are overtime, I'm afraid. Thank you very much, Mr Cooke and Mr Lock. I appreciate your bringing the industry perspective into this debate as well.

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GEORGIAN COLLEGE OF APPLIED ARTS AND TECHNOLOGY

The Chair: Our next presentation will be from Georgian College. Good afternoon, Mr Tamblyn, and welcome to the committee.

Mr Brian Tamblyn: Thanks for the opportunity to speak to you today about Bill 132. In the interest of time, I won't cover everything in our presentation.

There have been private colleges in Ontario for many years, and I believe this competition has actually strengthened publicly funded colleges, even during our current period of underfunding. I believe that private

universities should be received in the same manner by publicly funded universities. Ontario universities should be more than able to stand up to this competitive challenge. However, it will be important for the government to monitor private universities from a consumer protection perspective, as has been provided for in the legislation. Students investing in their futures and in the province's future must not have their education jeopardized by a lack of government accountability and control over these private institutions.

Georgian College has been able to develop a significant number of articulation agreements with universities. In fact, over 40 such agreements with over 20 institutions are currently in place. They have helped create a more seamless flow into future educational opportunities for Georgian's graduates who wish to obtain a degree.

These arrangements exist across Canada, in the United States and throughout the world. The only jurisdiction where articulation agreements are notably lacking has been Ontario. After over 30 years of college operations in the province, Ontario universities generally will not fully recognize and acknowledge an Ontario college education without students losing credit for at least one year of their college diploma.

The result of this has been that almost all of Georgian's graduates wishing to pursue a degree with full credit for their college diploma must leave Ontario. The proposed legislation will allow private universities into Ontario, a number of which have already shown an interest in working with Georgian to create opportunities for our graduates, granting full credit for their college studies. We believe the establishment of private universities in Ontario as a competitive influence on the public universities will indirectly encourage the public universities to more fully recognize the needs of the hundreds of thousands of community college graduates seeking to further their education, with better recognition of their prior learning experience.

There are two issues the committee may wish to clarify in this regard. The bill refers to the establishment of private universities in the province but does not clearly define them. We believe it is important that public universities from foreign jurisdictions be included in this definition; we assume that private foreign universities are already covered. This may occur in very rare circumstances, and obviously may need the minister's approval, but we have some programs, such as professional golf management, where an institution like Pennsylvania State University has the top program in the world. We may wish to partner with an institution like Pennsylvania State.

The second point of clarification is with regard to the private universities themselves and the role they may play in the province under this legislation. Georgian already has articulated relationships with private universities that allow the college's graduates to attend the private foreign institution and complete a degree. These private universities are often very specialized, offering the highest quality degrees possible in niche programs aligned with Georgian's own niche programs.

Georgian, it's graduates and its private university partners are anxious to be able to deliver the degree-completion activity at Georgian's campuses when Bill 132 is enacted. We don't necessarily see the university setting up an entire campus on their own, but we would see them perhaps delivering the fourth year of a program on our campus.

I can give you two examples. We have the only aviation management program in the province. Embry-Riddle, which is the world's leading aviation university in the States, is interested in delivering a fourth year at our campus. Again, our students would receive full credit for their studies. Another example would be our automotive marketing program, which is the only program in Canada. We're partnered with Northwood University in the States, and they have the only automotive marketing program in the United States and are very tightly connected with the Big Three auto manufacturers. They are interested in delivering a fourth year on our campus, and we will be proceeding with that.

Georgian College also welcomes the opportunity to grant applied degrees. Degrees are the global currency of post-secondary education. Our graduates are disadvantaged in many jurisdictions where a college diploma is an unknown entity or is associated with inferior institute diplomas. Like many colleges and universities, we recruit students from around the world, and if you go around the world, diplomas are typically associated with institutes. In most countries these institutes would be a floor in a high-rise building. They would be very poorly equipped and don't resemble Ontario colleges in any way, shape or form.

Ontario's community colleges play a critical role in providing a high-quality, job-ready workforce that can compete in the global economy. The competitive and responsive nature of Ontario's publicly funded community college system positions it well to ensure that progressive, degree-granting opportunities are seized and acted upon for the benefit of the citizens of Ontario. This ability is diminished when the educational certification that is granted to them is not recognized.

The proposed legislation goes beyond simply providing colleges with the ability to grant applied degrees. Under this legislation, colleges may in some circumstances be able to grant full baccalaureate degrees. This initiative of the government is also fully supported by Georgian College.

As Mr Dunlop knows, Georgian serves a catchment area of over 30,000 square kilometres in which there is no university. In this catchment area, the proportion of the population with university degrees is significantly below the provincial average. The lack of access to a university is seen as a possible explanation for this situation. We're very enthusiastic about exploring all avenues that will be provided by this legislation to open up access to degree-level post-secondary education opportunities to the over 660,000 people in our catchment area.

In our submission, we have several wording concerns around inspection powers, financial aid controls and

accountability of the board of governors, but in the interests of time, I won't go into those details.

In summary, Georgian College supports the introduction of private universities and the access this will bring for additional educational opportunities for our graduates. Clarification about degree-completion activities and access by foreign public universities is likely required. We welcome the empowerment of colleges to deliver applied degrees, and perhaps full degrees, in underserved areas of the province.

The Chair: Thank you very much. That leaves a couple of minutes for questioning from the government side.

Mrs Molinari: It's evident from what you've said in your presentation that you're fully supportive of the legislation coming forth. I will certainly read some of the points you didn't make and some of the areas on which you raised some concerns.

I want to respond to a question in your presentation about foreign jurisdictions being included in the definition. You say, "We assume that private, foreign universities are already covered in the legislation." I want to comment that this legislation is enabling and is not restrictive of any institution that wants to set up. The quality assessment board will be the body that will decide, based on a number of issues: student protection and certainly credibility of the curriculum and the excellence of any curriculum that is provided. Certainly the board will decide who gets to set up. I just wanted to make sure it was clear that it's enabling legislation rather than restrictive.

I appreciate some of the comments you've made. Certainly I can see how a college that covers such a large area with no university would benefit and be able to offer more opportunities for students, which is what this legislation is all about: offering more opportunities and making it more flexible for students and for the adult learner. I appreciate the comments you've made.

The Chair: I appreciate your taking the time to come before us and make a presentation today.

1700

SENECA COLLEGE OF APPLIED ARTS AND TECHNOLOGY

The Chair: Our next presentation will be from Seneca College. Good afternoon and welcome to the committee.

Dr Stephen Quinlan: Thank you, Mr Chair. I feel like I'm at college day at the standing committee hearings, but it's our pleasure to be here. My colleague Dr Anthony Tilly, our chief academic officer, joins me for today's presentation.

Let me begin, honourable members, by thanking you for this opportunity to share our views on Bill 132. While there are several key elements addressed in the bill, I realize that you are and will be hearing from a number of presenters on this subject over the course of the next few weeks. For that reason, I will not be discussing some of the what I might call mundane issues, detailed issues of

the bill, either its specific language, sections or subsections. What I would like to do is focus today on some of the issues which our students are most concerned with: the issue of the applied degree and the impact that it has on them and on the province in general.

As many of you may know, I am on record in support of applied degrees. During my remarks at the Empire Club in May 1998, I advocated strongly for the applied degree as one of the additional tools that help our graduates excel and exceed in the global economies. This is in addition to the tools already provided by colleges, tools such as high academic standards, experiential learning opportunities, exposure to leading-edge technology, faculty with industrial experience, and program input from business leaders in all sectors of today's economy.

The reality of today's economy is that many companies—and you have heard from Colin and Visteon this afternoon. Our global employers want the practical, specialized training that Ontario colleges provide, but they also seek employees with degrees.

Organizations such as the chartered accountants' association and the Certified General Accountants Association require a degree for professional designation. As well, and I'm sure you may know this, many, if not most, international airlines require a degree for co-op pilots to fly commercially. I have a great deal of experience in this area and indeed lost a contract worth millions of dollars to Ontario as a result of our inability to offer a degree.

In many organizations, promotion, as Colin said, beyond the entry level is frequently, if not often, limited to degree holders. Anything that inhibits an Ontario college graduate from maximum success in the workplace works against Ontario's prosperity.

Since our creation just over 30 years ago, Ontario colleges have been successful in providing the depth and breadth of educational opportunity to support the province's knowledge economy. Our strength in this area has been recognized by both the students who have chosen our programs and also by the employers who have hired our graduates. In Seneca's case, 100% of our graduates from 46 of our programs were employed within six months of graduation: programs such as accounting and finance, computer engineering technology, and business administration. I suggest that these graduates need opportunities to move up in their organizations, and we see applied degrees as an opportunity for them.

As world-class institutions, our colleges need world-recognized degrees that meet international standards and global expectations. The applied degree grants that recognition for all potential employers to see the stringent requirements that have been met in order to graduate from a particular college program: a program, as you've already heard from Mr Tibbits, that is equal to, if not greater than, that of a baccalaureate degree.

In our response to the consultation paper we received in April, we submitted the following comments:

In order to be successful, applied degree programs in the province of Ontario must be market-driven, they must be innovative responses to socio-economic demands,

they must have appropriate recognition from industry and the public at large, and they must demonstrate portability in the global workplace.

Throughout Ontario's college system there are numerous formal articulation agreements with post-secondary institutions outside the province that provide students with the opportunity to complete a degree. These arrangements were signed in response to the growing demand from students who were already seeking accreditation for their diplomas but doing so on an individual basis. The name of Bill 132 itself suggests this is about student opportunities, opportunities for choice and excellence in post-secondary education, and the creation of publicly funded choices is a key factor in keeping Ontario's students in Ontario by offering educational opportunities equal to, if not superior than, those offered by institutions south of the border and elsewhere in our international community.

The issues of quality control and regulated standards regarding curriculum, program delivery, faculty qualifications that reflect industry standards and the ability to grant globally recognized credentials are the keys to the continuing success for Ontario's students. Therefore, I must stress the significance of the role and membership of the quality assessment board as described in this bill.

With regard to the quality assessment board, membership should represent the full spectrum of post-secondary education, with equal representation from colleges and universities as well as from leaders from the international business community, with members who appreciate the direction in which Ontario's colleges of applied arts and technology are moving.

I fully endorse the concept of a quality assessment board and am confident that the board will respect the principles of fair competition and equal access in reviewing the applications from our colleges. All must be held to the same standard of quality and accountability. Moreover, whatever decisions the quality assessment board makes regarding the programs to be given applied-degree-granting status, the board must, first and foremost, look at the needs of students. The programs chosen must make sense in terms of what an applied degree will mean to those students. Applied-degree programs should be chosen based on the beneficial impact for students with respect to future opportunities, successes and meeting the demand of industry.

In closing, it is my ardent belief that the applied degree serves the very best interests of our students and their future success in the 21st century as well as the future success of Ontario as a leading player in global markets. Applied degrees, in addition to giving students the opportunity to complete their education in Ontario, will also attract international partners and international students who will make a significant contribution to our economy.

Seneca College as well as Ontario colleges can and will provide the environment for students to thrive. We look forward to the opportunity to recognize their hard work and academic achievements with the granting of an applied degree.

I thank you for your time and interest.

The Chair: Thank you very much, and that allows us about two minutes for a question from the Liberal caucus.

1710

Mrs Bountrogianni: Thank you and welcome. Over 18 years ago I used to teach at your institution. I know it is still an excellent institution.

I just want to make clear that the Liberal caucus agrees with the government on this part of the bill and applauds this move as needed.

I'll give you two concerns that I've heard from stakeholder groups, mostly students. Number one is, if there isn't enough funding for applied degrees in the colleges, funding will be sought in other areas within that college or colleges. Students are concerned that those diploma programs will then be watered down. How would you address that possibility?

Dr Quinlan: I wouldn't necessarily agree with that assumption. If you look at the cost to the students and to the taxpayers of Ontario, at the moment a student would spend three years in a college and three to four years in a university to get a roughly similar qualification. The cost to students and the cost to Ontario probably will be less, not greater, when measured in absolute terms.

Mrs Bountrogianni: The other concern I heard from the students—although, in the end, they did support this part of the bill, initially their concern was not the financial aspect but just the prestige or lack of prestige for a diploma in comparison with the applied degree. How have you probably already addressed this in your institution?

Dr Quinlan: Yes, I'd like to speak to that, if I may. I've done an extensive amount of work in the international community. Certainly in the global economies of the world today, the applied degree has as much recognition—in fact, maybe more with some employers—than the baccalaureate degree. In time, students who benefit from the applied degree will have a much greater appreciation than they do today, not having had the opportunity for that experience.

Mrs Bountrogianni: My question was in comparison to the diploma. I agree with you there.

Dr Quinlan: With regards to an Ontario diploma now?

Mrs Bountrogianni: To the lack of status or prestige of having a diploma.

Dr Quinlan: Different students will have different expectations based on their desire and based on their ability. I don't believe the diploma will be watered down in Ontario. Notwithstanding that, if they go to work for an international corporation or in an international environment, the degree will be more attractive to them.

The Chair: Thank you both for coming before us here this afternoon.

REDEEMER UNIVERSITY COLLEGE

The Chair: Our next presentation will be from Redeemer University College, as it has very recently

come to be renamed. Good afternoon, welcome to the committee.

Dr Justin Cooper: It is a pleasure to be here. We're very pleased to have this opportunity to respond to the legislation that has been tabled by Minister Cunningham. We confirm the intent of this bill to extend the choices available to students in post-secondary education in Ontario while ensuring academic excellence and institutional accountability. We would like to raise some points that we believe are relevant to the terms of the proposed legislation.

You'll notice our brief is organized with a number of statements in the executive summary. These are expanded upon in the subsequent section. I'll begin my remarks on page 3 of the brief with respect to the equality of access for all students, which is the comment that we would like to make on the section that deals with loans and awards.

Equality of access for students to loans, grants and awards, irrespective of whether they attend a public or private institution, should be an essential feature of all provincial student assistance programs. At the present time, it is not. While it may be defensible to vary the assistance available depending on the type of institution attended—vocational school, college or university—we believe it's unacceptable to discriminate against students who choose to attend institutions whose operations are funded privately by deeming such students to be ineligible for certain provincial student assistance programs, as is now the case.

We believe the criteria should be student need and not institutional mode of funding. Since the Lieutenant Governor in Council has, in the bill, wide discretion in prescribing terms and conditions for student loans, grants and awards, we believe a clause should be included in the act stating this principle of equality of access for all Ontario students regardless of whether they attend a publicly or privately funded institution.

The remainder of our remarks have to do with the policy of ministerial consents and degree granting. I continue on page 4 of our brief.

With respect to the names to be used by institutions that grant degrees, the use of the name "university," we believe, should be reserved for institutions whose primary purpose is providing university-level degree programs in a range of disciplines in the arts and sciences, together with supporting some research mandate. This usage follows academic practice in all other jurisdictions in Canada, and we believe should be noted in the act. This will protect the integrity and credibility of these important social institutions and the expectations of prospective students, faculty and project partners in industry and commerce.

As an example, a minimum of eight disciplines spanning the humanities, social sciences and sciences is one benchmark of which we are aware for defining what constitutes a sufficient range of degree programs.

With respect to ministerial consents, since the maintenance of appropriate institutional and academic stand-

ards essential for excellence is really tantamount to accreditation, the minister should seek the advice of the quality assessment board in framing any regulations relevant to such standards. These are referred to at various points in the act. While the act consistently speaks of ministerial consent, what we believe is at stake in the legislation is the accreditation of new institutions and new academic programs for which appropriate standards will have to be developed, in addition to the granting of consent for out-of-province institutions to operate in Ontario. We believe that the act would be strengthened by referring to accreditation and by requiring the minister to seek the advice of the assessment board in making regulations related to these kinds of standards.

On to page 5: I'd just like to highlight some remarks in relation to the composition of the Post-secondary Education Quality Assessment Board.

Consistent with standard academic practice, the assessment board should be made up of academically qualified persons and should include representatives of universities, private universities and community colleges. Ministry representatives could also be included. But the point about academically qualified persons is that this board is going to be asked to make very significant academic judgments.

Since the assessment board will in fact be the accrediting body for all new degree-granting institutions and degree programs in Ontario, constituting it in a manner which will ensure the maintenance of standards of excellence will be of utmost importance, we believe, and should be spelled out in greater detail in the act.

Moving on to page 6: just to note in section 8 that while it may be advisable to use the same assessment board for all post-secondary institutions and degree programs, there are different criteria which must be used, depending on what type of institution or program is being considered for accreditation. We would just note that given the current proposed legislation, the assessment board will be dealing with the accreditation of new Ontario-based institutions as well as existing institutions and out-of-province institutions. It will be dealing with institutional accreditation, we understand, as well as single program accreditation, with university degree programs as well as applied degree programs and with undergraduate as well as graduate-level institutions and programs. Clearly it will be a large undertaking to develop sufficient criteria of excellence for all these different types of assessment. We would just note that, as a private university in the province, we would be pleased if we would be able to participate in this process.

One topic we also would like to comment on is the issue of for-profit institutions. We believe that for-profit institutions should be excluded from receiving consent or accreditation to operate as a private university or degree-granting institution, as is the case in other jurisdictions, as we understand it. In the United States, for example, for-profit, or proprietary institutions, as they are also known, are ineligible for accreditation by the regional accrediting associations, which are the primary accrediting bodies. For-profit institutions, especially if they use

only part-time instructors and have no research mandate, fulfill in some residual way the task of disseminating knowledge but do so in isolation from the other essential function, we believe, of an educational institution, namely, the advancement of knowledge. Such a departure from the traditional mission of the university does not, in our view, promote excellence, and neither will it, over the long term, do so.

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Finally, to reinforce the point with which we began respecting government funding, if persons or institutions receiving ministerial consent are deemed ineligible for government funding, as is presently the case, this should not be construed, we would like to emphasize, to limit the eligibility for awards, grants or loans on the part of students who attend or faculty who teach at such institutions. The current policy of not providing operating or capital funding to new private universities is clear and its not at issue here. However, it does not follow from this policy that provincial assistance programs for citizens of Ontario, whether they be students or faculty, should not apply to people if they attend or work at a private university. Such inappropriate discrimination is unfair. Rather, as we mentioned before, equality of access should be maintained in all such programs. We believe that if these principles, the various ones that we've mentioned, were to be applied, it would improve and enhance the contents of this legislation and improve our post-secondary institution system in Ontario so that our students will have greater choice and we will maintain excellence.

The Chair: This time the questioning will go to the NDP. Ms Churley, you've got about three minutes.

Ms Churley: Thank you very much for your presentation. It's very interesting, helpful information.

On page 6, when you talk about for-profit institutions, can you elaborate a bit on that section and, more specifically, what you're talking about there as compared to the private universities? What's the difference? Can you give some examples of for-profit institutions in the US that you referred to?

Dr Cooper: Certainly. I think the point we're trying to make is that teaching and research go together, and that is the dissemination of knowledge and also its advancement. In that way an institution contributes to society in some larger sense as well as to the students specifically. What we are aware of—and I guess quite frankly we're thinking a little bit of the University of Phoenix as an example—is that when you use only part-time instructors and when they have no research mandate, then you are in some minimalist way disseminating knowledge but you're not advancing it. Traditionally, a university has always disseminated and advanced knowledge. Those two go together. I guess we're trying to stress that they go together for a reason, in that if you want to maintain quality and excellence over time, then it would be important to keep those functions together.

The Chair: Thank you very much for bringing your perspective to the hearings here today. We appreciate your taking the time to come before us.

ASSOCIATION OF COLLEGES OF APPLIED ARTS AND TECHNOLOGY OF ONTARIO

The Chair: Our next presentation will be from the association of colleges of Ontario. Good afternoon. Welcome to the committee.

Ms Susan Bloomfield: Should I come around and shake hands? You probably need to stand up.

The Chair: Actually, we're a little concerned because there will be a vote so we're trying to get the last two presentations in under the wire. The rules of the House demand that the committee rise when there's a vote, so we don't want to shortchange anyone's presentation.

Ms Bloomfield: Thank you for having us. I am very, very pleased to be here today. We're going to be brief because you've had so much information, I am sure, showered upon you. My name is Susan Bloomfield. I am chair of ACAATO, the Association of Colleges of Applied Arts and Technology of Ontario. On my left is Dr Howard Rundle with Fanshawe, who is speaking to you afterwards, and Joan Homer, our executive director.

A little background for you: I represent the governors, who are the employers of the college system in Ontario. I have been involved in the college system for six years as a governor at Cambrian College in Sudbury. I was chair of their governance for two and a half years and then was elected last February by 25 board chairs and 25 presidents to the position that I hold for two years as a volunteer in the system.

We represent 200 communities in the province of Ontario that have community college education available to them. I know you have the background material so I won't spend any more time on that. I would like to let you know, though, that over one million graduates have come out of the community college system. They have proven themselves to be a real economic and social benefit to the people of Ontario. We are really grateful that there are so many community college supporters here who are actively working in and with the college system. We thank you for that.

We are so supportive of this bill. We have been really enthusiastically working and lobbying for it since 1996, and I can tell you that the employers in the 200 communities are so thrilled, because they have been asking for more credentialing for the students for some time now. We need to make them internationally competent and marketable. We know that in the United States, in Alberta and in Europe, this is a recognized addition for young, middle-aged and older people's education. We need this credential to be internationally marketable, and we are so excited that it's coming now and will be available to the students of Ontario in the very near future.

This is not going to interfere, I don't believe, in any way with our diploma program or with the baccalaureate degree from universities. I think it really fits a need in our economic society right now, in our knowledge economy, and it will be of huge benefit to a very large number of students because most students now are lifelong

learners. There's just no way around it. This really facilitates the marketability of young people in our province.

You're going to be hearing from 10 different college presidents, so I will not spend any time talking about what they're going to talk about. I don't want to steal any of Howard's thunder. I just know that this is such an important time for all the people in Ontario to make this huge leap after 30 years of a successful process. But we need the change and it's timely, considering how well we're doing in our economic growth in the province.

We would ask for just some minor changes in terms of wording and recommendations to make it readable. I was talking to a student this afternoon and I said, "Well, what do you think about this bill?" She said, "We're thrilled, we're thrilled, we're thrilled." I think that just about sums it up. The more readable it is to the people who are using it, the easier it will be for everyone. That would be our only caution. Other than that, I would like to open it up to any questions you have of us at this point in time.

The Chair: Thank you very much. If you like, we could ask Dr Rundle if he wanted to make his comments, add his time to yours right now.

Dr Howard Rundle: Sure. I'd be glad to do that.

The Chair: Then we can have questions after that. OK?

Ms Bloomfield: Great.

FANSHAWE COLLEGE OF APPLIED ARTS AND TECHNOLOGY

Dr Rundle: My name is Howard Rundle. I'm from Fanshawe College in London, Ontario.

I'm only speaking to the matter of applied degrees contained in this bill and I'm only going to make, and my paper makes, only one simple point, although I do support all of the comments made by my colleagues from Conestoga and Seneca that you've heard this afternoon. But the paper tries to give you something, a contribution I believe Fanshawe College has made to this issue, and that is the fact that it has been an issue that we have been studying for over 10 years.

I come with the perspective of the person who was first introduced to this whole topic of applied degrees as vice-president, academic, of Fanshawe, a position I held for eight years prior to becoming president five years ago. I have lived through the last 13 years seeing this emerge as a major issue, so much so that our board of governors undertook a major study of it about a year and a half ago. I outline that in the paper.

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What we really observed was that for a growing number of students—and it is only a minority of college students—Ontario is in fact importing post-secondary education for its citizens, because our graduates are able to obtain much more credit by going out of province or indeed out of country to complete degrees, if they need to do that, and a growing number do need to do that. They are paying considerably extra money to do that. They are doing something that could be done in province. We

would not need to be importing education from other countries. That's basically what's happening now.

Our board studied the system in British Columbia and Alberta and after a year's work came to the conclusion that the introduction of an applied degree having the full status of a baccalaureate degree but being essentially different in that it would continue to be applied and not hugely theoretical, although there's always a component of theoretical work that goes with it, was what was really needed in Ontario. If we do this, we are going to save, as a colleague has mentioned, not only the taxpayer money, but where students do go on and articulate at universities inside Ontario, taking at least a year longer than they do at universities outside Ontario, it is at much greater cost to themselves. So it would seem to be a win-win situation all around, both for the taxpayer and for the student.

I simply wanted to demonstrate that our college has been studying this issue for over 10 years. It's not a flash in the pan. It has not been diminishing; it has been growing. A move like this has been needed for some time and we applaud it significantly. That's all I have to say. I'll try and answer questions.

The Chair: Thank you. In the rotation, the next round of questioning is going to start with the government members. We have enough time to go around.

Mrs Julia Munro (York North): Thank you very much, both of you—I know you were wearing two hats there—for presenting your views here today.

Many of us recognize how important it is to move forward with this piece of legislation. I wonder, though, if you'd care to comment, given the fact that you talked about how you have talked to alumni and that you have looked at this issue for some time, and could give us a sense of where you see new areas opening up, because I'm sure that you have given it some thought. We've heard presenters today talk about the way in which employers in their communities require degrees, but I'm just wondering if you've given some thought to new vistas that this piece of legislation would open up for either you individually or collectively as an institution.

Dr Rundle: I know at our institution our first thought is not going to be new vistas, if by that you mean whole new programming areas that we're not in. There's a pent-up need right now, particularly in the health field. Fanshawe provides a very broad spectrum of health para-professional training—respiratory therapists, radiography—and those students are now saying, "Now that nurses are going to have to have degrees, we're the only ones working in hospitals who don't. So we want it and insist on it." Indeed it's occurring out west.

In advanced technology programming, Ontario is one of the only jurisdictions that has three-year applied programs in colleges. Most other provinces and countries are limited to two years. So we have some very advanced programming already. There's such a pent-up demand right now at our institution that it will be to deal with those first before we start zooming off and looking into other fields or other areas.

Ms Bloomfield: I think you'll find it's region-specific to a certain extent as well. Sudbury will be looking, because of the mining industry and the forestry, at an applied degree in technology as their first and foremost priority, along with nursing. But depending on the community that is being served by the college, they will tell us very clearly what they want. They are very excited. The mood in the province in these 200 communities is just, "Let's get going." So we would really encourage—if we could get the immediate appointment of the quality assessment board and get the students going as of this coming September, it would be a huge benefit.

Mr Garfield Dunlop (Simcoe North): You mentioned that you talked to some of the students and they were very optimistic about this. What are you hearing around the province from students?

Ms Bloomfield: Tremendous support overall.

A community college encompasses a lot of different things. You can take ballroom dancing, motorcycle repair, advanced programs in accounting that you can transfer on to university. It covers so many areas. This is one area that allows students to be lifelong learners, to just keep growing and adding to their credentials, to maintain internationally. I think that's what we're really seeing, that colleges in Ontario now have to compete internationally and provide that for their students. This is one of the things that they want, that they know they need and that they're ready for. We have to keep that here because colleges do a lot of things for a lot of people, from upgrading to get into the process to this next step. So we can't forget: they are multifaceted opportunities.

Mrs Bountrogianni: I have one question for the government and one question for Dr Rundle. There's a lot of optimism and excitement about this, and we share the opinion of the value of this part of the bill. But I understand there will only be one applied degree per year per institution granted. What exactly is the formula? Maybe Ms Molinari could answer that.

Ms Molinari: Eight projects per year for three years would be approved.

Mrs Bountrogianni: So eight different projects every year?

Ms Molinari: Yes, eight projects every year, for three years.

Mrs Bountrogianni: Then my question for Dr Rundle: you have limited, as is appropriate, your comments to community colleges, that part of the bill, and you said that when this bill is passed, Ontario will be able to provide some of the education that we are now importing. The other part of the bill speaks very specifically to importing education, such as the Phoenix. I know you're the president of a college, not a university, but what is your opinion on that?

Dr Rundle: Because of that, of your last comment, we're really neutral with regard to private universities. We don't believe it will impact colleges in any significant way, so we really don't have a position on that.

Mr Levac: Do I have time, Mr Chair?

The Chair: For a quick question.

Mr Levac: I had asked earlier on about trying to get to education beforehand with the skills development. I asked a question earlier about programs that are necessary to have a built-in bias that seems to be in our communities about skills development and skills for trades. Do you believe that the government should be sponsoring and supporting programs that try to educate parents and the students before they become college students about the value of the skills and the trade development, for example? I'll give a kick to my own community: the Brant Skills Development Group forms partnerships with all stakeholders, including students and parents, with regard to trying to educate them in the value of skills development.

Dr Rundle: That is just absolutely true. Probably the most influential time is when the child is in elementary school, actually. They come to secondary school already with the notion, "If I'm better-than-average intelligence, I'm going to university," and sometimes into careers that are low-paying, over-supplied and do not appreciate what skills trades opportunities there are in our society today. It's really quite sad when there's going to be such a huge demand. So whatever can be done—and it looks like we have to reach parents predominantly, parents of children aged five through the teenage years.

Ms Bloomfield: If I could add to that too, I'd like to say that with this new applied degree coming out, what we provide for students is a seamless, over-time education. There isn't going to be us and them, the bright and the not-so-bright. There is absolutely no need any more for those kinds of expectations: if you're this bright, you go to university; if you're this bright, you do that. Colleges provide an ongoing educational opportunity for anybody who wants to work hard and do it. I think that is a new philosophy. You know, 30 years ago we had this streamlining. We don't need that any more. I don't see, in five or six years, the kinds of bias that has existed in the past: college material, university material. That will go. But we still need tool and die makers.

Ms Churley: It's just interesting to follow up on streaming in high schools. Do you think this would actually make an impact on how that's now done?

Ms Bloomfield: I don't see the pressure on the children that is imposed upon them now. If they know, "I don't know what I want to do but I know I have the opportunity to keep learning," and there isn't that bias, then they—I don't know if any of you have children. I have four children and my youngest is 19. The pressure he felt last November to pick a university or pick a college or pick a program was awful. It was pitiful to watch what they have to go through, because the expectation they have now is, "I must succeed." I want them to think, "I want to enjoy learning, I want to keep on learning all my life, I want to get validation from that," and I think if we institute this program, it allows colleges to provide a seamless ongoing education and if they want to go on to university and master's degrees and doctorates they will not be intimidated by the process any more.

Ms Churley: Thank you for that. I wanted to follow up on the question asked previously to the parliamentary assistant, just your views on that. I understand that there's a three-year pilot project and there are up to eight new applied degrees programs which will be approved each year. Do you and others have input on which pilot programs are being decided, how they are being decided and that sort of thing? For instance, do all of the colleges have input on how the decisions are going to be made?

Ms Bloomfield: Certainly. The board of governors in each college is the employer. They take a look at it. They have subcommittees that have educational committees and finance committees. So each college in each region will determine what they're going to apply for of those eight opportunities and sequentially how many each year. So it will be regional specific, based on their needs with their communities.

Ms Churley: What I am getting at, I guess—it's the three-year pilot project and "up to eight"—is how decisions are going to be ultimately made. Perhaps the government can answer this better, what those "up to eight" will be and which colleges. Are they applying for different programs? Who makes the decision, may I ask?

Ms Molinari: I can respond to that. Yes, the applications will be submitted and the quality assessment board will be the governing board that will make the decision on those that follow the criteria that the board is to follow with the approval. The board will be able to access the expert panels for various decisions that need to be made because the quality assessment board will be the body

that will decide, but they will get advice from a number of expert panels to make the decision on which will come forward. The colleges certainly will have a large role to play in the co-operation of that and knowing what criteria is going to be looked at, so they will be a partner in that decision.

The Chair: Mrs Munro, you were motioning that I had perhaps cut you off when I went to Mr Dunlop.

Mrs Munro: I just wanted to add a comment that's related to an issue raised a moment ago in terms of making sure that students are aware of the options. I just wanted to clarify that from grade 7 on, students are making individual education plans and this is the whole idea that you're addressing: the importance of being sure that our young people are making those decisions. At least in this program, it does allow that kind of opportunity to begin that early.

The Chair: If I could just add as well that you note in your presentation that there are some other wording changes you would like to see made. I could suggest that we have another week for you to offer any specific suggestions in that regard. If you care to send them to the clerk, we will make sure that they are distributed to all the committee members.

Thank you very much for taking the time to come before us to make your presentations.

With that, the committee stands adjourned until 3:30 on Wednesday afternoon.

The committee adjourned at 1745.



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Mercredi 22 novembre 2000

**Standing committee on
general government**

Ministry of Training,
Colleges and Universities
Statute Law Amendment
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**Comité permanent des
affaires gouvernementales**

Loi de 2000 modifiant des lois
en ce qui a trait
au ministère de la Formation
et des Collèges et Universités

Chair: Steve Gilchrist
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LEGISLATIVE ASSEMBLY OF ONTARIO

STANDING COMMITTEE ON
GENERAL GOVERNMENT

Wednesday 22 November 2000

ASSEMBLÉE LÉGISLATIVE DE L'ONTARIO

COMITÉ PERMANENT DES
AFFAIRES GOUVERNEMENTALES

Mercredi 22 novembre 2000

*The committee met at 1531 in committee room 1.*MINISTRY OF TRAINING,
COLLEGES AND UNIVERSITIES
STATUTE LAW AMENDMENT ACT, 2000LOI DE 2000 MODIFIANT DES LOIS
EN CE QUI A TRAIT
AU MINISTÈRE DE LA FORMATION
ET DES COLLÈGES ET UNIVERSITÉS

Consideration of Bill 132, An Act to enact the Post-secondary Education Choice and Excellence Act, 2000, repeal the Degree Granting Act and change the title of and make amendments to the Ministry of Colleges and Universities Act / Projet de loi 132, Loi édictant la Loi de 2000 favorisant le choix et l'excellence au niveau post-secondaire, abrogeant la Loi sur l'attribution de grades universitaires et modifiant le titre et le texte de la Loi sur le ministère des Collèges et Universités.

HUMBER COLLEGE

The Chair (Mr Steve Gilchrist): Good afternoon. I call the committee to order for our second day of hearings on Bill 132, An Act to enact the Post-secondary Education Choice and Excellence Act, 2000, repeal the Degree Granting Act and change the title of and make amendments to the Ministry of Colleges and Universities Act.

Our first presentation this afternoon will be from Humber College. I invite their representative to come forward to the witness table, please. Good afternoon and welcome to the committee.

Dr Robert Gordon: My name is Robert Gordon. I thank you for this opportunity. I certainly will try to make it brief because I realize you have a very short timeline.

First, I'd just like to offer my congratulations to the government and, in particular, our minister Dianne Cunningham for shepherding this through. In my opinion—and I've been at Humber for 19 years as president—this is a remarkably visionary bill, long overdue. It will not be greeted, as you have probably already discovered, with enthusiasm in some quarters, but I think you have done the right thing in focusing on what's beneficial to the

province in the long term, both for the students and taxpayers, but also for our ability to relate internationally.

I would like to make two major points, and maybe a couple of minor ones in closing. The first is that there is a major issue—and others may have mentioned this—relating to the inclusion in paragraph 2 of section 2, and it's mentioned throughout, of "or part of a program." I don't think it was meant the way it could be translated in years to come. We assume it's not intended to undermine existing relationships that have been developed, by the colleges in particular, with institutions within Ontario and certainly without, to facilitate student learning and access in an ongoing, seamless, lifelong educational perspective.

This could be a disaster if it is applied as it is specifically stated. Presumably it means every time you try to do some of these things, you require ministerial consent. That would be a bureaucratic tangle that I think would serve very little effective use of anyone's time. More importantly, the colleges have hundreds of relationships already in place, which in theory, as there's a grandfathering clause, would be jeopardized by this. For example, at Humber alone we have a book that's about half an inch thick which lists our relationships with universities all over the world, for which of course we have no ministerial consent because we haven't needed it. In any case, I think I make my point.

Attracting foreign students is a very important part of our business now. They want to know that they can take a diploma at a college in Ontario and then proceed to a degree. We live in the credential world, and the baccalaureate is understood around the world, whereas the diploma offered by the Ontario colleges, while it may be a very good education, is actually not that well understood because it is not in sync with the associate degree in the United States and western Canada, which is essentially two years, followed by two years to get a baccalaureate. We, as you know, have three years and two years. We need to have that marketing potential so that we don't disadvantage ourselves in that competition.

Anyway, there's more to be said on that point, but if you review your own document, you'll see that it's mentioned so many times that it's going to be very hard to ignore it. I don't think we need, with all respect, some bureaucratic enthusiast who starts applying the letter of the law.

The second point is a little more controversial, possibly. In section 4 you talk about an "applied area of

study," or "applied degrees," as they have been picked up by the media, for the colleges. I am very concerned that the universities are not enthusiastic about the colleges getting into this field, that is, the baccalaureate level, and they will not be helpful in terms of allowing students flexibility. Obviously, the primary focus of these degrees would be to go into the workforce, because why would we do them? The applied degrees will essentially be in this Education Quality Assessment Board, which has yet to be established. We'll be looking at proposals which are not offered at the universities for which there's a tremendous socio-economic need and also a demand by students.

Having said that, one of the big problems of the CAAT system for 35 years has been the fact that, as we now integrate so many things, the CAAT students, of which I would suggest there are probably about a million Ontario graduates at this point and growing every year, are essentially blocked from age 21 or whatever year they graduate—obviously some are older—from returning to any institutional credential which would allow them to keep their lives moving at the pace they require to upgrade. In other words, they're eligible to return to colleges, but most of them probably want to upgrade their college credential into a university one, and they find tremendous blockages.

Similarly, if you have applied degrees which will be translated by some as second-class degrees, not real university degrees, *de facto*, if the universities are not excited about this prospect to start with, they can easily block the colleges from further aggrandizement of their scope by saying, "Well, these degrees are not eligible for entry to graduate school." I think that's a great shame. Degrees should be offered on their merits just as every university in Ontario is not the same and, therefore, their degrees are not worth the same, at least in the marketplace and in the reputational place, if you read Maclean's magazine last week. I think it's only fair that the colleges and their graduates, if they're offering degrees, should be offering degrees and then judge them on the basis of the quality of their production and how their graduates do in years to come.

In other words, my point would be to not repeat the mistakes of the past, which is essentially having a two-tier system which never speaks and which has disenfranchised and made, I believe, Ontario weaker. If you remember, the colleges were established 35 years ago to fill a gap between high school graduates and the few university graduates to provide a middle level infrastructure for the economy, but the economy has changed and now we're looking at lifelong education where people need to have the opportunity to upgrade. You simply have to see the number of MBA programs that are offered in a flexible manner to understand that point. It is quite clear that more education will bring a better chance for Ontario to compete internationally, which is where we are today.

I would ask you consider stressing that where the colleges are getting in a nominal way into degrees, not

applied, and eliminate the terms which talk about "applied," so that the universities—they may not like this, but I've been around a long time—will not be able to christen them as second class and not really degrees.

Nursing, by the way, is another example of this, where the nursing people very definitely want degrees. They've got this through the Ministry of Health. We're now in a very great problem of trying to make sure the curricula are integrated. It's not easy because the universities don't accept the colleges by and large, and yet 70% to 75% of the nursing students in this province go to the colleges. I think this is a very good example of where the nurses are saying, "We fought all these years for degree status, so we don't want second-class degrees," and the universities say, "Right. We agree with you 100%," not looking at the needs of society at large. I think there needs to be some more flexibility which says that these are real degrees.

I have a couple of other points that are very nominal. In section 8, the sentence "The giving of a consent does not entitle the person ... to any funding...." I would put in words like "does not automatically entitle the person to any funding."

I'm a little concerned about the use of the word "inspector," which I think you stole from England, where they do have inspectors. I went there for six months and I know all about it. They descend on the colleges and universities to inspect their activities. This is a little pejorative. I think you may want to consider another form of the word "inspection." "Evaluation," "learning assurance"—there are other ways of doing it. I come from Quebec also, I might add, where the language police have developed quite a reputation for descending on recalcitrant stores who happen to have a sign that's one inch bigger in English than in French.

Finally, I'm a little concerned about the freedom of information and the rights of individuals where it is not clear what powers the inspectors have when it gets to things like reviewing student transcripts, which is actually private information, confidential to the student and the institution. I think that needs to be clarified.

Finally, in section 11, the whole question of OSAP and throwing people in jail: it is an interesting concept and may be fair from the point of view that there are those who have been ripping off the system, but I think it needs to be softened to read something like, "those who deliberately wish to mislead," as opposed to everyone's a crook until you can prove you're not by paying it back.

Anyway, there are some observations there. I hope I've said something that other presenters have not said, because I appreciate that many of my colleagues have already been here.

1540

The Chair: Thank you. If you wish, we have about three minutes for questioning. The rotation this time will start with the Liberals.

Mrs Marie Bountrogianni (Hamilton Mountain): I'm a little confused about your comments about universities not being sympathetic toward the degree-granting status of colleges, because, coming from Hamilton,

McMaster and Mohawk have worked very well together and have in fact applied to do a joint nursing degree and have received approval in principle by both the Ministry of Health and the Ministry of Training, Colleges and Universities. Unfortunately, approval is all they've received; they haven't received anything else and they cannot offer the program in September 2001. But they were ready to go. They've got the curriculum and everything. My experience has been there's a great deal of respect between those two institutions and a few others I have visited over the last year. I guess I'd like to know what hard evidence you have for making that comment, because I don't see that problem.

Dr Gordon: The hard evidence is 35 years working in public education. With all respect, the Mohawk-McMaster deal just fell apart last week.

Mrs Bountrogianni: I know that. But why did it fall apart?

Dr Gordon: Because McMaster insisted on getting millions of dollars for a new building, which is—

Mrs Bountrogianni: That's not why it fell apart.

Dr Gordon: I'm making a simple point about applied degrees, I'm not—

Mrs Bountrogianni: Actually, sir, it didn't fall apart. It's on hold.

Dr Gordon: I'm not here to argue with you. You can believe what you want, but the truth of the matter is that there has been very little co-operation and transfer between colleges and universities for the 35 years of the existence of colleges. If you wish to believe—

Mrs Bountrogianni: All right. If that's your evidence, thank you. That's all.

The Chair: Mr Levac, do you have anything? You have about one minute.

Mr Dave Levac (Brant): Just a short one. Thanks, Mr Chairman. I appreciate it.

Doctor, you made some observations about two or three concerns you expressed about the legislation presently. Could you give us a recommendation beyond just saying you have concerns about it? What would you do to rectify some of those things? Would you take them out?

Dr Gordon: I would take out the clause. The fundamental clause is the one about "or a part of." I don't have and certainly my colleagues don't have problems with—we think the legislation is wonderful, but it's not only confusing, I think it's going to be very problematic. It could destroy a lot of relationships that have already been established if one has to follow the letter of that clause. In addition, it will certainly be problematic for the future, because the way you read it is that you can't establish a relationship with the University of British Columbia without getting—and that's just a transfer. This is not about who's offering the degree in Ontario, which is another issue entirely. It simply means that you'd have to get ministerial consent. They'll have to establish a full-time bureaucracy to vet the hundreds and thousands of relationships that have been developed in the last 10 to 15 years.

Mr Levac: You're also talking about the entire relationship of the college portion of the bill that's speaking directly to granting of degrees.

Dr Gordon: Yes.

Mr Levac: Is it fair to distinguish between the two? So your support of the bill is mainly because of the degree-granting possibilities for colleges, or the privatization or—

Dr Gordon: Both. I'll take my chances. The colleges have always had competition from many private colleges, so this issue is fundamentally for the universities and they're going to have to speak to it. From a personal and professional educator's point of view, I think it's marvellous. To me, more education, particularly for people who are willing to pay for it themselves, because I assume that private universities will have to charge fees and there's no public money involved—how can that be a problem, except for those who want to protect a monopoly?

The Chair: Thank you, Dr Gordon. I appreciate your coming and making your presentation here today.

ONTARIO SECONDARY SCHOOL TEACHERS' FEDERATION

The Chair: Our next presentation will be from the Ontario Secondary School Teachers' Federation: Ms Sherry Rosner and Mr Mark Ciavaglia. Good afternoon and welcome to the committee.

Ms Sherry Rosner: Thank you. We have provided copies of our presentation to you. I'll just read through it, and if there is ample time at the end we will take questions.

The long title of the bill, An Act to enact the Post-secondary Education Choice and Excellence Act, 2000, repeal the Degree Granting Act and change the title of and make amendments to the Ministry of Colleges and Universities Act, betrays the true nature of the legislation. The act should be called "An Act to allow persons friendly to the Tory government an opportunity to make large profits by providing a minimum education at blockbuster prices or degrees for those able to pay."

As in the public elementary and secondary panels, most post-secondary education has faced the same kinds of fiscal pressures on education in Ontario. John Snobelen outlined the reasons for creating the crisis in his now-famous "create a crisis" speech caught on camera in 1995. Since then we have witnessed an erosion of funding that has produced a 30% increase in the ratio between full-time faculty and students at Ontario public universities. The new ratio exceeds the average ratio of nine other provinces. The reason for this increase lies in the cuts to operating grants to universities. In 1996-97, the government cut \$280 million to universities, which since 1995 amounts to a cumulative cut of \$1.4 billion. Just as has been experienced in public elementary and secondary education, the per-student amount committed to post-secondary education has declined since 1995 by 17%. At the same time, to compensate for declining investment in post-secondary education, tuition fees in-

creased. Tuition now counts for over 40% of operating costs. Tuition fees are \$1,395 higher than in 1995-96, when this government came to power.

In terms of capital expenditures, government commitments to funding new buildings and deferred maintenance are outstripped by need. New infrastructure money allocated in the SuperBuild fund will be directed to projects largely in the applied areas of technology, health sciences and general sciences. At the same time, applications from students are at the 40% level for programs in the arts. Maintenance costs are projected to rise to \$1.3 billion by 2010. This government has not addressed enrolment growth and crumbling infrastructure, other than by divestment.

In 1999, PricewaterhouseCoopers found that a summary analysis of the financial position of the Ontario university sector indicates that universities do not possess the necessary financial resources to fund their own growth, to take advantage of opportunities or to meet the record level of student demand they will be facing over the next decade.

Underfunding has served to drive tuition up as part of a broader strategy to make private, unregulated tuition fees palatable. By underfunding universities, the government has paved the way for business to assume what is a necessary government function. Driving up student debt reduces access for those least able to afford post-secondary education. In conclusion, the government has deliberately set the groundwork in place to absolve themselves of the responsibility to provide comprehensive education for all citizens in Ontario.

Opening the doors for private universities has made profit the bottom line—not excellence. Market forces work to increase profits and, to do so, modify service. Currently, Ontario has a system that works toward excellence in academic legitimacy and in the interests of students. Efficiencies delivered by for-profit institutions will speak to the qualification rather than the qualifiers or requirement to attain the degree or diploma. Private institutions allowed to grant degrees or diplomas will deliver the paper but not the rigour. Any implementation of academic rigour will cut into profits and market appeal. As Henry Jacek, President of OCUFA, said, "If it's a profit-making corporation, you're under a lot of pressure to make it easy for people to enrol, to pay money and to get a piece of paper saying they have a degree."

Private for-profit post-secondary institutions will create institutions of higher learning dedicated to play on the anxieties of job-hungry potential graduates and not on the betterment of society. They will cater to the interests of companies, not citizens, and narrow the focus of education to training alone. They will view students as products and evaluation as quality control. If tuition rates are competitive, then only service can be adjusted to produce profit. The quality assessment board for private universities proposed by the Ontario government is only an advisory body. The government does not have to follow the board's advice. In Ontario, we will have the same as the United States, where an accredited private

university does not mean that it is necessarily of high quality.

1550

A recent example of this is noted in an October news item on CKNW radio in British Columbia, which read as follows:

"Degrees for sale on-line.

"The regulatory body for private post-secondary institutions in BC is taking court action against Vancouver University, because it sells degrees on the Internet. In a writ filed in BC Supreme Court, the Private Post-Secondary Education Commission says the university, also known as the BC Montessori Teachers College, charges US\$500 for a certificate, and US\$4,000 for a PhD. It says the degrees are awarded following a review of an individual's prior studies, and professional or other experiences. However, the commission claims the BC institution has no lawful degree-granting authority."

The Chronicle of Higher Education reports in its October issue that the University of Phoenix in the US, with more than 75,000 students, is now the largest private university in the United States. About 14,000 students take its courses on-line. The Harris government has said this type of service is what makes private, for-profit post-secondary education attractive, especially for working people.

A report entitled *What's the Difference? April 99, A Review of Contemporary Research on the Effectiveness of Distance Learning in Higher Education*, prepared for the American Federation of Teachers and the National Education Association in the US, pointed out that a higher percentage of students participating in distance education tended to drop out before the course was completed. Only 40% of the students who started on-line courses completed the courses, compared to 95% of resident students who completed their courses. The report refers to the learning styles of individuals who took on-line education, to whom it is supposed to appeal. The report suggests that researchers look at the factors that reduce participation rates among those who take on-line courses. With the high dropout rate, the company is left with the profits and the students are left out-of-pocket.

If the Ontario government's recent university quality performance funding announcement, based on graduation and employment rates of university graduates, is an indication of what the government sees as quality in university programs, then there is no assurance that students at these private universities will be guaranteed a quality education. Quality relates to the whole range of resources and experiences a university brings to its students, including ongoing student-teacher interaction and library and research facilities. Private, for-profit universities such as the University of Phoenix have been found wanting in each of these areas in a number of US states.

In terms of research, we only have to look at the experience of Naney Olivieri and her research arrangement with Apotex. Bill Graham, president of the University of Toronto faculty association, summed it up best at

a conference on creeping private sector control of education last November: "Government and business want us all to be entrepreneurs." He went on to say "the job of an entrepreneur is to develop and sell a product, not to pursue the truth."

Private universities will do nothing to address the disturbing trend of declining access to higher education for students from lower-income families caused by high tuition fees and other education-related costs. For example, a recent University of Guelph study found that students from lower socio-economic groups were not attending the university in the same numbers in the late 1990s as in the late 1980s. The study found that in 1987, 40% of the students came from families making less than \$40,000, while 33% of families in Ontario reported making less than \$40,000 that year. Almost 10 years later, in 1996, 16% of Guelph students came from families earning less than \$40,000, while 23% of Ontario families reported earning that same amount.

In 1998, the University of Western Ontario raised tuition fees for incoming medical students from \$3,500 to \$10,000. Among those in the 1998 first-year medical program who paid \$10,000, only 7.7% reported their family income at less than \$40,000. However, more than 17% of fourth-year medical students who were not affected by the large tuition increase came from low-income backgrounds. Another recent study at the University of Waterloo found a similar trend. The government needs to address these trends through appropriate funding and student assistance policies, not by introducing private universities which only accentuate problems of accessibility to higher education.

The OSSTF is opposed to the high-tuition programs offered by public universities, which essentially represent the creeping privatization of public universities. The OSSTF believes government policy should be directed to meeting student demand through an affordable, high-quality public university system which is much more accountable to the taxpayer than a system of privately owned institutions which charge exorbitant fees and offer programs of questionable quality. We also question why the government is devoting so much time and resources to setting up an essentially means-test private university system when our excellent public university system could accommodate student demand, if given the appropriate resources.

In a January 2000 Canadian Press story about Canada's first Internet-based degree-granting university, Michael Gaffney, president of Learnsoft Corp, the Ottawa-based company that owns and administers Unexus, said it's a bargain for students. Tuition for the inaugural program, an executive Master of Business Administration degree, is \$25,000. The program takes two and a half years to complete. Such a program at most Ontario universities would cost anywhere from \$55,000 to \$85,000.

For students who can least afford a post-secondary education, there will be no choice. When the government of Ontario claims that introducing private universities

will offer a greater scope of choice, one has to wonder about whom they are talking. In some cases, as we see in the Chronicle of Higher Education, for-profit institutions such as the University of Phoenix can afford to pay fines as the price of doing business and leave students who cannot afford higher education to learn the bitter lesson that you get what you pay for.

As reported in the Chronicle of Higher Education in April 2000, the University of Phoenix agreed to pay \$6 million to the US federal government and to lenders to resolve education department charges that the institution gave federal financial aid to students who were ineligible for the funds. The department's inspector general had sought more than \$55 million in fines against the for-profit university.

In an audit report released late last month, the inspector general, Lorraine Lewis, said the University of Phoenix students did not spend enough hours in class to qualify for the aid they received. As a result, she recommended that the department require the university to repay lenders \$50.6 million in federal loans which she said its students had received improperly. She also recommended that the university be required to reimburse the government for the interest and the federal subsidies the department had to pay to lenders for those loans. This was the second time in the past few months that the education department has penalized the university for mishandling federal aid funds.

Who is ultimately left holding the bag? It's the students. And it's the students who can least afford it. We only have to look at the King's Medical Centre fiasco to see what happens when private enterprise is allowed in a picture motivated by concerns for profit.

In the Globe and Mail on April 28, 2000, Premier Harris noted, "There are a considerable number of Ontario students who are now going to the United States who are prepared to pay \$40,000, \$50,000, \$60,000 a year in tuition." He said it is only common sense to provide institutions in Canada that would accommodate such students.

From the Premier's comments it is apparent who would attend these private institutions. He obviously did not mean poorer students. Students at the new private institutions will be eligible for money from the Ontario student assistance program. But the maximum tuition fee that will be accepted for OSAP aid will be \$4,500, as is the case for the existing institutions. So to whom will private, for-profit post-secondary institutions answer?

On Friday, September 29, the Chronicle of Higher Education, in an article entitled "U. of Phoenix Sells \$70-Million Worth of Stock in its Distance-Education Efforts," stated that the parent company of the University of Phoenix raised \$70 million from Wall Street investors on the previous Thursday in a stock offering tied directly to the company's distance education operation. The deal was being widely watched in education and finance circles, because it was the first market test of a public offering of stock in a distance education institution.

The parent company, the Apollo Group, raised the money by issuing stock tied directly to the performance of the company's University of Phoenix on-line division. The five million shares of this so-called tracking stock were sold at \$14 per share, the low end of the \$14 to \$16 range the company had previously discussed in public filings. The stock closed at \$17.81 on the first day of trading, having reached as high as \$21 per share during the course of the day. Although these first few shares were not voting shares, the next issues may well be, and the Apollo Group will act in the interests of their shareholders to deliver profit, not in the interest of citizens to deliver excellent education.

The same Michael Gaffney, president of Learnsoft Corp, the Ottawa-based company which owns and administers Unexus, said in the *Globe and Mail*, "We're not here for charity or for the public good."

Again in the *Chronicle of Higher Education* issue dated September 22, Ane V. Wellman said, "American higher education is undergoing a period of enormous experimentation, which holds great promise for positive change. But the potential for inferior educational offerings is also ripe, from sham operators who offer 'college courses' over the Internet to established institutions that have allowed quality to erode in the scramble to do more with less. In such an environment, the role of accreditation in ensuring that higher education institutions are accountable to the public is more important than ever."

1600

The Chair: Excuse me, Ms Rosner. I've already indulged you with three minutes over your time. Perhaps you could move to your conclusion.

Ms Rosner: Sure. Sorry about that.

The Chair: That's OK.

Ms Rosner: In conclusion, the introduction of Bill 132 raises more questions than it answers. There is no doubt that privatization of post-secondary education is the first step down the line. We can expect, and indeed we are hearing of, overtures made to this government to put public money into private education at the elementary and high school levels. This is the government that claims it is here to fix government. In fact, this group of Tories sees no role for government at all. Bills such as Bill 132 have become indicative of the theme "business good, government bad."

This bill is foolhardy. It is equivalent to inviting in off-shore registered education providers. The role of government in all of this will be to clean up the mess, à la Exxon Valdez. There is a role of government to protect the public interest. It is not in the public interest to develop a multi-tiered education system. People in Ontario want government to provide public health care and public education. Do not leave the people of Ontario on the hook for the inevitable cleanup after free enterprise has delivered the educational disaster.

We encourage you to withdraw the bill.

The Chair: Thank you very much for your comments. I appreciate your coming in today.

MICHENER INSTITUTE FOR APPLIED HEALTH SCIENCES

The Chair: Our next presentation will be from the Michener Institute for Applied Health Sciences. Welcome to the committee.

Ms Renate Krakauer: I hope you'll all be able to see the slides. This is just a summary of the brief that we are handing out to you, but this will hopefully leave time for questions. So I can do it quite quickly.

I'd like to thank the committee for the opportunity to address how Bill 132 will affect the Michener Institute, which is a unique institution in Ontario, and how it will benefit our students, our graduates and the employers who hire our graduates.

We're here particularly to address the issue of the Bachelor of Applied Health Science, which we think our students deserve and for whom this bill would hopefully make it a reality.

The Michener Institute for Applied Health Sciences has a unique role in Ontario, both in the health care system and in post-secondary education. It's been around for 42 years and has developed an excellent reputation. It is funded by the Ministry of Health and Long-Term Care, so you're not dealing with a private university. The Michener is the only institution of its kind in Ontario dedicated to educating professionals for the health care system.

The Michener Institute particularly appreciates the government's emphasis on excellence and choice in Bill 132, because we believe we have demonstrated excellence. As I hope to point out this afternoon, we've demonstrated excellence in our programs, in our graduates and in our faculty.

I'm going to refer particularly to our three- and four-year diploma programs—we have seven of those—which are the ones we believe qualify for a Bachelor of Applied Health Science. Although we also have 12 additional programs in advanced areas and in certificate programs, these are the ones, as you see on the slide, that are three- and four-year and require entrance requirements the same as universities, that is, six OACs.

We have a very rigorous applicant selection process, which is also equivalent to that of universities. By the way, in terms of entrance requirements I failed to mention that not only do they require six OACs, but some of our programs require two years of university as a prerequisite. In terms of the selection process, we only accept those candidates who are the best qualified. It's not an open process, so we make sure we have a very high quality of student.

Our curriculum is very demanding; it has three basic components which we believe is part of our sure-fire success in finding employment for our students. There is a theoretical or didactic component; a practical component in our very well equipped laboratories with state-of-the-art equipment; and a third component, the applied or clinical education component in over 80 clinical sites around the province, where the students actually get

hands-on experience in the kind of work they will be doing when they graduate. These clinical relationships are with Ontario's hospitals and public and private sector laboratories.

Five out of our seven programs are accredited by the Canadian Medical Association Conjoint Committee on the Accreditation of Educational Programs and two are in the process of acquiring accreditation through highly respected professional associations in the United States. Attesting to the excellence of our programs is the fact that we already have agreements with a number of excellent Ontario universities, and those are the University of Toronto, Queen's, Ryerson and the University of Waterloo.

All of our programs have mandatory advisory councils which ensure that we have the most relevant information about the workforce and the skills and competencies that are required. These councils consist of physician specialists and technologists, usually senior technologists in their fields.

Now to address the excellence of graduates: our graduates receive a high-quality education and so they graduate with a high level of skills and knowledge in compliance with national competency profiles established by their professional associations with the CMA, and 97% of our graduates find employment within the first three months of graduation, as we have found in our most recent survey.

Our graduates would qualify for degrees in other jurisdictions outside of this province. For example, in Australia, a very similar three-year education earns students a degree in these disciplines. Many American jurisdictions also provide degrees, as does Great Britain, and, in fact in other provinces of this country students who take similar education get a degree. So our students are currently disadvantaged by not getting degrees. They are disadvantaged particularly in the global economy if they want any mobility. In fact one example of this disadvantage is the withdrawal of mutual recognition that we have experienced recently with Australia.

Our faculty also can measure up to the criterion of excellence. They're highly qualified professionals, combining academic credentials with advanced certification in their own disciplines. They are leaders in their disciplines by participating in their professional associations, regulatory colleges and the Canadian Medical Association accreditation survey team.

I'd like to address the issue of choice, and I do believe that an applied degree for the Michener Institute has a lot to do with choice for students. It would expand the choice that our students would have in terms of career path opportunities. Currently it's very difficult for diploma students, who have put in an awful lot of work and have achieved a high level of skill and competency, to advance beyond that level. We believe that with a bachelor of applied health sciences degree, they would have more access to management jobs, they would have more access to further education, including graduate education, and they would be able to pursue research careers if they

wished to do so. They would certainly gain greater credibility nationally and internationally.

We believe that having a degree would give them a choice in terms of getting the appropriate recognition for their knowledge and skills to move into other professional areas. There would also be an increase in employer confidence, because a degree does stand for something intangible in many employers' minds. It represents a combination of generic skills and high-level technical skills. I think that employers almost use the degree as a shorthand to represent to them a certain level of qualification that a diploma doesn't, even though the content of the education itself would be identical.

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The applied degree would support the Michener Institute's track record on quality, reliability and accountability. We don't require additional funding from government for this initiative.

You may not know, but it may be of interest to you in relation to the legislation specifically, that the Michener Institute has the lowest student loan default rate of any post-secondary educational institution in Ontario.

A degree would also help us to attract more students. We are currently going into a period of very high skills shortage areas where it's difficult to recruit students. We believe that an applied degree would help us in our recruitment efforts. It would support our responsiveness. We've always been responsive to our stakeholders, but it would increase our responsiveness to the professional associations which are increasingly requiring degrees for entry to practise. The nursing profession is not the only one that has established that. Other health professions are now requiring the same. And I believe we would be responsive to our employers, especially in the private sector where we are now trying to help our students find employment in the pharmaceutical and biotech areas. They use the degree as a screening tool, and quite often, even though our graduates have the required skills and competencies to work in the private sector, if they don't have a degree they don't even look at them.

Given the right to grant an applied degree, the Michener Institute will ensure that it will do so within the academically and fiscally sound framework expected in this province and it will do so in the best interests of the citizens of the province. I'd be pleased to answer any questions, as will my colleague.

The Chair: Thank you very much. That does give us about three minutes for questions. This time it will be from the NDP.

Mr Rosario Marchese (Trinity-Spadina): Thank you for the presentation.

You mentioned several times that your curriculum is demanding and that excellence is achieved by your graduates, of course. You say that because presumably some people doubt it?

Ms Krakauer: No.

Mr Marchese: No one doubts it?

Ms Krakauer: I've not had any questions doubting our excellence; in fact, we've had universities from overseas seeking us out to partner with us.

Mr Marchese: What about universities? Do they doubt the excellence of your program?

Ms Krakauer: As I mentioned, there are four universities already that have partnerships with us. We're very pleased—the University of Toronto, Queen's, Ryerson and the University of Waterloo.

Mr Marchese: I was about to mention the fact that you do have a link with the universities and that's a good thing, obviously—

Ms Krakauer: Yes, it is.

Mr Marchese:—where some colleges don't have that link with universities and that's a problem, so that speaks well of your program.

Ms Krakauer: I believe it does.

Mr Marchese: But Dr Gordon was here earlier from Humber College and he was talking about how some of the universities will not recognize the degree from the various colleges and that they will have a difficult time getting into graduate work in a university. You're saying, however, that will be easier. Is there a problemo here?

Ms Krakauer: I think there are two things that are different here. We are not a community college. I have a great deal of regard for the community colleges but as I explained, our entrance requirements are higher and we do not have open access. We do take the best-qualified candidate, and so I think the universities find it easier to deal with our graduates because they're dealing with students who have achieved a certain level of achievement.

I might add that many of our students already have some university. We found in a recent survey that about 75% of our students have at least one or two or more years of post-secondary education before they even come to us.

Mr Marchese: By the way, my objection to the title "Choice and Excellence" is more connected to the allowing of private universities to enter our market—

Ms Krakauer: So it doesn't refer to us.

Mr Marchese: I understand that, but out objection is usually to that. There is no choice in terms of a majority being able to have access to those programs because if it's a private university and presumably they're funding their own education, it will cost a minimum of \$40,000 a year in tuition fees. So I say to myself, "To whom does that give choice?" Not many, except the very wealthy. In terms of excellence, we don't know whether there is quality or not, because I'm not sure that we've seen that greatness of quality being achieved by universities like Phoenix.

So that's our objection to that, just so you are aware of it. Thank you very much for your presentation.

The Chair: Thank you both for coming to make a presentation before us here today.

COUNCIL OF ONTARIO UNIVERSITIES

The Chair: Our next presentation will be from the Council of Ontario Universities. Good afternoon and welcome to the committee.

Dr Ian Clark: Thank you, Chair. My name is Ian Clark. I am the president of the Council of Ontario Universities, which represents the interests of Ontario's 17 universities. We're delighted to appear today. I have with me Ken Snowdon, who is the vice-president of research and analysis at the council, and Marny Scully, who is the manager for research and analysis. Dave Marshall, the president of Nipissing University, is planning to join us. His plane was delayed leaving North Bay. He might get here to answer questions at the end of my 15 minutes.

Bill 132 will make two very significant changes to the delivery of post-secondary education in Ontario, dealing with private universities and the extension of limited degree-granting authority in applied areas to colleges. In both these instances, as the government bill title suggests—although as the honourable member previously questioned—these changes will increase degree opportunities for Ontario students.

Our concern, described in our brief which we have tabled today, is essentially that the bill, as it stands, does not provide sufficient protection for the taxpayer or for the students. We would like to propose amendments to the bill which would strengthen these protections.

In May the Council of Ontario Universities participated in the minister's consultations and submitted a written brief. We stressed four principles at that time: transparency in the review process; quality and how to maintain the quality of current degree standards; the need to limit degree-granting authority for colleges to applied degrees; and public subsidies and the need to limit the use of scarce public funds to public rather than private post-secondary institutions. Let me just elaborate on those four principles as they apply to the wording in the bill before us.

First, on transparency: the proposed legislation does not include a requirement for applications nor the recommendations for the Post-secondary Education Quality Assessment Board to be made public. We in the council believe that a number of benefits can be gained from procedural transparency. There are other examples in legislation that require such openness and transparency, and we think that applications for degree-granting situations are at least as important as applications for liquor licences, for example, where the transparency and public nature of the applications are made clear in the legislation.

A legislative requirement for an open and transparent review process would provide the public with the opportunity to review new proposals and make comments that would help members of the board with a broader array of perspectives on the new proposals, as well as provide additional information through which programs and institutions can be assessed. It will strengthen consumer protection and ensure accountability to the taxpayer. So our recommendation here is to include a requirement in the legislation for all applications and board recommendations to be made public.

The second principle on quality: in addition to an open and transparent process in order to ensure that new,

private degrees provide a level of quality commonly associated with the Ontario degree, we believe that the assessment process should ensure "expert" membership on advisory and assessment panels.

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So we would recommend that the legislation indicate that expert evaluators should conduct the reviews and provide advice to the board, and that one add a clause to section 7 which states, "The board shall include members who have special knowledge in university education."

The third principle regarding the limiting to applied degrees to colleges: Although quality assessment and protection is crucial to consumer protection for both private universities and applied college degrees, the quality measures and degree standards should be clearly seen as different for the applied college degree in order to distinguish this credential from the university credential. Without a clear understanding and statement of the difference, there would be considerable consumer confusion regarding the two types of baccalaureate degrees.

The act, as proposed, makes clear this point in sections 2 and 3, and our concern is that the exceptions, subsections 4(6) and 4(7), essentially give the minister authority to give a community college consent to grant any kind of degree without limitation.

In essence, this would give more opportunity for a community college to get university status than is available to existing affiliated or federated universities in Ontario which wish to obtain full degree-granting status. In fact, the legislation as is presented would give colleges more freedom than, say, Nipissing University, which has a limited charter by its legislation.

When we combine this discretionary freedom implied in subsections 4(6) and 4(7) with the lack of public scrutiny, I think you can understand why the Council of Ontario Universities has concerns about this significant departure from past practices.

Our recommendation would be simply to remove subsections 4(6) and 4(7) from the bill. If the purpose of the legislation is to provide limited applied degree-granting to colleges, these clauses are unnecessary. In the public consultation legislation, this was the only issue presented and the only issue to which the council and the universities replied. If the government has other intentions, these intentions should be made public in order for the public to assess and comment on the need for these exceptions clauses.

The fourth and final point is limiting public funding for private post-secondary institutions. Section 8 of the bill stipulates, "The giving of a consent does not entitle the person to whom the consent is given to any funding from the government of Ontario." However, taxpayers will be subsidizing degree education provided by private institutions through the Ontario student assistance program tax credits for tuition and the potential of Ontario research grants and other government programs.

The minister's consultation document states, "The maximum tuition fee that will be recognized for OSAP purposes at new degree-granting institutions will be

\$4,500 in a normal academic year. This is the same maximum that applies to additional cost recovery programs at publicly supported institutions." The government-stated restriction on tuition fees recognized for OSAP purposes is not stated in the bill before us.

A recommendation would be to change the wording in section 8 to something like, "The person to whom consent is given is not eligible for direct provincial government funding from any government program," something more categorical that states that the government will not provide these kinds of funding as opposed to "the consented person is not entitled to."

Second, we would propose that the legislation make clear that the tuition fee cap recognized for OSAP purposes for private degree-granting institutions should be stipulated in the legislation, and that should be the same as that which applies to the publicly funded institutions.

That ends my presentation, Chairman. We believe the best consumer and taxpayer protection is to ensure that there's a high standard of quality in all degree programs before they are offered and students are enrolled. We have recommended amendments to the legislation to achieve this purpose.

We're happy to try to answer any questions the committee might ask.

The Chair: This time the questioning will be to the government.

Mrs Tina R. Molinari (Thornhill): How much time do we have?

The Chair: You've got about four minutes—a bit less, three-and-a-half minutes.

Mrs Molinari: Thank you very much for your presentation. It's very comprehensive and there are some very detailed recommendations that you have made throughout your presentation. It's evident that you've read the bill and certainly have a good understanding of it.

There are some concerns and some questions I would ask about your comments and I'd ask you to expand on the issue over the \$4,500 maximum OSAP application that this provides. You've stated that your recommendation is that it be included specifically in the wording of the bill. Could you just expand on that?

Dr Clark: Yes. It's not a specific number because that could change over time, but the principle, which was enunciated in the government's consultation paper, is that the cap would be the same for private institutions as for public institutions.

Mrs Molinari: If it were stated in a regulation rather than the legislation, would that address the concern that you have?

Dr Clark: It would go a long way toward addressing the concern. Naturally, we would like as much as possible to be in the legislation and therefore less subject to change over time than to rely on regulations which are more changeable than the legislation is.

Mrs Molinari: Also, your comments about the applications should be made public—I'm trying to find it

in the presentation here—if you could expand on how you envision that occurring.

Dr Clark: Certainly. As we understand it, the quality assessment board will receive an application from an institution. We would like the application that the quality assessment board receives to be made public at that time or in time for other interested parties to comment on. Then we assume that the quality assessment board will cause to be created an expert group of some kind, expert in that area of university activity, to give them advice. We would like to see that advice or that assessment to the quality assessment board made public as well.

Mrs Molinari: You're referring to applications for private universities and also for applied degree granting for colleges?

Dr Clark: As a general principle, it would apply to everything, but we have in mind more particularly the private institutions for the initial application.

The Chair: Thank you very much. Unfortunately, Mr Marshall's plane has obviously prevented him from joining you here today, but thank you to him for making the effort and to you for actually achieving it. Thank you for your presentation here today.

DEVRY INSTITUTE OF TECHNOLOGY

The Chair: Our next presentation will be from DeVry Institute of Technology. Good afternoon and welcome to the committee. Seeing as I don't have any names on my agenda, perhaps I can get you to introduce yourselves for the purposes of Hansard.

Mr Peter Brown: I certainly will. Mr Chair and members of the committee, my name is Peter Brown and I'm president of DeVry Institute of Technology in Ontario. Joining me today are Rick Davey, our dean of academic affairs, and Judith Fraser, our director of communications.

We are pleased to have the opportunity to appear before this committee and to provide our comments in support of Bill 132. DeVry strongly believes in providing students with educational options and commends the government for adopting this position. We believe this bill contemplates a new vision for post-secondary education in the province, a vision that emphatically reinforces the importance that individuals, society at large and employers place upon the values of choice, equity, flexibility and quality. We believe these values should shape and inform our post-secondary education system and we will work to support this initiative as best we can.

Our support for this policy direction and hence this legislation is based on our experience providing post-secondary education to Ontario students.

DeVry has been a committed, contributing and tax-paying member of Ontario's post-secondary education system since 1956, offering coursework leading to diplomas since its inception. DeVry's two Toronto-area campuses currently offer six diploma programs in electronics and computer-based business. Currently, DeVry Ontario diploma graduates of our electronic engineering

technology and our computer information systems programs are able to transfer to another DeVry campus for one additional semester to complete course requirements for the bachelor of science degrees. These degrees are conferred by the receiving campus.

While this arrangement in part meets our students' demands for degree completion opportunities, it's not good enough. DeVry is very concerned that the need for students to transfer to one of our US campuses has negative implications both for our students and for the province and contributes to the current loss of students to jobs south of the border.

To reinforce this point, during the five-year period from October 1994 through June 1999, 63% of DeVry Ontario students in our electronic engineering technology and computer information systems programs transferred to another DeVry campus to complete the requirements for a degree. Of these, 42% of the computer information systems graduates and 33% of the electronic engineering technology graduates elected to remain in the United States to work. This represents a totally unnecessary and unwanted drain from Ontario's skilled labour force. The passage of Bill 132 will put in place the framework to address this situation, providing students with another option, a better option, to complete their degrees at home in Ontario.

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That's what this legislation is all about: increasing options and providing additional choices for students. It allows individuals greater opportunity to select alternatives that will allow them to meet their educational goals. Our students tell us they value choice. They also value the credential of the degree. And they are just about unanimous that, given the choice to remain in Ontario and complete their degree, this is exactly where they would stay.

But students must be assured of the quality of the degree they are pursuing and the institution they choose to attend. Ensuring quality must be the number one priority of the government and the new quality assessment board.

In DeVry's view, degree-granting institutions and private universities should be accredited based on a rigorous set of criteria that assesses them relative to their actual missions. Mission-based accreditation is the process that the US DeVry Institutes are already subject to as a member institution of the North Central Association of Colleges and Schools. The North Central Association is one of six regional accrediting agencies in the US, each with a mandate to assure the public about the quality of their accredited colleges, universities and institutes of higher education. Such accreditation is recognized in practice by registrars across Canada. Member institutes include the University of Chicago and the University of Notre Dame.

The North Central accreditation for institutions of higher education demands a rigorous two-stage process. First, institutions must fulfill the general institutional requirements, which include specific expectations about

an institute's mission being appropriate for a place of higher education. Additional requirements include appropriate policies and practices with respect to governance, finances and public information. And perhaps most importantly, clear expectations are established about the educational programs, the faculty who deliver them, and the resources that support student learning.

However, the real rigour of the accreditation process is ensured by the second part: an institutional self-study that is subject to a focused evaluation by a team of peer evaluator-consultants from other members of the North Central Association. This self-study aims to include all institute stakeholders in a comprehensive examination of the institution as it fulfills its stated mission and purposes. The association applies five criteria for accreditation. Both outcomes assessment and a detailed set of indicators are prescribed for each. All five must be met for an institution to receive and/or maintain its accreditation.

The US DeVry Institutes are currently preparing a self-study for a focused evaluation scheduled for the summer of 2002. Each campus is reviewing policies, practices and outcomes against five criteria, which in turn are linked to the DeVry Institutes' mission, which is: "to provide high quality career education, higher education programs in business and technology to a diverse student body." Our mission goes on to state that our "programs integrate general education to enhance graduates' personal development and career potential."

While we agree with other parties, including the universities, on the need for high-quality post-secondary institutions, clearly the DeVry mission is much more focused on applied learning and career education than that of a comprehensive Ontario university with its emphasis on research, teaching and service.

Because DeVry is subject to a mission-based accreditation process, it has an established and credible means to demonstrate that it is accomplishing its mission within the accepted standards of the north central accredited degree-granting institutions. In DeVry's view, a mission-based accreditation process is consistent with the policy direction of Bill 132. Such a process addresses public policy requirements while encouraging institutions that have a mission different from the universities that currently exist in Ontario. Rather than being judged within that existing context, they can be judged according to their stated mission. This will allow new degree-granting institutions that address specific needs to be rigorously assessed to ensure the highest quality, without having to fit into the box that is the Ontario university we know today.

Our view is that by encouraging mission-based accreditation of degree-education providers, Ontario's degree-granting sector will begin a process of diversification consistent with the government's vision. Ontario citizens in turn will benefit. They will have more real choice in selecting where they wish to pursue their post-secondary education.

With respect to three final matters, we have the following comments. First, we recommend that terminology that is more inclusive be used in the legislation; for example: "institute" or "college" or "polytechnic," as well as university. This will help ensure that the perspective within which these new post-secondary education providers are viewed is as broad as possible. Second, it will be important that the degree designations be established early in the process; for example, a bachelor of technology. All parties involved will want to know what type of degree they will be able to offer, and an early decision by government will help to clarify this. Third, the language in the bill, specifically sections 2 and 3, contemplates that institutions will be able to apply to grant degrees and/or become a private university. In our view, this is an important distinction that helps to underline that a degree-granting entity does not have to be a university. DeVry agrees with this distinction.

In conclusion, DeVry believes the government has demonstrated vision and leadership in introducing this legislation. We are pleased to support it and look forward to its passage. My colleagues and I appreciate the opportunity to come this afternoon and welcome any questions you might have.

The Chair: Thank you very much. That does allow us about four minutes for questioning. This time it will be for the Liberals.

Mr Levac: Mr Brown, I won't put words in your mouth, but I think you indicated a distinct concern for the students' choices and their availability to get those degrees. Is it fair to say that's what's been said?

Mr Brown: Yes.

Mr Levac: Do you agree, then, that there should be some protections built into the bill for the students who end up having one of the colleges or universities simply pull the plug in the middle of the year saying, "We can't make any more money so we close shop"?

Mr Brown: Of course.

Mr Levac: It's happened in my riding and they were left in the lurch. They did not get a certificate, let alone a diploma or a degree, and we're left with a pot full of bills.

Mr Brown: During the consultations we made that point in spades. We fully agree.

Mr Levac: Do you also agree that any kind of associated college or university that does that should never get a charter again in our province?

Mr Brown: I hadn't thought that far ahead. It makes sense.

Mr Levac: Would you then agree that anyone who has had that reputation anywhere else in the world and comes into our province to make the same proposal should not be allowed a charter?

Mr Brown: I have to think about that one. I'm not sure.

Mr Levac: Finally, you made mention of equity. Do you believe that it's almost a stacked deck when we say the word "equity" and poor students may not be able to afford to go to these institutions?

Mr Brown: Maybe you could just come back a little bit.

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Mr Levac: I'm deeply concerned with the wonderful institutions that have been making presentations today, and they're all the best. I applaud them for that, and I'm not trying to be facetious here. Of the institutions I've been made aware of, they are excellent institutions. In some cases, if we now move down the road of private for-profit institutions, they may not be accessible to those people who may indeed need that degree because that's their gift, that's their talent, but they can't afford to go. That's not equity.

Mr Brown: I think affordability will continue to be an issue at all levels of education. I heard the number \$40,000 mentioned earlier this afternoon. DeVry does not foresee those kinds of numbers in its future. For the record, we would come in at about \$10,000.

Mr Levac: I appreciate that comment. I'm just voicing my concern that we can say equity across the board, but you can't control a private institution in how much they're going to charge. But if that student has a gift in that particular area and needs that diploma or degree to carry on, their ability to attain funds to go there is really kind of restricted, particularly if they are impoverished.

Mr Brown: I think the reality of tuition will continue to be a factor in any program—public universities, private universities, wherever.

Mr Levac: I wouldn't advocate completely tuition-free, but I am of the ilk that says anyone who cannot afford to go to university has been disadvantaged.

The Chair: Thank you all for taking the time to come before the committee today.

ONTARIO ASSOCIATION OF CERTIFIED ENGINEERING TECHNICIANS AND TECHNOLOGISTS

The Chair: Our next presentation will be from the Ontario Association of Certified Engineering Technicians and Technologists. Good afternoon and welcome to the committee. Please proceed.

Ms Angela Shama: Mr Chairman, members of the standing committee on general government, ladies and gentlemen, OACETT, the Ontario Association of Certified Engineering Technicians and Technologists, is pleased to appear before you in support of Bill 132. I am Angela Shama, executive director of an approximately 20,000-member association representing technicians and technologists, most of whom are graduates of the community college system. With me at the table today is Mr Trevor Onken, president of our association. Our comments will be very brief, but along with the verbal comments we have included in your package two briefs which will show our consistency of support over the years for degrees in technology in the college system. I assume that you've received the packages we've distributed.

The first is an OACETT brief to the colleges of applied arts and technology, submitted over 10 years ago, which proposed a degree-granting program for specific colleges to be identified by the ministry. The second is more current, having been sent to the ministry in this past year as a response to the ministry's request for input to their consultation paper Increasing Degree Opportunities for Ontarians. If I may, I would refer you to a couple of important recommendations from both those briefs.

First, from our brief to the minister dated May 29, 2000, on page 2, paragraph 4, regarding names of the degree and the academic institution, our comment is, "The name should be consistent with international nomenclature." We would appreciate your giving thought to using the term "polytechnic institute." That same name was used in our Vision 2000 response in that we recommended the need for a polytechnic system.

Further, in our May 29 brief, we stated in that same paragraph, "The bachelor degree should be the initial stage and not an associate degree." We believe it is important that the new applied degrees be recognized by universities toward post-graduate work and by industry for advancement to senior management roles. Similarly, in our response to Vision 2000 in 1989, we referred to the NAFTA, where a minimum of a baccalaureate degree is required. We recommend that BTech or BSc(EngT) degrees should be developed in Ontario.

Whether it be our brief of over 10 years ago or our recent one, our position of support for degrees in technology within the college system has been consistent. We are pleased to support on behalf of our association the ministry's new initiative within the colleges of applied arts and technology. We look forward to providing a certification process for those new graduates from these degree programs.

Mr Onken or myself would be pleased to respond to any questions you might have. If I might just add, we are very pleased with the presentation from DeVry as well. I think you can see from our comments that we share many similar views.

The Chair: You are the first group to allow us enough time to actually have a full rotation, because there are 12 minutes, or four minutes per caucus. This time we'll start with Mr Marchese.

Mr Marchese: Would degree-granting in that particular field of the community colleges involve more costs for the colleges? Do you know?

Ms Shama: My background is from the college system, where I came from, but I think that will certainly depend in many ways on the criteria that are established for the colleges. Are they three-year programs? Are they four-year programs? Will there be a greater degree of technical content, which of course increases capital costs, equipment costs, for a college? It's very difficult for me to give you an answer to that. I think it really depends on what the final product is going to look like.

Mr Marchese: Are you assuming, where there will be additional costs, once this government passes this bill, which it will, that the government will be there to support

those colleges with those extra costs? Is that the assumption? Have you had chats with the parliamentary assistant or the minister or any staff person about that?

Ms Shama: I'm not sure it would be appropriate for our association, necessarily, to comment on that one. I think you need to determine what you're prepared to support in terms of the college system. I think public funding support is extremely important to the college system. It's critical.

Mr Marchese: Absolutely. We see the post-secondary educational system as being underfunded and has been so for the last—

Ms Shama: Right.

Mr Marchese: You don't say that because they won't like it. You can't say that.

It has been underfunded for many, many years. If this brings additional costs, I would assume you would be worried that if somehow colleges didn't get the additional costs, they would be unhappy—happy to have the degree-granting, but if they don't get the additional help, they would have to find money they don't have from other areas. That would be a concern for you, wouldn't it?

Ms Shama: It would certainly be a concern. We would like to see this succeed and we would like to see the degree-granting program succeed. In particular, we'd like to see a good offering of those programs within the technology area of the colleges. I think that's really important.

Mr Marchese: Perhaps the parliamentary assistant will assist me in helping with those questions, because she's next for questions.

Mrs Molinari: I'm not sure which questions he's asking for me to respond to.

Interjection: You're not going to help him, anyway.

Mrs Molinari: I would be very pleased to help. I missed the question.

I would like to congratulate the presenters on their presentation and certainly for submitting the brief to the minister during the consultation process. We had extensive consultations on this bill and a number of people joined in, not only in the consultation process that the minister and I held in various areas across the province but also in the submissions that came through in written format. Certainly it is our hope and our belief that this bill, as drafted, covers a number of issues that were raised during the consultations, and these types of hearings will also add to any amendments that might need to be made to the legislation as we move forward. We appreciate your comments and your support of some of the issues.

I believe, and the minister believes, that this is an area that is long overdue for us to be moving into, to offer students more choices. There is certainly a demand from the public, businesses and industries and globally and nationally that this is an area we should be moving toward. Again, thank you very much for taking the time to come today and for all the work you've done in

submitting to us to help us in developing a legislation that is workable and effective.

Ms Shama: You're most welcome. If there's anything we can do in the future to help, we'll certainly be there as well.

Mrs Molinari: Thank you very much. I appreciate it.

Mrs Bountrogianni: I was also of the opinion that establishing polytechnic institutes is something we should be looking at, until I had a consultation with Dr Birgeneau, the new president of the University of Toronto, last week. He had just come from the biggest polytechnic institute, MIT. His opinion was, coming from MIT, as well-respected as MIT is, that you really lose a lot of breadth when you focus and overspecialize and develop just polytechnic institutes, that there are a lot more research opportunities and learning opportunities if you are part of a more-than-one-focus university. Can you address that challenge? It's making me rethink my position on that. How would you address that?

Ms Shama: I'm not sure I understand why it would narrow it. Perhaps our president would like to comment on that.

Mr Trevor Onken: Frankly, I wasn't sure what your scope was, so I probably didn't understand the question.

Mrs Bountrogianni: A polytechnic institute typically just has technical studies and very little general arts, liberal arts, languages, medicine and so forth.

Mr Onken: Right. I catch it. Our community colleges, as you realize, do not have that format. They are in fact designed for each individual area of the province through their industrial contacts in those areas that produce the type of community college graduate who fits the industrial workplace in the area. I would not see our Ontario polytechs changing from that.

Mrs Bountrogianni: When you say "polytechnic institute," you're not speaking of overspecializing. OK. That was my misunderstanding, then.

Mr Onken: I'm not looking at an MIT, but certainly—can I say it?—Mohawk has a—

Mrs Bountrogianni: Be careful when you say "Mohawk" around me. I'm from Hamilton.

Mr Onken: I recognize that.

Mrs Bountrogianni: Thank you.

The Chair: Thank you very much for taking the time to come before us here this afternoon and for your previous submissions as well.

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ONTARIO UNDERGRADUATE STUDENT ALLIANCE

The Chair: Our next presentation will be from the Federation of Students, University of Waterloo. Good afternoon and welcome to the committee.

Mr Mark Schaan: Thank you. My name is Mark Schaan. I'm the vice-president, education, for the Federation of Students, University of Waterloo. I'm joined today by Ryan Parks, the executive director of the Ontario Undergraduate Student Alliance.

I'd like to thank you for this opportunity to address you on behalf of the Ontario Undergraduate Student Alliance and the 120,000-plus students we represent. Let me begin by saying that the challenges post-secondary education will face in Ontario over the next decade are daunting. A study by PricewaterhouseCoopers indicates that in the next 10 years almost 90,000 additional spaces will be needed for university students.

I believe the government's move to allow private universities and colleges degree-granting status is a response to forecasts such as these, an attempt to avoid the infrastructure costs of investing in tomorrow's workforce that would otherwise be required.

OUSA strongly states that the government decision to allow private universities in Ontario is wrong on both philosophical and practical levels. I do not wish to take much of your time outlining the rationale for our opposition. I will simply say this:

Right now, Ontario students have the choice of 17 strong public universities. Over the next decade, a government's failure to create sufficient space to meet enrolment demands in these public institutions will not create choice. Rather, this failure will force students to attend a private university.

We already have the option of attending Harvard or the University of Phoenix. Do not take away tomorrow's students' choice to attend the University of Waterloo, Queen's or York. Please do not take away tomorrow's students' ability to attend Ontario's public universities.

With that being said, I did not arrive today with any hope of the government withdrawing this bill. I'm resigned to the fact that this government will force a significant portion of tomorrow's university students into private institutions or quite possibly to study out of province or out of country. For that reason, the remainder of my remarks will focus on how best to minimize the damage we see Bill 132 causing.

First and foremost, private universities should have access to no public funding of any sort—no tax incentives, no land grants, no operating grants, no research grants. I mention research grants last because that seems to be the most controversial point and is likely the only point requiring some explanation. I would put forward several points to you in this regard.

First, research dollars are too scarce and spread too thinly already. Second, public dollars should be spent on a public good. For-profit universities are no good—sorry—not a public good. A Freudian slip, I guess.

Finally, for-profit universities are a business like any other and, as such, should not be eligible for taxpayer subsidies any more than any other business.

A second area of concern is quality. Everybody raises the example of the University of Phoenix when speaking against private universities. Everyone cites the panacea of Harvard when arguing for private universities. We recognize that even the most token of quality standards would exclude an institution such as the University of Phoenix, and that Harvard probably has more pressing concerns than setting up a satellite campus in Durham

region. The truth will lie somewhere in the middle, but by accrediting any private institution, the government of Ontario is explicitly placing a guarantee on their quality.

We note that Bill 132 creates a Post-secondary Education Quality Assessment Board whose mandate will be to recommend approval or denial of consent to the minister. We see two problems with this. First, we see no body to ensure that quality is maintained over any period of time after consent. For-profit universities will exist to make profit, not to provide quality education. Of course, as the graduates of these institutions enter the workforce, employers will be the judge of whether this ancillary mission was fulfilled. If the government is willing to attach its credibility by accrediting such institutions, it must recognize that it will be held accountable if one of these private universities turns out to be a Phoenix in Harvard's clothing. Second, while every other university in Ontario was created by legislative act, Bill 132 will allow private universities to be accredited by ministerial approval. Why? Why does the transparency and accountability of the legislative process not suit private universities?

Another major concern is that since the government is forcing a large proportion of tomorrow's students to study in private institutions, these students must be eligible for graduation, regardless of market forces. Therefore, we call on the government to require each private institution to develop and maintain an endowment sufficient to pay the costs of "teaching out" students already in the system.

Perhaps the thorniest issue, however, is that of student aid. This is what we believe: First, since the government is forcing a large proportion of tomorrow's students to study in private universities, we shouldn't penalize these people further by denying them access to public student aid. Second, it is very possible that public student aid could become a form of unlimited government subsidy to private universities, as their tuition is unchecked. Third, there is a movement in this government to bring transparency to public education institutions by publishing their student loan default rates. We are concerned that Ontario's high-quality public institutions may be tarnished in reputation if they are lumped together with private institutions.

Therefore, our recommendation to you regarding student aid for those at private universities would be that students at private universities should be eligible for public student aid but only to the limits faced by students at public institutions. Finally, a separate pool of funds should be established to distribute aid funds to students at private institutions.

I'd like to thank you again for this opportunity, and I'd be happy to address any questions or comments you may have.

The Chair: Thank you, and that does allow us lots of time for questioning. We've got about three minutes per caucus. This time it will start with the government members. It will be Mr Dunlop.

Mr Garfield Dunlop (Simcoe North): Thanks for being here this afternoon.

We listened the other day to the president of the community colleges association and we asked her how the students in the community college system felt about this bill, and all we heard was positive comments from her about the legislation and about how it would be so beneficial to the students in the community college system. Have you got any comments on that?

Mr Schaan: We represent eight university members from across the province and our unanimous consent at our recent general assembly passed the paper you have in front of you which is called Preserving the Public Good. What Bill 132 threatens to do is remove education as a public good and remove education as a shared responsibility, something that we believe society has a responsibility—not an opportunity but a responsibility—to help students with. By making private institutions available in Ontario, our members have had nothing but fear that this will compromise our notion of education and our understanding of the role of the university.

Mr Dunlop: So you see no opportunities in this bill whatsoever?

Mr Schaan: I think the kind of institutions we're looking to attract in Ontario aren't the kind of institutions that will necessarily be attracted by this bill. If we're looking for a Harvard of the north or if we're looking for a Yale or a Princeton, you're looking at operational costs that have required decades of alumni and decades of endowments to try and build. Meanwhile, we're looking at cash-strapped public institutions that are already facing quality gaps. I see no incentive for a for-profit private institution to come into this province with the aim of providing quality educational opportunities for Ontario's undergraduates.

Mrs Bountrogianni: Welcome. Excellent presentation, as always.

I think the part the colleges liked was the applied-degree part. They didn't make any reference to the private universities. They stayed away from that.

I'd like you to comment on the last few years with respect to the effect of the rising tuition on students from lower-income families. There have been three research studies done and I think one was done at your institute. Could you talk about that for us, please?

Mr Schaan: Yes. The University of Waterloo last year did a study based on postal codes, correlating data from Statistics Canada, average household income, with the populations of Ontario's universities. What we found is that over the last 10 years we've seen a 6% drop in Ontario of students coming from socio-economic backgrounds of less than \$50,000. At the University of Waterloo, an institution which prides itself on its co-op program and the ability of students to help the financing of their institution, we saw a 10% drop, which is radical. Considering that tuition has gone up 150% over the last number of years because of the shortfall of funding, obviously there's a frightening trend that the university is no longer the jurisdiction or the landscape for all people in Ontario, but only those who can afford it.

Mr Levac: Thanks very much for your presentation. Again, I want to congratulate you for voicing the concerns of the students. Earlier I asked a presenter questions about equity, questions about availability and protection. Can you outline some of the things beyond what you've already said today about other areas of protection, because when we deal with a majority government, they tend to pass bills that maybe not everybody agrees with and then they become law. You've indicated that in your presentation. Can you give us an outline of other things that you think might be able to be done that would protect students?

1700

Mr Schaan: There are a number of things we can do to ensure that both taxpayers and students are protected at these institutions, obviously at no public funding. But then also we need to ensure that there's a proper information channel to students. It would be negligent of this government to assume that simply opening the door to private institutions means that students are well aware of what the realities of their educational choices are. Students need the opportunity to make choices in their post-secondary education careers with informed decisions. Private institutions come with no operating history, unless it's the University of Phoenix, and we know what their operating history is like. That means lawsuits and the mismanagement of student loan funds, so students need to be made well aware of what their choices are. That's one of the key protections that needs to be put in place.

The other thing is potential tuition maximums. I mean, if these institutions are looking to come in and try and set up shop, they can't simply go under the guise—unfortunately, sticker price is often associated with quality, and just because you have high tuition doesn't necessarily mean you have a high-quality institution. In the same way that public institutions are regulated on how they increase their tuition to ensure that it actually is improving quality, we need to have some standards of how these institutions are making money and where their profit is coming from.

Mr Marchese: I enjoyed your presentation. One of the objections I put forth in the legislative debates was that normally governments introduce bills on the basis of someone in the public or a significant section of the population saying, "We really want this." I quite frankly haven't found too many of those people. There was a president from a community college who said he supports private universities—God bless, there must be a few of them—but not vocally saying, "We want it."

You come from a student body, you're a young guy. Have you heard young people saying, "We're screaming for this choice. We're lacking choice and we want it and that's why we want for-profit private universities"? Help them out, help me out.

Mr Schaan: We found it quite ironic that the bill was titled "choice and excellence in post-secondary education"—I can't remember the full title of the bill—because we agree, students aren't begging for choice. Students are

begging for quality opportunity. We have seen the growth of some innovative and exciting new programs at the 17 public institutions we have in Ontario over the last number of years. We've seen the growth of software engineering at my institution and at McMaster. We've seen new programs in applied health sciences, new programs in gerontology and health, new programs in applied arts degrees. I think our public institutions are doing a very fine job at ensuring that all undergraduates in Ontario have choice in the university sector.

I think what we're lacking from the Ontario government is a commitment to quality choices and with quality comes increased funding. We're 59th of 60 in funding in this province. I don't know how many times we need to tell that and hit that home. We need to ensure that the excellent opportunities that are being provided at our public institutions will be met with funds to ensure that they are the quality that undergraduates are demanding.

Students aren't looking for more names of degrees. Students are looking for the degree they have but want to ensure that it's of the highest quality they can get and that's what we're asking for from this government.

Mr Marchese: Let's stick to that point about choice again. One of the deputants talked about the idea that this will provide equity and so on. "Choice, equity, flexibility and quality" was one of the comments that was made by an earlier deputant. As it relates to private universities, as opposed to the college part of degree granting, which is a different kind of discussion, in my view, do you think it offers choice to students in terms of their ability to access those private, for-profit university programs? If it's really privately funded, they're going to have to rely on tuition fees. In these universities we hear that it would cost anywhere from \$40,000 a year and up if it's just privately funded alone, right? Does that offer choice to students, or for whom?

Mr Schaan: We agree. I don't know how many studies we've done. There's the Guelph study, the Waterloo study. Even the Kitchener-Waterloo Chamber of Commerce recently did a study of educational attitudes toward post-secondary education. The overwhelming barrier to access was not one of space at a university, although that is becoming an increasing concern and we need to make sure that we do fund increased spaces with the institutional requirements of faculty and support services on top of that, not just new spaces. But the biggest barrier to access is tuition, and if these institutions are coming in and charging \$40,000 tuition, that's not accessibility. If we think that the student loan program is the way to go about creating access to that, we would, frankly, disagree because we would like to make sure that the student loan program doesn't become a subsidy for private businesses to operate private universities in this province. Without putting a maximum on students' loans, all we're doing is ensuring that the profit margins of these corporations that want to start universities are wider, and that's not what we're looking for. We're looking for student choice.

The Chair: Thank you, gentlemen, for coming before us and making your presentation today.

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

The Chair: Our next presentation will be from the Ontario Public Service Employees Union. Good afternoon. Welcome to the committee.

Ms Leah Casselman: Thank you very much. My name's Leah Casselman, I'm president of the Ontario Public Service Employees Union. With me today is Stephanie Blake, who's a member of our board of directors and also an employee at Ryerson, and Jordan Berger, who is our supervisor of research.

The Ontario Public Service Employees Union represents community college professors and support staff as well as thousands of university-sector workers. We are appearing before you this evening to address Bill 132, the Post-Secondary Education Choice and Excellence Act.

This is our third opportunity to address this legislation. The first opportunity came in response to the government's consultation paper on private universities. There were a number of questions raised in that paper but all of them can be boiled down to just one: how do we introduce a private tier to the Ontario post-secondary education system? We answered the minister's questions but made it clear that our position remains that post-secondary education should remain a publicly funded and publicly administered system available to all qualified students.

The second opportunity came during a shadow consultation on private universities organized by the Ontario Post-Secondary Education Coalition, which unites faculty, staff unions, students and other supporters of public education. All of the participants during the shadow consultations were clear in their opposition to the introduction of private universities.

1710

With Bill 132, this government shows that it has not listened to those who provide and value quality public education in Ontario. It is interesting to note that the Public Appointments Secretariat has already begun the task of identifying possible candidates for the quality assessment board, even though the legislation that creates that board has yet to be passed by the Legislature.

Obviously, the government feels that it must at least go through the motions of listening to those who oppose its education agenda. So we're here today. Although I have no confidence that our concerns will be taken seriously, I welcome the opportunity to have our objections entered in the public record.

First and foremost, the current Ministry of Colleges and Universities Act specifically prohibits a corporation from applying to set up a university in Ontario, in case you weren't aware of that situation. This proposed legislation would undo that prohibition.

Second, this act further removes the post-secondary system from public scrutiny by allowing the ministry to decide whether or not a private institution qualifies as a university. In contrast, the existing legislation requires these approvals to be debated in and decided by the

provincial Legislature. This proposed change is clearly intended to reduce the accountability of government to protect public post-secondary education in Ontario.

The notion that problems can be avoided by giving the ministry stronger regulatory powers is deeply flawed. After Walkerton, does anyone believe that this government will allow its own staff the resources and freedom from interference necessary to preserve high standards in post-secondary education?

Finally, if this experiment with private universities fails, as we think it will—as we predicted the Walkerton crisis—the provisions of NAFTA will make it very difficult for a future, more progressive government to undo the damage. NAFTA allows US corporations to sue provincial governments if any future change in public policy—for example, to return to a fully funded public higher education system—negatively affects their anticipated profits, the almighty bottom line.

Given all of these concerns, why is the government so keen to pursue the path of private, for-profit education? In addition to its unqualified support for privatization and strong lobbying by the private sector, the government is once again trying to avoid its responsibility to support our cherished public services. As we all know, the number of students applying to universities is projected to reach unprecedented levels within the next few years. Rather than fund the services that these students need now, the government is looking to the private sector to take up, and charge hefty fees for, the slack.

Are Ontarians really demanding private education? Of course not, no more than they are demanding private health care. All Ontarians want the best quality public education system that we can provide as a society. As we all recognize, support for higher education today is a critical factor to ensure our province's success tomorrow.

Even our free market neighbors to the south recognize the importance of higher education. Ontario continues to rank near the bottom of the list of states and provinces in per capita spending on education. How can we expect our export industries to compete with those in New York and Michigan, for example, when we starve our educational system while they invest unprecedented amounts in their universities and colleges?

Of course, the issue here is not just inadequate funding. Education should do more than just produce human widgets to fill job slots in our workplaces. A higher education should develop full, rounded citizens who are equipped with the critical skills they need to assume their responsibilities to society and to reach their own maximum potential.

Private vocational schools already offer post-secondary programs but ignore their responsibility to provide quality higher education. They promise their graduates jobs, and they train for jobs alone. Yet they fail at even that meagre objective. What other conclusion can you draw from the fact that their students in private colleges have the highest default rate on their OSAP loans?

There are many ways to improve what we already have, but opening up the field to the University of

Phoenix is not one of them. If we force students to get their education from www.edegree.com, their fly-by-night education will eventually undermine our society and economy. Rather, we must invest in our future, not borrow against it to serve private interests.

On the subject of colleges offering applied degrees, we remain cautious and concerned. While it is not beyond the capability of Ontario colleges and universities to work out a system of applied degrees, such an arrangement would have to recognize the different strengths and qualifications of the university and college systems. Our experience with existing applied degree programs leads us to suspect that this balance is not being found. Nursing programs, for example, have been turned into cash cows for certain universities, with little benefit for the colleges that provide the bulk of the instruction. By extending the duration of nursing studies, we are starving our health care system of the qualified staff they so urgently require.

Clearly, there is a crisis in education today. But it is not caused by a lack of consumer choice. It is caused by years of systematic underfunding. Over the years, the provincial government has been squeezing the colleges and universities without mercy. Classroom time has suffered, courses have suffered, students have suffered. In fact, students have suffered doubly. They're not getting the quality their teachers would like to give them, because there aren't the hours in the day and classes are too large for any significant interaction with their instructors, and of course students graduate today with debt loads that would have covered a pretty decent mortgage 25 years ago.

This proposed legislation would act as a further barrier to poor and middle-class students by criminalizing the administration of student loans. For example, if a single mother suspects she may occasionally have to work more than 10 hours a week to provide for her family, the prospect of a \$25,000 fine and jail time will surely discourage her from pursuing a degree. Mind you, the 60-hour work week would probably look after that too.

The per capita debt of the average student far exceeds the per capita debt carried by taxpayers. But this government that campaigned to create the phony debt crisis continues to ignore this growing financial pressure on our students and their families. As a result, we are losing a generation of students to a very real and very individual debt crisis.

The current federal election has shown once again that voters want no part of a privatized health care system. Canadians clearly view education and health care as two public services that must be preserved at all costs. Political parties that defy the public mood must be prepared to pay a very high cost in the court of public opinion. OPSEU remains confident that the citizens we serve as members and as students strongly prefer a well-funded public education system over a patchwork of public and private educational facilities.

1720

I will conclude by repeating the same advice we have given in our two previous presentations on this subject.

Like medicare, our post-secondary education system should adhere to some fundamental principles:

(1) It should be universally available to those who qualify and who want the opportunity.

(2) Its degrees and diplomas should be of a standard and reputation to be accepted at other institutions across Canada and around the world.

(3) It should have the infrastructure and resources to offer programs that meet this standard.

I'll repeat that, in case you missed it. It should have the infrastructure and resources to offer programs that meet this standard.

(4) It should be publicly funded and publicly run.

(5) It should be accessible to all students, so that poverty, language, family circumstances and disability create no barriers.

If we stick to these basic principles, which I know is a foreign concept for some, we can build a better public education system. I urge you to work with us to achieve that.

I do have one comment on what's happening with private universities. There is one that started up, called the Canada West Canine Centre. It's a school for dog trainers, registered with the Private Post-Secondary Education Commission. Obviously, in British Columbia, education is going to the dogs.

I do have an instant fix for the government today, if you're worried about finding the money to ensure there is adequate funding in the post-secondary system. I believe the Provincial Auditor found you have not collected a half-billion dollars in sales taxes, which employers have collected on your behalf. If you got the staff and went out and got the money, you'd have enough for post-secondary education. It would solve all your problems and certainly a whole bunch of ours.

The Chair: That leaves us about three minutes for questions. This time the rotation takes us to the Liberals.

Mrs Bountrogianni: Unfortunately—or fortunately, depending on which side of the House you sit—this is going to pass. It's a majority government. Are there any amendments you can develop which will minimize the damage done by private universities? That is basically what we've come to.

Mr Jordan Berger: We would like to see the quality assessment board made as firm as possible, so that it has good representation from qualified academics from the public system. If they are going ahead with this change, they need to take a lot of care to make sure that board is actually functioning as an overseer. You really are putting the future value of an Ontario degree in question. That would be one major area we would like to see some action on.

Mrs Bountrogianni: The Council of Universities voiced a similar amendment. Do you have any thoughts on amendments or additions to the legislation with respect to protecting students financially from the strong possibility of private institutions folding, as they have in the past.

Mr Berger: Obviously, there has to be protection. If the government authorizes this move to a private system, I think the position of OPSEU would be that they should assume ultimate liability for institutions that go belly-up.

One of the changes that I think the president has already mentioned is a real concern about the criminalization of OSAP. The system is too tight as it is, and it's no surprise that some people have to work a few extra hours or find some exception just to provide for their families or themselves and to study. That's an area where we would like to see some changes as well.

Mrs Bountrogianni: Many more students I knew, as well, were actually working overtime illegally to make ends meet and still collecting OSAP. It points to the high tuition more than to their being criminals or trying to defraud the system.

The government does have some protection in the legislation for students, but maybe the government can answer this question. Is it the government that will take up the liability, or is it the institution that will be expected to pay the students if it closes?

Mrs Molinari: Could you repeat the question, please?

Mrs Bountrogianni: The way the legislation reads now, if a private university goes bankrupt and leaves, will the government assume liability—in other words, give back the tuition to the students—or will it be the bankrupt institution? I know there is something in the legislation.

Mrs Molinari: Before a private institution is granted status, a bond will be set up for student protection. The quality assessment board will ensure that all those things are in place before recommending to the minister that the institution be granted status.

Mrs Bountrogianni: That wouldn't be like the bond you were supposed to have on all those companies, which you were supposed to be collecting for the Ministry of the Environment?

Mrs Molinari: Am I responding to questions?

The Chair: Actually, our time is up. Thank you very much for coming before us again to make a presentation.

Ms Casselman: It's our pleasure.

GLENN GOULD PROFESSIONAL SCHOOL

The Chair: Our next presentation will be from the Glenn Gould Professional School. Good afternoon and welcome to the committee.

Dr Jack Behrens: Good afternoon, Mr Chair and honourable members. I would like to introduce my colleagues from the Royal Conservatory of Music: Shannon Paterson, the general manager of the Glenn Gould Professional School, and Rennie Regehr, the dean of the school. In light of the presentation two presentations back, I hope the fact I have a PhD from Harvard won't be held against me.

We appreciate this opportunity for the Royal Conservatory of Music to support Bill 132, the Post-secondary Education Choice and Excellence Act, 2000. It's a very timely act, and it recognizes the changes in

higher education that are underway in Ontario and elsewhere.

It's becoming clear that the most successful institutions will be those that can adapt to and cope with change and society's demands and thereby offer high-quality education and training to students both within Ontario and from elsewhere.

Higher education is becoming more individualized and tailored to the needs and aspirations of individual students. There will be less emphasis on studying prescribed courses for prescribed numbers of hours in prescribed lecture halls. With access to computers and the Internet, anyone may now have access to a wealth of facts. Facts, however, are not a synonym for knowledge.

The most renowned professors and practitioners will likely be more and more associated with two or several institutions, with costs perhaps shared proportionately.

It is becoming clear that awards, grants and loans will follow students rather than institutions. In this regard, we support the concept that students should be able to utilize support, which should be available to all, based on common criteria. They should be able to utilize this at the post-secondary institution of their choice.

We also applaud the government's intent that Bill 132 be enabling rather than restrictive

We welcome the opportunity this bill provides for the Royal Conservatory of Music to apply for degree-granting status. Founded in 1886, the RCM, which until 1947 was known as the Toronto Conservatory of Music, is the largest and oldest self-supporting institution of its kind in Canada. In 1994, the Frederick Harris Music Publishing Co was donated to the conservatory. The modern era began in 1991 with the re-establishment of its independence from the University of Toronto through an act of the Ontario Legislature. Under the direction of Dr Peter Simon, the president and CEO, it has gained financial stability and has refocused its activities on a model of interrelated business units which include: the Royal Conservatory of Music examinations, which serve more than 100,000 Canadians annually; learning through the arts, which is in the school systems from coast to coast; the community school; and the Glenn Gould Professional School, which we represent.

This year, the Glenn Gould Professional School has an enrolment of 179 students: 132 are Canadians from 10 provinces; 47 students are from 15 countries, and of the 47, 15 are from the United States. It's interesting to note that of those who apply to the Glenn Gould Professional School, half do not apply anywhere else. That does not mean that they get admitted, of course, but it does mean that they are focused and have identified a school which they believe will be helpful to them. Our students are talented and motivated. Faculty who teach for us and also teach for universities in Ontario tell us that our students are in no way inferior and in fact are sometimes more highly motivated.

While we believe our curriculum is unique and does not parallel precisely those of Ontario's colleges of applied arts and technology, there are some commonalities, as may be apparent from our mission statement,

which is on page 7 of the prospectus that has just been distributed. Our mission is to train performing musicians for successful careers, to provide artistic leadership skills and to inspire commitment to the transformation of contemporary society.

1730

We believe we are complementary to but do not duplicate university programs. Among the advantages that students find in studying with the Glenn Gould Professional School is that we are one of the only major international schools to offer systematic training in communication skills, technology and teaching. We provide the skills that students need to be employable and entrepreneurial.

Our average class size is 10. We provide half again as much private instruction in voice or instruments as most institutions, whether in Canada or elsewhere.

We have a roster of national and international visiting artists who present master classes, workshops and lectures that are perhaps unparalleled anywhere. This allows our students direct access to the professional world and connections leading to employment.

Students enrolled in our four-year performance diploma program also have the opportunity to obtain a bachelor of music degree in performance or composition through British Columbia Open University, with which we have an articulation agreement. BCOU is a member of the Association of Universities and Colleges of Canada.

Recently, the Ministry of Canadian Heritage has designated us as a national training institution. It seems somewhat ironic, therefore, that we are not permitted at the present moment to offer our own degree, as much as we have that rather unique distinction.

Diplomas, as I am sure you have heard in other presentations, are not widely recognized outside of Canada, it's unclear what they really mean, whereas baccalaureate and masters' degrees have more or less universal significance. In this rather incongruous and strange situation, we believe that we are competitive on an international footing, and we strongly urge that our recommendation that we be given degree-granting status be considered.

We believe that the Post-secondary Education Quality Assessment Board and its review panel should be cosmopolitan in outlook. It should include international members and members of professional organizations and associations from the disciplines under review. The Glenn Gould Professional School within the past few years has been scrutinized by external reviewers on behalf of the Ontario Arts Council, the British Columbia Open University and twice for the Minister of Canadian Heritage, all of whom have been highly positive and even laudatory. We look forward with anticipation to being considered for degree-granting status under the provisions of Bill 132. Accordingly and naturally, we support this initiative.

The Chair: That certainly leaves us time for questions. This time the rotation will begin with Mr Marchese.

Mr Marchese: Just a few questions. By the way, I'm a big fan of the Royal Conservatory, obviously. I went there once for voice lessons. I used to sing Tom Jones. I ruined my voice singing Tom Jones.

Dr Behrens: We'll take you back for a visit. It has been transformed, perhaps.

Mr Marchese: It didn't help me, but that's because I'm the problem, not the teachers.

What is the difference in your programming from those programs offered by—

Interjections.

Mr Marchese: Mr Dunlop, sorry. Is everything OK?

Mr Dunlop: I just couldn't see you doing Tom Jones. Sorry.

Mr Marchese: Hard to picture?

What is the difference in your program versus those offered in colleges or universities?

Mr Rennie Regehr: It's much more practical. Our students do a lot more playing. They have much more interaction with professionals and artists in the field. We have a lot of internationally recognized guests coming in to give classes, to conduct our orchestra and that sort of thing. We feel that gives them a much closer look at the real world, so to speak, and it often provides—because contacts get made, relationships are built—our students options when they are finished their studies here. I think that's quite different.

Mr Marchese: Do community colleges or universities object to your perhaps providing degrees? Do you expect it? Have you had those discussions?

Mr Regehr: I think there is some feeling that they would rather we not be there with the degrees.

Mr Marchese: Have you had discussions with them?

Ms Shannon Paterson: We already do offer a degree through our articulation agreement with the British Columbia Open University, so they've had to deal with that situation for the past few years already.

Mr Marchese: Right. So that was good because you set a precedent with the university, obviously, with whom you work. But that hasn't necessarily helped with other universities here in Ontario or other colleges, has it?

Dr Behrens: We could probably say they are less than enchanted.

Mr Marchese: What kinds of support do you expect from the government, other than your ability to provide a degree? Anything else?

Mr Regehr: No. We are not expecting any operating funding at all.

Ms Paterson: Currently we are supported by the national program, through the Canadian heritage fund. We are hoping that will continue.

The Chair: Thank you for bringing the perspective of your unique organization before us here today.

Committee members, I just want to inform you that we've had a request from Mr Kwinter to consider meeting next Monday to deal with his bill, so I'm going to be convening a subcommittee meeting tomorrow to see if all parties are amenable to that. Pending those discussions, the committee stands adjourned until next Wednesday at 3:30.

The committee adjourned at 1735.

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Official Report of Debates (Hansard)

Monday 27 November 2000

Journal des débats (Hansard)

Lundi 27 novembre 2000

Standing committee on general government

Motorized Snow Vehicles
Amendment Act, 2000

Comité permanent des affaires gouvernementales

Loi de 2000 modifiant la Loi
sur les motoneiges



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ASSEMBLÉE LÉGISLATIVE DE L'ONTARIO

STANDING COMMITTEE ON
GENERAL GOVERNMENTCOMITÉ PERMANENT DES
AFFAIRES GOUVERNEMENTALES

Monday 27 November 2000

Lundi 27 novembre 2000

*The committee met at 1550 in committee room 1.*MOTORIZED SNOW VEHICLES
AMENDMENT ACT, 2000LOI DE 2000 MODIFIANT LA LOI
SUR LES MOTONEIGES

Consideration of Bill 101, An Act to promote snowmobile trail sustainability and enhance safety and enforcement / Projet de loi 101, Loi visant à favoriser la durabilité des pistes de motoneige et à accroître la sécurité et les mesures d'exécution.

The Chair (Mr Steve Gilchrist): I call the committee to order. The first order of business would be to receive a motion. Mr Spina.

Mr Joseph Spina (Brampton Centre): I move that the committee move into clause-by-clause for Bill 101.

The Chair: Any debate? Seeing none, all in favour? Opposed? Carried.

With that formality out of the way we'll proceed immediately into clause-by-clause. Bill 101, An Act to promote snowmobile trail sustainability and enhance safety and enforcement.

Any comments or amendments to section 1?

Mr Dave Levac (Brant): Excuse me, do we move into an opening statement at all?

The Chair: The normal *modus operandi* of many of the members is that on the very first section they can indulge themselves, rather than setting aside a formal time. You can take as long as you want, up to 20 minutes, for any interjection.

Mr Levac: Thank you. As the members of the committee know, and the snowmobiling community at large knows, there were some concerns raised regarding Bill 101, An Act to promote snowmobile trail sustainability and enhance safety and enforcement, that were heard mostly up in the north.

I believe that our purpose today is to address that and I know that Mr Spina has worked very diligently at this process and has worked very hard with the community at large, particularly with the snowmobiling community, to get to their needs. Maybe it's multi-faceted. My understanding is that he had to deal with three ministries in trying to—

Interjection.

Mr Levac: Even more, Mr Spina? Five, I hear. Five ministries, each of them having their own desires to be

fulfilled. I compliment him on his ability to try to pull this together, and I sincerely mean that.

We have raised some of the concerns at committee, but mostly the snowmobiling clubs themselves have raised some of these concerns. When it first came out before the hearings, when I first heard about the bill, I didn't have a large concern and then realized that there were things being proposed that the community itself had some difficulty with and that affected groups outside the snowmobiling community. There were hunters and anglers and trappers, private property owners themselves, farms.

One that we found that was rather interesting and unique to try to tackle was municipalities. There were areas in which snowmobiling clubs would go through some municipal properties, leaving liability in question, so we're going to have to address that as well.

What I've learned is that it's a community that prides itself on its own volunteerism, and it's a community that has done an awful lot of work to try to promote and enhance the sport of snowmobiling. The outside agencies that were involved in that also pointed out the need for the use of snowmobiles outside of just recreational use. Those are the things that I recognized, and the number of people who actually earn a living using snowmobiles was actually larger than I anticipated. That being said, the education was wonderful for me.

I will speak to individual clauses as they come up. Through Mr Spina's co-operation, I know some of the concerns are being addressed on the government side. We will be proposing a couple of areas in which we need some clarification to ensure that the bill doesn't affect the snowmobilers and the subsequent other groups outside to the detriment of the sport and/or their livelihood.

Those are my opening comments. I look forward to the rest of the clauses. I'm sure that most of them have been addressed in the amendments that have been put forward by the government, and I compliment them for that detailed work.

The Chair: Any other comments? Ms Lankin.

Ms Frances Lankin (Beaches-East York): I want to begin by saying how delighted I am to be subbed into the committee today due to the last minute scheduling of this bill. Unfortunately, both our standing committee member and our critic were unable to attend this afternoon.

Although this is not a bill that I've heard a great deal about in my own riding in terms of concerns from con-

stituents—the great constituents of Beaches-East York haven't been ringing up my phone a lot on this—it is a bill that I have a great deal of interest in in my extended circle of colleagues, friends and citizens in the province. I have spoken to a number of people about it. I had the opportunity to speak a few weeks ago directly with the federation, and of course I've spoken to the local club that I belong to that I buy my trail permits from and the trail wardens who are involved there.

As committee members know in the history of this, the snowmobile clubs of Ontario have for some time wanted to see a move to the mandatory permit and they're very supportive of the direction of the legislation. Their concerns I think are concerns that have been warranted, however. For example, one of the largest issues is with respect to the enforcement of the new provisions in the bill. The bill as it is set out provides that those enforcement measures really are in the hands of people like the OPP and the Ministry of Transportation.

In terms of checking mandatory trail permits, the trail wardens, the members of the club, the people who do all the work, who do all the fundraising, who do all of the trail grooming, who certainly are the life and spirit of these communities in keeping their clubs and the activities going and keeping the trails in shape for people right across the province and for tourists from outside of the province to travel through their area, feel very strongly that there should be an enforcement role for trail wardens, for the clubs themselves, that it is a local issue and a local initiative.

The STOP officers currently have sworn powers that are similar to some of the other higher levels of law enforcement, and I'm sure there must be a way for bringing trail wardens into that. I know Mr Spina is aware of this problem. I've spoken to him about it directly and I raised it in a statement in the House. He's assured me that he's looking into this. I hope that today he might be able to give not just the committee but the snowmobile club community some assurance of the direction that the government might proceed with respect to this issue.

Secondly, the issue of exemptions: There are numbers of people, traditional users of the trails, like trappers and prospectors, as well as people who require using the trails to have access to their cottage property, and others where that may be the only method of winter access into their properties; certainly intermittent use by people who are ice angling. Those sorts of issues have been well explored in front of the committee and I think Mr Spina is well aware of them. But I think the opportunity for those to be set out in regulation and for those exemptions to be granted, monitored and controlled by local clubs under regulated categories is very important, and I think it's critically important that there not be fees attached to that for those kinds of exemption permits. Again, I think Mr Spina has been quite supportive on that issue.

Thirdly, I just want to briefly address the issue of cost of permits. Over the last few winters, with the conditions we've had and the much-shortened season, I hear from local folks up north where my club is that the cost of

permits is something that is becoming prohibitive for families who want to snowmobile together as a family, who have multiple sleds.

I think it is an issue that can't be addressed through the legislation. I am appreciative of the amendment that is coming forward which changes the power of the minister to fix the fee to a power to authorize the fees so that the clubs, those which are most sensitive to the supply and demand and the issue of how they set the price in order to maintain sufficient funds for the running of the clubs, the grooming of the trails and the upkeep and maintenance of the equipment and the trails, but also sensitive to the number of permits that are being sold and the affordability of those permits to local people—I think that balances once that's understood through the local clubs with input to the federation. That's an important amendment that is coming forward.

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I would say overall, however, that the contribution that snowmobiling makes to our economy, particularly to our northern economy and winter tourism, is incredible. It has been increasing over the years and it is one that must be recognized, I believe, by greater government investment in the expansion and upkeep of the trail system. I had the honour and opportunity when in government, as a member of treasury board, to look at the first proposal for the TOPS trail program that came forward. Somewhat to the surprise of many of my colleagues who only knew me as the southern Toronto MPP, I spoke very strongly in favour of it because I understood what it would mean to the northern economy.

In a small part of the world that I visit frequently in northern Ontario, I can tell you the number of local tourist operators that have gone from seasonal to year-round as a result of this. Where they were only summer operations, now with the snowmobile business that comes through there they have been able to take the steps to winterize and to provide that service. That has allowed them to innovatively find the spring and fall seasons. Many of them now promote the deer hunt and moose hunt and other activities in the spring, ecotourism among them.

I think that my last pitch is outside of the bill. I just wanted the government to understand the importance of not just the investment that has already been made, which is significant and has been for a number of years in Ontario, but of the amazing return on the investment dollar that we see in our economy and the need for the government to expand and increase its investment. Thank you.

The Chair: Ms Lankin, you're certainly welcome to the committee, joining us whether it's at a late stage or not, and you clearly are not at a disadvantage on the subject matter, it would seem.

Mr Spina: I want to thank the opposition members for their kind comments and their familiarity with the subject. I say to the member from Beaches-East York, I know you don't have a lot of snowmobiles in your area, but you have an influential person who lives in your riding. I don't know if you know that.

Ms Lankin: There are a number of us, actually, gentlemen.

Mr Spina: I meant in the industry. He is a journalist with *SnowGoer* magazine, and I teased him, "You must be the only snowmobiler in the Beach." He and his wife live in your area and they travel a lot. If you ever look at the back page of *SnowGoer* magazine you'll see his regular column. He takes a lot of photographs and so on.

I just wanted to thank the members, and also the members of the committee. This has been a long process, 11 months now, since we embarked on this beginning with the consultation back last winter from which we received numerous pieces of information and feedback from many of the stakeholders in the various industries. Furthermore, as a result of that process, a number of these individuals were invited to make presentations.

We took an unusual gesture, and it was really to try to make this more time-sensitive. The unusual gesture was that we went to public hearings on the committee after only first reading, which is not normally the case. We did that for a specific reason. We wanted the public hearings to be more part of that consultative process rather than waiting for it to come back to the House for second reading this fall—a question of the amount of time available—second, different parties tend to become more entrenched in their positions after we get to second reading, and we felt that it was important that the bill have as much flexibility and opportunity as it could have to really reflect the needs and desires of the population.

The snowmobiling and non-snowmobiling and non-recreational users were identified as part of this process, and I'm very happy we were able to get the hearings that we had. In fact, there weren't as many numbers of people who came to the committee, so with the co-operation of all parties involved, we were able to combine some of the hearing days so that we were able to give everybody who wanted a chance to say their piece and at the same time reduce a bit of our travelling costs. At any point, of course, as we all know, even those who were concerned about taking the time and expense to make a presentation to the committee, the committee is always available there to try to bear the costs of that expense if the committee agreed, and I think we've covered that off.

The reason we got into this was twofold. One was the apparent need for sustainability of a trail system that was maintained, as my colleagues have indicated, largely by volunteers who commit many long hard hours of work into maintaining these trails. However, we did have a situation where we had a large number of users both from within the system, from within Ontario, and from outside Ontario who wanted to have access to the system.

At the same time, the federation was running into essentially a shortfall of operating funds. They had some capital dollars which had been given to them from the northern Ontario heritage board, but those were restrictive to that area defined clearly under government regulations as northern Ontario. We have a lot of trails in this province south of Muskoka-Parry Sound. We have a lot of trails, in fact, in eastern Ontario which are sub-

stantially used trails, both by residents of Ontario and guests to our province.

In addition to that, the other side of it was the act called the Motorized Snow Vehicles Act, which essentially had been barely touched since 1972, when it was first enacted. Clearly there were elements of that bill—the MSVA, as it is more or less affectionately or non-affectionately known in the Ministry of Transportation—which were out of date, were too general in nature.

Bill 101 afforded the opportunity for the Ministry of Transportation and the Ministry of Finance to bring a few amendments forward that basically cleaned up some of the elements of the outdated bill. There were some pretty fundamental elements in the bill where it was very general in describing motorized snow vehicles. It did not define classes of motorized snow vehicles. It did not define classes of individuals who would be users of the trail system.

The memorandum of understanding that existed under the MSVA with the federation of clubs had only been amended once when the amalgamated clubs I think took place here, and under the one federation of snowmobile clubs for the entire province. A lot of these elements had to be addressed: issues of safety, use of reflective materials, helmets, headlights and lighting features. All of these kinds of things were under the MSVA. Some of the standards had been adopted by the industry without really being in legislation, but it wasn't consistent. Bill 101 will allow that consistency to now take place with those safety measures.

Some of the enforcement measures have long been wanted by many people in our society as general citizenry. Those were safety issues. We wanted, as a public, to make it a safer recreational sport. Elements such as the amendments in 101, which more closely tied the use and operation of a snowmobile to the use and operation of vehicles under the Highway Traffic Act, were very critical elements that we wanted to see in the act. To some degree these could have been enforced in the past, but it was far more difficult.

This makes it a lot easier. If an individual has, for example, a suspended licence or is charged for whatever reason, usually an impairment charge, that charge not only applies to the one area of snowmobiling but also applies to the area of the operation of a motor vehicle. Conversely, where an individual's licence has been suspended for a conviction under the Highway Traffic Act, they would also be suspended from driving a snowmobile. We think this was only fair. These vehicles, as we all know, can travel as fast as many motor vehicles, into the 60-, 80-, 90-, 100-, 120-kilometre-an-hour range. Frankly, a snowmobile driven carelessly or under the influence can be as dangerous to the individual and to the public as it would be for any individual driving a motorized snow vehicle.

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So the enforcement elements of this act also bring it closer to the Highway Traffic Act, and I think there are very few people who actually would complain about that.

I think we all agreed that what we did want was a safer snowmobiling recreational sport for the province of Ontario.

Frances, thank you for talking about the economic impact of snowmobiling, because in 1997 the snowmobile federation did an economic impact study using a very legitimate, qualified model, which was the economic impact model from the Fraser Institute, which is highly accepted and highly regarded by governments at all levels. In that economic impact study, they determined that snowmobiling was at that time, in 1997, a \$932-million industry in this province. With good weather conditions over the last couple of winters, it could well have broken the \$1-billion mark. That is the recreational winter sport with the largest economic impact in our province, and it deserves the attention that I think we, as a government, should give it.

I compliment the NDP government of the day, in 1992, for instituting what was called the Sno-TRAC program. At that time, it was a \$20-million investment in the snowmobiling industry to essentially create the interconnected, province-wide, border-to-border-to-border trail system that we have today. Sno-TRAC was what enabled the industry to be as successful as it was in terms of its economic activity, as I say, from border to border to border. That was a capital investment.

What we face today, of course, is now the ability to be able to allow that integrated system to operate. So the capital dollars and the investment was there to create the system, and now what we find is that we need sustainability dollars. That will clearly not be addressed just by this bill, or by the requirement of trail permits. However, I will say for the record that this government recognizes the importance of snowmobiling and the fact that the trail permits and the fee levels, such as they are today, are probably about as much as the market could possibly bear. They are certainly above those of many other jurisdictions across North America. However, those jurisdictions are in the position of having a mix of total private sector use and a toll user-pay system versus a partially or fully government-funded system. That makes the difference, to a large degree, between a \$150 fee in Ontario, a \$170 or \$180 fee in Quebec versus a \$35 fee in the state of Michigan, where it controls the entire trail system: it owns the groomers, and it pays the state park employees to groom the trails. But that's a considerable government cost to the taxpayer.

What we're seeking to achieve here is really a blend of user-pay with government-subsidized trail systems, recognizing the value of the economic impact of the use of the snowmobile trail system and at the same time ensuring us, as a government, collectively that when tourists visit this province as our guests we can count on a consistent trail system that would be able to be delivered for the use of our guests who come to this province. That was the reason why, when I was the parliamentary assistant to the Minister of Tourism, we took on the responsibility of the leadership of this bill, but technically I think we can all appreciate the fact that the Motorized

Snow Vehicles Act is a Ministry of Transportation bill and therefore it is the Ministry of Transportation that essentially owns both the Motorized Snow Vehicles Act and Bill 101.

That being said, we have a few amendments that have been put forward both from the government and opposition benches. There are some issues that may arise as a result of some of these amendments. I, along with others I'm sure, would be happy to address those.

The last element, perhaps if I may take another moment, to address was the one of traditional users and exemptions. I know there's an amendment that talks to that in a few moments. I know there is a commitment from the government to exempt the traditional users. They are defined in currently drafted exemptions, which I think is in part of the members' package, in section 3, I believe—in the appendices, I'm sorry. There is a section there that talks about proposed trail permit requirements for traditional and business users, and it identifies a number of user types.

The one thing that I disagreed with—and we have concurrence now from the minister's office and we hope that we can address this more specifically when we get to the actual outlining of the regulations. In it, it talks about a special permit being issued for exempted users of the trail system. We felt this was too prescriptive, and we have obtained, as of 1 o'clock today, the agreement that in regulation the users would be identified as exempted users of the trail system.

However, to go to the prescriptive level of actually issuing exempt permits and charging a nominal fee, we have concurrence from the minister's office that they are willing to waive that. We can clearly focus, then, on identifying those traditional users and allow the local people—who usually know that if an individual is travelling from point A, where they've left their vehicle, to point B, where their cottage is, they have to access a quarter mile of trail. Clearly, the local people know that this is in fact the case, because they know the local people, they know the portion of the trail that may be used. We had bait fishermen who were operators, ice fishermen and so forth, other users who came to us during the committee hearings, who expressed the concern that they were just taking their anglers out to the ice-fishing huts or they themselves would be using it to access their huts or using the trails for their own anglers, their customers. We fully understand that that is a very legitimate traditional user that should be exempt.

It really must be defined as the recreational user who is on the trail system for the purpose of recreational snowmobiling who would be the individual who would be bound essentially by the permit we are proposing in this bill.

That being said, I also know that with respect to sustainability, the revenue from these permits, the additional users who might be brought into using the trail system, would not address the shortfall indicated by the Ontario Federation of Snowmobile Clubs. I do know, and I am permitted to say, that there is a move afoot for a funding

mechanism to assist the operations funding on an annual basis for the snowmobile trail system that is being proposed as I speak. The mechanism by which those dollars will flow is, at this point, something that I don't know, but it is currently in the process of being planned by the Ministry of Finance and Management Board to be able to determine how much those dollars would be and how those dollars would be channelled through to the support of this large economic impact system to the province of Ontario.

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With those assurances—I share that with the committee members and with the members of the public who are here—I think, Chair, perhaps we can begin clause-by-clause.

Do you need a motion to accept—what is it?—section 1 of the bill? I think our first amendment is in section 3, is it not?

The Chair: Actually, we don't need a motion. Ms Lankin.

Ms Lankin: I was just wondering if you could address one of the issues that I raised, Mr Spina, and that's the issue of enforcement. As you know, the federation and a number of the local clubs have been very concerned about the authority vested in Ministry of Transportation, OPP, STOP officers, and not in the administrative authority of enforcement, with the clubs themselves and trail wardens. It appears that there's not an amendment coming forward to address that concern. Could you tell me where you're at in your thinking with the government ministries on that issue?

Mr Spina: This was an oft-repeated request from the various regional presentations we had. In the bill, it clearly defines sworn police officers and conservation officers who have the power to enforce not just the trail permit but the other elements that would be required when a snowmobiler is asked to produce documentation on the trail, and I'll just address those for a moment: a driver's licence or an operator's permit, the MTO registration permit for the vehicle, a valid and active insurance coverage certificate and, last, the trail permit. In the latter section of the bill, if a police officer or conservation officer, CO as they refer to it, pulls someone over, they're expected to produce these documents. Then, subject to the discretion of those officers, of course, with failure to produce those, they can issue a ticket.

My question to the Ministry of Transportation—when we were going through the discussions, there was resistance to the use of trail wardens to enforce some of these. The question came forward, if Green Hornets, as we refer to them in Toronto, are empowered to issue tickets for parking meters, for example, how do they do that? Of course, they are authorized under the Municipal Act. That's a bylaw under the municipality to be able to do that. I asked if there was an equivalent within the provincial legislation. The apparent equivalent seems to be the regulation. If a regulation is set forward that would empower trail wardens to issue tickets and enforce the acts, the various elements of Bill 101 and others, then the

regulation would be the one that would be in a position to empower those trail wardens.

The act strictly deals with the overriding legislation, which would therefore be the responsibility of police officers, sworn conservation officers and sworn special constables under the STOP program. The trail wardens would have to be addressed under regulation, not being sworn police officers, if we get to that stage.

Ms Lankin: A further two questions on that. Does the current legislation, or the legislation as we predict it will be amended today, provide the statutory authority for the creation of exactly such a regulation? Is the regulation-making power contained within the bill as we speak now, or within the act as we speak? Secondly, is it the government's intention to bring forward such a regulation?

Mr Spina: I think the power is there, because there are a number of elements—in subsection 2(5), which we have an amendment to, it talks about, “The minister may give authority to any person to issue trail permits and to provide evidence of such issue of trail permits and may define the duties and powers of such person.” I'm not a lawyer, but there is counsel here from MTO. That may be sufficiently broad to empower the OFSC trail warden to be able to enforce the bill, because it certainly talks about defining the duties and powers of this person and providing evidence of issue of trail permits. If there's no objection, maybe through the Chair we might ask MTO counsel for an opinion on that.

Ms Lankin: I would appreciate that because, in addition to the clause you've read, I think there has to be specific regulation-making authority. I'm just looking down to subsection (5). I don't see that particularly set out there. I'm wondering if we could get an answer from legal staff to that.

The Chair: We certainly invite the legal counsel from MTO to come forward to the witness table. You heard the question. Perhaps I could get you to give Ms Lankin—

Mr Allen Doppelt: OK. My name is Allen Doppelt. I'm senior counsel with the legal branch at the Ministry of Transportation.

The question was, is there sufficient legal authority in the new section 2.1 in the bill to give the trail wardens authority to enforce the trail permits? I don't believe the existing wording is sufficient, because 2.1(5), when speaking about defining the powers and duties of such person, is written in relation to the power to issue the permits and to provide evidence of such issue of permits. I don't think it is broad enough to cover enforcement. I think if that is the desire of the committee, then there would have to be specific additional power added to the bill.

Ms Lankin: Perhaps, Mr Spina, recognizing that it would still take an act of government to write the regulation to actually bring trail wardens in—and I realize that may be another hurdle—while we are working on clause-by-clause, perhaps we can stand down that section and see if someone might be able to develop the appropriate clause to add to, I would imagine, section 8, which is the

regulation-making authority set out in this. If someone could do that, we could come back to it before the end of the afternoon. If you could give the appropriate direction to the appropriate people.

Mr Spina: If it is the will of the committee to—I'm not sure. Allen, are there any other elements in the bill that would authorize the regulation to be set for trail wardens to—

Mr Doppelt: There isn't sufficient reg-making power right now in 2.1(8). I've looked as well at the general regulation-making powers in section 26 of the act. They are not broad enough or specific enough to provide such authority. There would have to be an amendment to add such a regulation-making authority.

Mr Spina: OK.

The Chair: I'll certainly take my direction from the members of the committee. Mr Spina and Ms Lankin, if it is your request that when we get to that section, we stand it down—

Ms Lankin: We stand that down, and then perhaps Mr Spina could ask appropriate ministry staff to draft an amendment that would accomplish that, that the committee could come back to and look at.

Mr Spina: I didn't know whether the opposition had any comments on this.

Mr Levac: I agree with that because that was what was spoken to by all the clubs in terms of their wardens. I would assume that everyone would agree with the fact that there were concerns issued about teeth. They were basically saying we needed to have some teeth; the wardens needed to have some teeth. They strictly spoke of just the permits. They wanted no other authority; they wanted no other responsibility beyond the permit. That's what I was led to believe.

I don't have a problem with standing it down.

Mr Spina: A question really of order here, Chair. If we stand it down, would that have to come back at a future date to committee or—

The Chair: In theory. We do not have time allocation binding us on this bill, which means that if we stand it down, if there was an answer by this afternoon, we could deal with it out of sequence. Alternatively, if it took to the next day afforded to us in committee, which would be next Monday, we could deal with it then. I'm totally in your hands.

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Ms Lankin: I think there is the possibility of dealing with it this afternoon. It's not a very complicated amendment, and if ministry staff could draft an appropriate suggestion for us, that would be helpful.

Mr Spina: What do we need, Chair?

The Chair: I think Ms Lankin has correctly outlined it. If the legal staff from MTO could set their minds to the wording that would be appropriate, or Ms Hopkins, the leg counsel—between the two of them—and apply themselves diligently to the task, hopefully to get an answer back to the committee this afternoon, I'm sure we—

Ms Lankin: When we get to that section, we can then agree to stand it down and we could proceed.

The Chair: I am quite prepared to stand down section 2.

Ms Lankin: I'm glad I came after all.

The Chair: Ms Hopkins, the legislative counsel, informs me it will be section 9 we would be amending to do that. If the committee is amenable, we'll proceed through to that point.

Ms Lankin: Could I just ask Ms Hopkins—there's not a requirement to amend subsection 2.1(8)? I haven't looked at it. So it is just in the general regulation-making authority section, in section 9?

Ms Laura Hopkins: Yes.

Ms Lankin: Terrific. Thank you very much.

Mr Levac: Mr Chairman, I just want to reiterate what you said. Because we are not on time allocation, to stand something down does not mean we have to get it done this afternoon. If it requires any other permissions or any other discussions from any ministry—I know Mr Spina said we dealt with five different ministries. One that would affect this one might not affect the next one. If there's something else we could stand down, we have the time to do so. I just want to clarify that is the case.

The Chair: That is the case, Mr Levac. We are under no legislative constraints here this afternoon. I'm sure everyone has as their intention the crafting of the best possible bill and getting it right the first time. If we encounter other similar issues as we go along, that will obviously impact on our ability to finish today, but hopefully we can get the required amendment to section 9 by the time we get to section 9.

Ms Lankin: We hope so.

Mr Levac: Sure. Thank you, Mr Chair.

The Chair: Is there any further debate on section 1, or any amendments? Seeing none, shall section 1 carry? Section 1 is carried.

Any comments or amendments to section 2? Seeing none, I'll put the question. Shall section 2 carry? Section 2 is carried.

Section 3. Mr Spina, I believe you have the first amendment.

Mr Spina: I move that subsection 2.1(1) of the Motorized Snow Vehicles Act, as set out in section 3 of the bill, be amended by inserting "and in accordance with" after "under the authority of."

The Chair: Do you wish to speak to the amendment?

Mr Spina: No. This is just cleaning up some of the terminology.

The Chair: Any debate? Seeing none, all those in favour of the amendment? Contrary? It carries.

Mr Spina.

Mr Spina: I move that section 2.1 of the Motorized Snow Vehicles Act, as set out in section 3 of the bill, be amended by adding the following subsection:

"Limitations, restrictions on trail permit

"(2.1) A trail permit may contain specific limitations or restrictions on the use of the motorized snow vehicle upon a prescribed trail."

The purpose of this was to really allow the opportunity, if at some point we wanted to issue exemption permits to exempted riders, for that to be able to happen.

Ms Lankin: I had understood Mr Spina to say that at this point in time the Minister of Transportation's office has indicated that they are waiving the desire to create exemption permits. Therefore, I wonder why we would proceed with this amendment to give the authority at this point in time. If you're setting out in regulation those groups which will be exempted, and we're not requiring them to have trail permits with the exemptions set out, we shouldn't at this point in time be passing this particular provision.

Mr Spina: I understand that. I guess what I'm wondering—and I'd seek comments from all parties here. At this stage, if we don't issue the exemption permits for a couple of seasons—however, we find there are problems—then this may allow the opportunity for the regulation to come in and maybe tighten it up.

Ms Lankin: I agree with you. It would absolutely allow for that. But the question is, do you want that decision-making, given the feedback that you've heard and given the committee's concern, as I understand it proceeding today, about that provision, do you want that left to a regulatory power as opposed to a legislative decision that, in fact, there will be exemption permits and/or whether any fee may be set for an exemption permit? That's a second issue that we'll have to contend with. I know you were a very strong proponent of not having the exemption permits. I'm just not sure why, at this point, the government would proceed with that amendment.

Mr Spina: I think it's more enabling than prescriptive. That is why I don't have a problem with this amendment.

Ms Lankin: Except that it enables the government to do something that you're very opposed to, Mr Spina. There's not a logic in this that I can follow.

Mr Spina: What it says, if you look at the amendment, is that the "permit may contain specific limitations or restrictions on the use of the ... vehicle upon a prescribed trail." If at some point we find that we want to issue an exempted permit for Ontario Hydro users, for example, then that would allow the legislation to empower the regulation. This amendment allows the ministry to work with the designated authority that issues the permits to create that.

Mr Levac: I want to voice a concern about that, because what I heard from the presentations was that the most they could see their way clear to is some kind of little identifying sticker that the person would have access to; that they basically should just be able to show the warden or the STOP officer or the OPP, flip something open or have a sticker on their helmet or something that basically says, "I'm a registered traditional user, and I've just been identified. Thank you very much." As a matter of fact, I did hear people speaking against the idea of even having a permit introduced, because of the concern and the fear that was expressed.

Mr Spina: Bureaucratic red tape.

Mr Levac: This is the concern that was being voiced.

I can't support the amendment, simply because it didn't speak to what the committee heard. What the committee heard was, "Please identify us if you have to." Most of the local people involved in that know that Joe is with traffic or Sally is with the OPP or whatever it is. If we're going to devolve that to that local level, they will be in touch with that on a regular basis.

If we do anything, what I perceive we should be doing is encouraging that communication process that's taking place and to ensure that, "OK, don't forget to get your little yellow sticker on top of your helmet, because when we use that, the wardens might not even have to pull you over, because they know that's there." Counterfeiting, of course; games getting played, yeah. But in terms of permits, I didn't hear anything in any of the presentations up north about supporting any kind of permit.

So I can't support the amendment, because it's being built in for something that might take place later on, but I didn't hear it happening.

The Chair: Any further debate? Seeing none, I'll put the question. All those in favour of the amendment?

Ms Lankin: I thought Mr Spina was going to withdraw this motion. Am I incorrect?

Mr Spina: Thank you very much. I will withdraw this motion.

The Chair: My goodness.

The next motion is amendment 3, the Liberal motion.

Mrs Marie Bountrogianni (Hamilton Mountain): I move that subsection 2.1(5) of the Motorized Snow Vehicles Act, as set out in section 3 of the bill, be struck out and the following substituted:

"OFSC to issue trail permits

"(5) The Ontario Federation of Snowmobile Clubs is authorized to issue trail permits and any employee of the club may provide evidence of such issue of trail permits.

"Additional powers may be delegated

"(5.1) In addition to the authority under subsection (5), the minister may delegate to the Ontario Federation of Snowmobile Clubs powers in respect of the administration of trail permits, including the authority to stop and inspect a motorized snowmobile on a prescribed trail to determine whether a driver is in compliance with subsection (4).

"Terms and conditions

"(5.2) The minister may attach terms and conditions to a delegation under subsection (5.1).

"Minister may authorize OFSC to retain fees

"(5.2) Despite section 2 of the Financial Administration Act, the minister may authorize and fix the fee to be retained by the Ontario Federation of Snowmobile Clubs for each trail permit issued."

1640

The Chair: Do you wish to speak to this?

Mr Levac: What we're basically trying to do here is repeat what we heard through the presentation, that the OFSC wanted basically the responsibility of taking care of that directly.

The Chair: Thank you. Mr Spina.

Mr Spina: Does anybody else here want to say anything?

Mr Ted Chudleigh (Halton): I just wondered how it related to amendment 3A.

Mr Spina: I was going to draw that analogy. Thank you. Amendment 3A actually summarizes in a much simpler manner where the minister has the authority to be able to authorize all of what has been described here. The fundamental difference is that if in three or five years' time the Ontario Federation of Snowmobile Clubs, or whoever, becomes another name, another body, if there's an amalgamation with other organizations and trail systems, those kinds of things, that would require a statutory change then, whereas if they, as the federation, are identified in regulation, it becomes a much simpler change, as an order-in-council change, as opposed to having to go through a bill and all that sort of thing. That's why we tried to keep that amendment.

We all had a problem, I think, with the minister fixing the fee. That was a message we all received, and that's why we felt that it was sufficient that the minister may authorize, as I have in 3A, the fee. Then of course, it's in there that they'll authorize the fee to be retained by the person so authorized. So essentially the person who would be named in the regulations would then end up being, at this point, the OFSC. That's the reason we would vote against this amendment and adopt ours, 3A.

Mr Levac: Mr Spina and I had this discussion, and I guess what was attempted here, and I think Mr Gerretsen in his discussions, after going through the committee, wanted to make sure that the message was clear. We understood that the OFSC's concerns were regarding the particular section you're talking to, about the minister having that final fixing of the fees.

They've indicated very clearly, with the single question that was asked of them time and time again, and as you know, I was the one who asked them that, "Can you support the bill in its present stance regarding the particular of fixed fees?" and they said no. So we came back with the amendment that basically said, "OK, then we'll try to craft it in a way that says we're not trying to remove authority from the ministry, but we're trying to say to the OFSC that we understand that your 30 years of volunteerism is why you've got to the place that you have now, and that is to be able to run this nice, smooth shop, collect your fees and not bother anybody else." That's basically what they were trying to say.

In defence of the amendment, what I'm trying to clarify is giving it right back to them. If indeed it does require a change because OFSC decides to change its name, I don't know what kind of a hurdle we would have to go over in order just to change that particular moniker. Maybe I'm seeking a clarification of that, because that's what I thought I heard.

Mr Spina: David, if we set this in legislation, then, as I indicated, it would require a statutory change. In other words, you'd have to change legislation down the road. Without letting too many cats out of the bag here—not

that I know a whole lot about this bunch of cats—there is an initiative afoot to create a comprehensive trails policy in this province.

Mr Levac: That's fair.

Mr Spina: There could be a multiplicity of users and a policy and regulations that would govern the multiple use of these trail users. If we become that precise here, then it could become very restrictive for a more comprehensive trails policy using other types of users of trails, whether they be cross-country skiers, ATVers, motocross, motorcycles, those kinds of things.

Mr Levac: I would ask if OFSC has been made aware of the amendment that you're proposing, and are they OK with it?

Mr Spina: Yes.

Mr Levac: That's fair.

The Chair: Any further debate? Seeing none, I'll put the question. All those in favour of the Liberal motion? Opposed? It is defeated.

That takes us to the amendment marked 3A in your packet.

Mr Spina: I move that subsection 2.1(5) of the Motorized Snow Vehicles Act, as set out in section 3 of the bill, be amended by striking out "may authorize and fix the fee" and substituting "may authorize the fee."

I think we've argued that one to death and we've just moved that that go forward.

The Chair: Any further debate? Seeing none, I'll put the question. All those in favour? Opposed? It is carried.

The next motion would be back to Mrs Bountrogianni.

Mrs Bountrogianni: I move that section 2.1 of the Motorized Snow Vehicles Act, as set out in section 3 of the bill, be amended by adding the following section:

"Limitation

"(7.1) The amount of a fee for the issuance of a trail permit shall not exceed the amount of a fee for the issuance of a class G driver's licence issued under the Highway Traffic Act."

The Chair: Do you wish to speak to the amendment?

Mr Levac: Just in terms of equity, and I don't know if that discussion came up: Mr Gerretsen said to me that he was concerned that if we are going to make the relationship between the snowmobile licence and the issuance of a driver's licence, one shouldn't go over top of the other. That's basically where that came from.

Ms Lankin: I understand any concern that is being raised with respect to the cost of a trail permit and the potential prohibitive nature of that cost. I've spoken to it and Mr Spina has spoken to it today already.

However, we have talked about the importance of the fee being set with input from the local clubs and through the federation, with their intimate knowledge of the cost of maintenance, what level of government subsidy they receive—and we hope it is going to be increased—and what they receive from their trail permits.

In a sense, this is counterproductive to local control. While I agree with the sentiment, if it is one to try and keep the costs down, I argue the way that needs to be

done is by a further infusion of provincial funding, which Mr Spina spoke to earlier.

Mr Levac: Be assured, Mr Chair, that was the intent. I can understand what this discussion is about, but that was the purpose of the amendment, to keep the price at least as low as or lower than. Maybe the wording wasn't quite appropriate. I understand the concern of Ms Lankin.

Mr Spina: I'm not sure how much a class G permit fee is. Is it \$80?

Mr Levac: It is up to \$80 now, I think.

Interjection.

Mr Spina: It's \$90? Clearly what Ms Lankin said, if we are concerned about sustainability—in the last motion the minister has the ability to authorize the fee. At the same time, as Frances indicated, it is fair that we allow the users of the trail system to have the input. This would be too prescriptive, so I would be against this.

The Chair: At the risk of being seen to enter the debate, I'm wondering whether it might even be out of order, given that we've just amended it so that someone else is setting the fee and the minister has the power to authorize that. But now you're asking that there be criteria applied to the actual fee that the arm's-length group would set.

Mr Levac: Having said that and having heard the rest of the debate, I will withdraw the amendment to allow for the free flow of that particular issue.

The Chair: Thank you. That amendment is withdrawn. Back to you for the next one.

Mr Levac: I move that section 2.1(7) of the Motorized Snow Vehicles Act, as set out in section 3 of the bill, be amended by adding "Subject to subsection (7.1)" at the beginning.

1650

The Chair: Do you wish to speak to it? Give me just one moment, Mr Levac, please.

Since you withdrew amendment number 4, number 5 is out of order here.

Mr Levac: So let's continue the trend and withdraw.

The Chair: Excellent. Thank you very much. Number 5 is withdrawn. Number 6 would be back to you again. Mr Levac or Mrs Bountrogianni?

Mrs Bountrogianni: I move that section 2.1 of the Motorized Snow Vehicles Act, as set out in section 3 of the bill, be amended by adding the following subsection.

"(9) This section does not apply to,

"(a) a person using a prescribed trail for the purpose of hunting, fishing or trapping;

"(b) a person using a prescribed trail for the purpose of prospecting;

"(c) a person using a prescribed trail for the purpose of his or her occupation; or

"(d) a person using a prescribed trail to travel to travel to an established camp located on lands owned by the person."

Mr Levac: These were the groups that made presentations and identified themselves as traditional users and probably would be open to (e), (f), (g), (h), (i), (j) if there was anyone else that had been identified.

Ms Lankin: That would be my point. There are a number of people who are missing from this list. You would either need to add them all, and that's one of the dangers of doing this in legislation, or add any other person who may be authorized by the minister.

My understanding is that the parliamentary assistant has set out that there will be a list of exempted users in regulations, and perhaps we could hear from him directly. The appendix that we have now that sets out a number of users, including the ones in Mr Levac's amendment, but additional others—do we have a commitment that that will be the minimum list of exempted users that will be set out in the regulations?

Mr Spina: I'd be happy to address that. I agree with you that this motion is too narrow in scope. In the act it does, as I've indicated at committee, give the minister to permit classes of vehicles and classes of individual users in terms of the legislation. Then the actual identification, as I said earlier on, would be in the regulations, and in your package there is a proposed trail permit requirement for traditional and business users.

I would be happy to go through that list, which is far more comprehensive. It talks about aboriginal persons, First Nations—a trail permit would not be required on treaty land—licensed anglers; bait harvesters and helpers; commercial fishermen or fishing people; crown tenants; emergency workers—ambulance, medical personnel, search and rescue; licensed hunters; local property owners and immediate family if they're on their own property, of course, or if the trail is on their property; mining workers, geologists, geophysicists, engineers and the like; Ontario land surveyors—

Ms Lankin: Actually, Mr Spina, that one suggests that there would be no exemptions. Are you now suggesting that would be added to the list of classes of people exempted in regulations?

Mr Spina: That's the recommendation from MTO. I'm just going through the list of users who were identified here.

Ms Lankin: What I wonder is if you could give us a commitment as to the government's intent of which classes of people will in fact be set out by regulation as being exempted.

Mr Spina: OK. Then mining workers and the land surveyors, according to this, are not exempt.

Police staff officers; property owners who have allowed OFSC use of the land for a trail; licensed trappers and helpers under a geographic restriction, because they have a trapline under which they operate; utility workers—Bell, hydro, TransCanada Pipelines: those would be items that would have a proposed exemption.

Those that don't have exemptions: one of the difficulties there, for example with surveyors or geologists, is that there is no geographical limitation to their licence. Essentially, when you're dealing with anglers and hunters, they're on crown land. When you're dealing with trappers, you have a trapline within a very specified area for which you can designate the exemption. When you get to the others, there would absolutely be no way

of controlling it, enforcing it or even permitting it, with a capital P.

Ms Lankin: Just a quick question: would it also be likely that employees of snowmobile clubs might be added to that list?

Mr Spina: As exemptions?

Ms Lankin: For the need for a trail permit. There was a motion before us earlier to look at snowmobile clubs being able to issue to their own employees. I'm assuming that's without cost. I don't know.

Mr Spina: I think the policy right now is fairly discretionary, because for the most part—and I stand to be corrected—employees of snowmobile clubs tend to be snowmobilers themselves. If they belong to a club, I think the peer pressure would be sufficient that they would buy a permit. If they wanted an exemption, likely the club itself would issue a full-blown permit and just remit the remaining portion that's owed to the federation. In other words, they wouldn't collect the club portion of the fee.

Ms Lankin: They have the discretion to do that, do they? That's all I'm asking. Under the new legislation?

Mr Spina: Well, at this point they do. That's a very valid point under the regulation, under what the minister will authorize in terms of the disposal of funds. So that's a good point in that context, yes.

Mrs Bountrogianni: Of the three days of hearing that I attended in the north, and of course you were at all of them, there was a very strong protest by the traditional users about not having this simply in regulation; they didn't think that was enough. They wanted it in the legislation. You have a much longer list than the Liberal motion and I'd have no problem adding that to the Liberal motion, but I just want to remind the committee of the strong protest and feelings of discrimination from southerners against northerners and all those things that came out, presentation after presentation. Will simply putting it in regulation deal with those people's beliefs and feelings?

Mr Spina: I think it will. Again, the danger of putting it into the act itself is that it becomes statutory. If you ever want to add someone or delete someone or modify it, it's far easier to do it in regulation because you can do that by order in council as opposed to going through a statutory process. That's one of the reasons why you need that flexibility, particularly when you might want to leave the discretion for the enforcement of that to the locals who know the users who would be classified as traditional users.

Mrs Bountrogianni: It's exactly that flexibility which worried the traditional users, if in regulation there's a great deal of flexibility to make none of them exempt. You see? I'm just bringing us back to those warm nights in August when we were up there. Basically, those presentations outnumbered the others, at least in the three days that I was there.

Mr Spina: I'm trying to be practical from a legislative perspective. If we lay it down in legislation, if you forget someone or overlook somebody at this point or you want

to add somebody in a year's time, you're going to need a statutory change. I hate to say it, but you have to ask them to have some degree of trust in the government to outline them in the regulation. The power of the regulation is just as valid as the legislation but it's far more flexible.

Mr Levac: I don't know if there's such a thing as applying your own friendly amendment but, to accommodate some of the concerns that have been raised, to add an (e) to it that says, "Any other group or individual identified by the OFSC." Is that doable?

1700

The Chair: You can certainly amend your amendment, yes.

Mr Levac: Then I would add that section that was copied down.

The Chair: We have no such concept as a friendly amendment in this sense. You would have to propose an amendment to your amendment. It would be voted on first.

Mr Levac: Then I'll do that, and the amendment would be "(e) any other group or individual identified by the OFSC."

Ms Lankin: Could I say, just for consistency in language, it may be that it should be "any other person identified by the OFSC." That's up to you; you're moving the motion. I would just say that I support the intent.

Mr Levac: "Any other person."

The Chair: Further debate? Sorry, could we have the final wording?

Mr Levac: "Any other person identified by the OFSC."

The Chair: While Mr Spina composes his thoughts, taking us back to a discussion only a couple of amendments ago about referring to the OFSC specifically, I'm in your hands, Mr Levac. If that's the way you want the amendment to read, I will call the vote on that basis.

Mr Levac: I appreciate what you just brought to my attention. I would probably have to say something to the effect of, "Any other person identified as a traditional user."

Ms Lankin: It may be that there you'd want to trust the government and say, "Any other person designated by the minister." That might be the way to resolve the problem. I don't know.

Mr Levac: We will get it yet.

The Chair: Are you amenable to that change?

Mr Levac: I'm open to that, identified by the ministry. And this is the Minister of Transportation this is from.

Mr Spina: I would draw your attention to subclause (8) that says, "The Lieutenant Governor in Council may make regulations respecting any matter ancillary to the provisions of this section with respect to trail permits and in particular (a) prescribing trails or classes of trails, or parts of trails or classes of trails, on which permits are required; (b) respecting the issuance and replacement of trail permits; (c) prescribing the term of validity of" these permits and so forth. It allows for the classes of trails.

There's another section—I'm just trying to get my finger on it—which talks about the classes of vehicles and classes of individuals. I'm just trying to find where that is in the act. Section 26(1)(j) of the current Motorized Snow Vehicles Act has "designating classes of persons to whom any provisions of this act and the regulations do not apply." That's covered under the current MSVA, I gather, from what counsel has shown me here.

If you're broadening the scope of your amendment enough—I mean, we've already got that broad scope, if you will, of designation of classes and exemptions in either the existing act or in the amendments, so I would be opposed to this.

Ms Lankin: I would think we would agree with Mr Spina that the broad power is there. We recognize that. The intent of this motion is to set specifically in legislation those groups who came forward most frequently and whose voices were heard most often by the committee and that there would be an exemption set out in legislation for those classes of people and any other class as is designated with the amendment that Mr Levac is putting forward and that would give reference to the existing designation powers under the existing legislation.

The debate here is whether or not the committee heard sufficient concern from these groups, these traditional users, to take those concerns to heart and actually list them in the legislation to give them a greater sense of protection. I think that's the nature of the debate.

Mr Levac: Ms Lankin probably wrapped up my thoughts nicely. Thank you, Frances; I appreciate that very much. What we heard very clearly a few times, because I know my colleague heard it from her observations and I heard it in mine, was that there were specific groups that said, "Sorry about the regulation idea, but we want this in legislation." That's why it was put forward. I do acquiesce to the concept that we had missed a few people.

That's what this amendment is about, to try to allow for these groups to be allowed inside the legislation to show that their concerns are seen as historic, and in some cases, those that I may have personally missed or Mr Gerretsen may have personally missed during the presentations would have room to be put into that legislation to show them that their historic use of those trails, before the trails were actually even groomed and created—that their rights were protected as much as the OFSC's.

Therefore, in this particular case there will be no withdrawal of the motion. The motion is intended to be put into legislation and then the other sections that are being referred to still apply. This group is being identified as one that should be in the legislation.

The Chair: Any further debate?

Mr Spina: My comment still stands.

The Chair: The clerk is just asking for the final wording for your amendment to the amendment.

Mr Levac: "Any other person identified by the Ministry of Transportation."

The Chair: Leg counsel, would "minister" be more appropriate?

Interjection.

The Chair: "Minister" would be sufficient? Thank you.

If you could formally move that amendment now, your amendment 6.

Mr Levac: I move that with the amendment before us, an amendment to the amendment read, "(e) any other person identified by the minister."

The Chair: Is everyone clear? We are voting on an amendment to the original motion.

All those in favour of the amendment? Opposed?

The amendment to the amendment fails, which takes us to the original amendment, number 6. All those in favour?

I beg your pardon, Ms Lankin.

Ms Lankin: I just wanted to indicate that without the amendment to the amendment passing, I have concerns with the motion as it is set out, first in the prescriptive nature and those groups that are left out and, secondly, in that there is not a provision for criteria to be applied; for example, a person using a prescribed trail for fishing. We are not here specifying whether we are talking about commercial fishing or if we are talking about recreational ice angling. I believe it is appropriate to give exemptions for use of trails for recreational ice angling, but not 250 miles to get to the lake that you want to fish from.

I think snowmobile clubs would have significant problems with the wording as it is set out here. I agree wholeheartedly with the intent, but the wording is problematic, so I'll have to vote against this.

The Chair: Any further debate?

Mr Spina: I couldn't have said it better myself.

The Chair: I believe that, Mr Spina.

All those in favour of the amendment? Opposed? The amendment fails.

Shall section 3, as amended, carry? It is carried.

Section 4: any debate or amendments to section 4?

Seeing none, I'll put the question. Shall section 4 carry? Section 4 is carried.

Section 5: this would be your amendment.

1710

Mr Levac: I move that section 10.1 of the Motorized Snow Vehicles Act, as set out in section 5 of the bill, be amended by adding the following subsection:

"Municipalities not liable

"(4) No action or other proceeding shall be instituted against a municipality with respect to an accident involving the operation of a motorized snow vehicle that occurs on an unopened road allowance."

Speaking to that, we had a presentation from, if I recall, two or three municipal employees up north who voiced a concern that there's this class of road or allowance, unopened road allowances on municipal property, that would become liable for any problems if there's a connector between a trail and it's being used traditionally as a trail. So the municipalities had voiced a very deep concern that the liability would be theirs.

Mr Spina: Mr Levac and I spoke briefly about this. We have an amendment regarding the Insurance Act which is coming up next, and I wasn't sure whether that amendment covered or addressed this issue. We have I think legal counsel here from the Ministry of Finance and maybe we could ask an opinion from counsel.

The Chair: We invite the legal counsel from finance to come forward.

Mr Levac: Mr Chairman, just speaking to that, Mr Spina and I had that conversation and I told him at that time that I was open to that interpretation and would be prepared, quite frankly, to remove the amendment if it turns out that legal counsel says the amendment covers that off.

Ms Lankin: You're leaving the fate here of this bill in the hands of lawyers. Is that what you're saying? The power that we give over to you.

Mr Levac: I'm quite prepared to hear their interpretation.

Mr Spina: They had control of this all along, Frances.

Mr Eric Endicott: My name is Eric Endicott. I'm legal counsel, actually, from the Financial Services Commission of Ontario. I have to say the amendment regarding the Insurance Act affects the applicability of automobile insurance and the availability of an auto insurance policy. Municipalities in this context are not covered under automobile policies, so that amendment would not address this particular issue directly.

Mr Spina: That being said, are you aware of the implication of this particular amendment and whether in fact this would be in order with respect to the liability that is potential, as claimed, to the municipalities, or are you in a position to offer that opinion? I'll give you the out.

Mr Endicott: This obviously provides an exemption for municipalities. It might affect the liability that would otherwise arise for other people. In a typical motorized snow vehicle accident there may be any number of people who are liable. If you removed this particular actor from the liability scene, I have to say I would want to think about that in the provisions of how the different types of liability accrue.

With the other amendment, of course, snowmobiles will be treated like automobiles. They will get the protection of the restriction on the right to sue that's under the Insurance Act. Municipalities do not have that. They are specifically exempted, and there are complicated provisions apportioning liability and responsibility in that regard. In fact those issues are, if I may say, even in the courts now somewhat uncertain. We've gotten some recent interpretations which surprise me.

So, in a word, I can't give a definitive answer. Obviously, if you remove liability from one party and there are other ones, they may wind up picking up more liability, in principle. But as I said, I would have to go back and think about it. It is an area where joint and several liability is already—I would say the case law is still evolving under the Insurance Act.

Ms Lankin: Perhaps we need also to consult lawyers from the Ministry of Municipal Affairs. I wonder, how-

ever, with respect to this amendment, without definitions, for example, of what an "unopened road allowance" is—or is that definition already contained under the Municipal Act?

Mr Endicott: That one I wouldn't want to give an opinion on.

Ms Lankin: I wonder if there's a possibility to stand this down to deal with the insurance and if someone can make a phone call to the Ministry of Municipal Affairs and see if they have any opinion to offer the committee with respect to this.

The Chair: Certainly, if that's the wish of the committee. Mr Levac, I don't know if you have any other questions you'd like satisfied from such a phone call.

Mr Levac: For clarification purposes: I've been informed by two municipal employees who made presentations that they would be very hesitant to provide permission for them to use snowmobiles if they were not covered off against this. It being that serious, I probably would not want to proceed until we had a clear picture of what this means. I'm prepared to have this stood down so that we can get those questions answered.

The problem seemed to be in a very small number of cases, but enough that the municipality did step forward to make comment on it, that this wasn't seen as a trail; this was seen as a connector or a place they had to get through in order to continue their trail service. I too would be concerned if we were asking other people to pick up liability. That was not the intent. Of course, not being a lawyer, I don't know what happens in those cases.

Mr Endicott: As I said, you shouldn't take that as an opinion at this point. I'm just saying that at least is an open question that I would want to look at further.

Mr Levac: Having that opinion, it really does make sense to stand this down until we can get a definitive answer on it and, in fairness, a definition if it doesn't exist. The gentleman I spoke to—I believe his name was Mr List—indicated that it was a defined piece of property in the municipality. But having said that, I'm quite prepared to let this sit for a bit to get it answered.

Mr Spina: I'm not opposed to or supportive of the amendment. We all want to do the right thing, if you will.

David, you mentioned the connector between points in the trail system, I think, for example, if you're going from one part of the trail to another part and there's a connector that goes through a piece of municipal land. Generally speaking it would seem to me—and like you, I'm not a lawyer either—that if the local snowmobile club, ostensibly under the sanction of the OFSC, sought from the municipality use of that section to connect the trails, then it becomes a piece of sanctioned trail. I'm not sure where liabilities are there. If they're using it without the authority, permission, sanction of the municipal government, then I'm sure there's a whole different set of circumstances there. My concern is that if we're trying to create something where there isn't something, in other words, if it's a sanctioned trail, presumably liability would be in place—I'm guessing—by the federation, the

user of the snowmobile or the municipality. If it's not a sanctioned trail, then the municipality, if they're concerned, would have the legal right to walk in and shut that chunk of trail down.

Mr Levac: I can speak to that. Mr List spoke of both options, both scenarios. He spoke of a scenario of the piece being handed over, if you will, to the club, but for some reason he was quite convinced that they would still be liable, they would still be suable under the circumstances, that it was still theirs. The second thing: he referred to subsection 308(5) of the Municipal Act, indicating that it was an old chestnut and it's still the same thing and it hasn't been changed since forever, I guess, was his comment—130 years if it's case law. You can't do it legally unless it's a bike or a walk path. So that's what brought me to the whole concern about the idea that the municipalities continued to voice concern that even if it was being used as a trail, other people still have access to it because it's—and then he used the same thing—"unopened road allowance." He kept voicing that they were still liable under any scenario because they can't give this road away; they can't sell it. I couldn't quite get the whole thing and I called him back, and he simply said, "All you have to do is remove the liability and the municipalities will be happy." Where that goes, Joe, I don't know. Again, I come back to it: I don't know what the legalese is and I don't know whether we should be at least not trying to take care of that particular piece. I think he said there were 12 different pieces of trail that he was aware of in the province that had that unopened road allowance problem, 12 pieces. I don't know where they are, and I didn't get them identified.

1720

Mr Spina: I don't know if Laura, as legislative counsel, has an opinion on this.

The Chair: Mr Spina, actually, I've been keeping notes of all the various questions that have been asked. I'd be happy to pass them to Ms Hopkins. They are—and let me know if I've missed anything: given that your amendment number 7 would have the effect of taking "motorized snowmobiles" and turning them into "motor vehicles" for the purposes of the Insurance Act, what is the case law related to all motor vehicle use on unopened road allowance; what happens to an unopened road allowance when it becomes a sanctioned trail; what happens when it's used in an unauthorized fashion; it's my understanding that the landowners on either side of an unopened road allowance have particular rights and responsibilities, so would this impact on them; and Mr Levac has posed the question, what significance and relevance is section 308, paragraph 5 of the Municipal Act. Have I missed any of the questions that relate to this amendment?

I don't know, Mr Endicott, if it's fair to put them to you.

Mr Endicott: Sorry. I'm not an expert on unopened road allowances.

The Chair: I didn't know, given your expertise in insurance, whether the fact that this will become a motor

vehicle—whether you have any experience in that area, the case law or the statutes related to the use of any motor vehicles in an unopened road allowance.

Mr Endicott: I don't. I would only hasten to add that the effect of this amendment will be to restore what was always thought to be the case, that they were motor vehicles in any event. This amendment is driven, I think, by what many people certainly in the insurance industry regarded as a surprise, with the courts holding that a motorized snow vehicle was not a motor vehicle, since it's required to be insured under a motor vehicle liability policy, and the definition of a motor vehicle liability policy is one that insures an automobile. So in that sense it's just restoring, I think, what everybody understood before. A negligence claim with respect to an unopened road allowance is probably the same whether it's a motor vehicle or not; there just may be other actors involved that may have liability.

Mr Spina: For the record, I think he's referring to amendment number 7, not 6.

The Chair: I understand. Thanks, Mr Spina.

Is it the wish of the committee, then, that we stand down motion 6A pending answers from legislative counsel to the questions?

Mr Spina: I have one other little question that's a corollary to what you've got there. I'm wondering what the status is of someone driving an off-road vehicle or an ATV. I'm presuming the same kinds of things would apply, or the same kinds of problems, perhaps, could apply to those off-road users, and by adopting your motion it would really be for a very short, limited group of users, as opposed to addressing a much larger issue which I think should come under municipal affairs. If we were to bring this into account now—I'd rather you withdraw it or we defeat it, David, because it would become too narrow to snowmobiles. This is a larger issue than I think we're prepared to handle at this committee.

Mr Levac: Having said that, I'd like to have it happen, though, so we can get the research people to find out whether or not there is even cause to do it. If there's cause to do it, I'd like to be able to address that at the next meeting. That would give us time to find out whether we want to leave it here in this bill for snowmobilers, or do we want to advise municipalities that they had better be looking at something broader than simply 101? So I take your logic and I'd want to apply it.

Mr Spina: Based on that, I'm wondering if it's in order, then.

The Chair: I think it's certainly within the purview of the committee to ask for the kind of feedback that you have asked for in those questions. Recognizing the time and the less than likely circumstance of getting an answer this afternoon, I think we will have to resign ourselves to standing that amendment down, and obviously the corresponding section, if that's the will of the committee.

Agreed? Agreed. We can move on.

Perhaps you could stay there, Mr Endicott, because the next motion is related to insurance.

Mr Spina: I move that section 6 of the bill be struck out and the following substituted:

"6.(1) Subsections 12(1), (2) and (3) of the act are repealed and the following substituted:

"Insurance

"(1) No person shall drive a motorized snow vehicle unless the vehicle is insured under a motor vehicle liability policy in accordance with the Insurance Act, and the owner of a motorized snow vehicle shall not permit any person to drive the vehicle unless the vehicle is so insured.

"Production of evidence of insurance

"(2) The driver of a motorized snow vehicle who drives or permits the driving of the motorized snow vehicle shall, upon the request of a police officer or conservation officer, produce evidence that the vehicle is insured under a motor vehicle liability policy in accordance with the Insurance Act.

"Offence for failure to have insurance

"(3) Every person who contravenes subsection (1) is guilty of an offence and on conviction is liable to a fine of not less than \$200 and not more than \$1,000.

"(2) Section 12 of the act is amended by adding the following subsection:

"Application of part VI of Insurance Act

"(6) A motorized snow vehicle shall be deemed to be a motor vehicle for the purposes of part VI of the Insurance Act."

The Chair: Any debate?

Ms Lankin: One more time, I would just ask legal counsel to give us a brief, definitive statement of what this accomplishes, so I know I understand what is happening.

Mr Endicott: OK. The amendment to 6(1), which has three subsections, is actually correcting an anomaly that exists in the Motorized Snow Vehicles Act, which I believe requires the driver of the snowmobile to be insured, as opposed to the vehicle itself. This is not consistent with the way other compulsory insurance operates in Ontario, in particular motor vehicles and off-road vehicles. We tried to do some research to find out why it was put on the driver rather than on the vehicle. Customarily it's vehicles that are insured, not persons. This just puts it into practice with what they are, because they are often issued with motor vehicle policies as well.

Ms Lankin: I have a question on that point. Currently, is it the correct interpretation of the law that if a person has life insurance they can go without vehicle insurance?

Mr Endicott: No. They would still have to have a motor vehicle liability policy. It is technically possible to have one that is issued on a driver rather than on a vehicle. But as I said, normally the requirements, if you look at the compulsory auto act, are that the owner of the vehicle is required to be sure the vehicle is insured.

Ms Lankin: But this isn't creating any new obligation with respect to insuring the operator and vehicle with respect to snowmobiling. It's just clarifying the language.

Mr Endicott: That's correct. That was always there; the fine was there and so on.

The second amendment is, I guess, probably the more important of the two, and it is to perhaps overrule a recent Court of Appeal decision that found that a motorized snow vehicle was not an automobile for the purposes of part VI of the Insurance Act, which is the entire automobile insurance regime. It provides for limited liability in certain circumstances. It actually has other provisions that have cost transfer with respect to snowmobiles and the like.

It was a rather unusual decision which would remove certain protections from the owners of snow vehicles and could result in an increase in the cost of auto insurance. Also, frankly there was an uncertainty about what the court meant, in terms of how it would apply in other situations. Any time you have uncertainty, that also makes insurers less likely to write insurance, so this really just restores it. Once a motorized snow vehicle is a motor vehicle under part VI, it comes within the definition of "automobile," so it is, as was always understood, an automobile for the purpose of and within the auto insurance system.

The Chair: Any further debate? Seeing none, all those in favour of the amendment? Opposed? It carries. We strike another blow for the duly-elected Parliament.

Shall section 6, as amended, carry? Section 6 is carried.

Section 7. Any debate? Seeing none, shall section 7 carry? Carried.

Section 8. Mr Spina.

Mr Spina: I move that subsection 17.1(1) of the Motorized Snow Vehicles Act, as set out in section 8 of the bill, be amended by striking out "who is readily identifiable as such" in the sixth and seventh lines.

This amendment is being proposed to address the concern that STOP officers, who also enforce the act as special constables, may not be as quickly identifiable as police officers even though they have a uniform and identification. That's the only reason it's necessary. But they have the power and the authority.

Ms Lankin: If I may, this becomes a very important amendment, particularly in light of the general powers we are going to give the minister to designate trail wardens, who would have been limited by the earlier language, "is readily identifiable." I'm appreciative and will support this amendment for that very reason.

The Chair: Any further debate? Seeing none, I'll put the question. All those in favour of the amendment? Opposed? It is carried.

Shall section 8, as amended, carry? Section 8, as amended, is carried.

I believe we all agreed that section 9 would be stood down, unless we've had an answer. Ms Lankin?

Ms Lankin: Yes, I would like to request at this time that that be stood down. Legislative counsel has drafted an amendment for the committee to look at. She's reviewing it with the ministry lawyer right now and will then, I assume, produce copies for the committee.

The Chair: That's certainly a requirement. Thank you. If it's the wish of the committee, we'll stand down section 9. Agreed?

Mr Spina: Do you want a five-minute recess?

The Chair: No, just agree.

Mr Spina: Agreed.

The Chair: Thank you.

Mr Spina: Till when?

The Chair: We'll proceed with the other sections and then come back, in the two or three minutes it will take to say, "Shall sections 10 through 13"—

Mr Spina: Thank you. Sorry, you're the Chair, not me.

The Chair: Is there any debate or amendments to sections 10 through 13? Seeing none, I'll put the question. Shall sections 10 through 13 carry? Carried.

Shall the title of the bill carry? Carried.

Now we face the logistical issue that—

Ms Lankin: May I suggest that we take a five-minute recess so Mr Spina might be able to consult with legislative counsel and ministry counsel, take a look at the amendment and see if he can give it his blessing. That might speed us along a little bit.

The Chair: It is certainly your right to request that, and the committee stands recessed for five minutes.

The committee recessed from 1733 to 1751.

The Chair: I call the committee back to order. As the clerk has ably noted, we can actually deal with section 9, because what we're talking about with the amendment that has been circulated would be a new section, 9.1.

So, let me first go back to section 9 itself. Any amendments or debate? Ms Lankin. That's a new section.

Ms Lankin: Sorry. Go ahead.

The Chair: That's OK, not that I'm psychic or anything.

Seeing none, I'll put the question. All those in favour of section 9? Carried.

That takes us to a proposed amendment. Ms Lankin.

Ms Lankin: I'm going to move a new section of the bill. I'm wondering if I might just explain to committee members what I'm going to do, which is slightly different than the piece of paper they have in front of them, before I actually move it. Can I have that kind of leeway from the Chair?

The Chair: Absolutely.

Ms Lankin: Thank you.

Committee members will see a draft amendment, which has been done by legislative counsel, attempting to meet the concerns that the committee spoke of earlier, those concerns being the authority for the minister to designate, for example, a trail warden to have the powers of police officers with respect to the sections of the act that deal with mandatory trail permits and the display of the trail permits and the offence of not having mandatory trail permits.

You'll see that there are two key paragraphs here. In consultation with ministry counsel, I think you will hear that there is an objection overall that the authority to appoint trail wardens for such responsibilities exists in other pieces of legislation, and, more particularly, if it were to be contained within this piece of legislation, that the second paragraph is problematic.

I intend to move this amendment without that second paragraph and add a couple of words to the amendment. I would ask members to listen carefully. At the end of the first paragraph, I'm adding about six words. Just so that you know it will be coming and you could make note of that.

I move that the bill be amended by adding the following section:

"9.1 The act is amended by adding the following section:

"Enforcement

"26.1(1) For greater certainty, the minister may designate any person or class of persons under subsection 1(3) of the Provincial Offences Act as a provincial offences officer for the purposes of enforcing subsection 2.1 and exercising the powers of a police officer under subsection 17.1(1)."

Mr Garfield Dunlop (Simcoe North): Can you repeat that, Frances, please?

Ms Lankin: Yes.

"26.1(1) For greater certainty, the minister may designate any person or class of persons under subsection 1(3) of the Provincial Offences Act as a provincial offences officer for the purposes of enforcing subsection 2.1 and exercising the powers of a police officer under subsection 17.1(1)."

If I may, let me tell you first of all what the amendment does. It makes it very clear and contains within this piece of legislation the regulation-making authority or the designation authority of the minister to designate persons to do two things: to deal with the new offence created under subsection (2.1); that is the new subsection that mandates trail permits, that a person must have a trail permit and that they must display the trail permit and sets out an offence if a person fails to comply with the provisions in (2.1). This would allow the minister to designate a provincial offences officer to have the power to deal with that.

The reference to the words that I added, "and exercising the powers of a police officer under subsection 17.1(1)," that is the new power of a police officer to stop a snowmobile. So if you see someone zipping along without a trail permit, you have to have the power to actually stop them to be able to tell them that they have committed an offence at that point in time. So that's the reference there.

Ministry counsel quite rightly points out, as does this amendment, that the power to appoint a provincial offences officer is already contained within the Provincial Offences Act. Similarly, the power to name someone as a police officer, for example, the STOP officers out there, is contained in the Police Act. I think what we have heard from the community out there is that they want, within their own piece of legislation, to be able to understand what powers are and what powers may be designated. Ordinary folk in snowmobile clubs don't read the Provincial Offences Act and the Police Act to find out whether or not they could be appointed.

This doesn't undermine any other piece of legislation. It may be considered by ministry counsel, legal counsel, to be redundant, and I understand that concern. However, I think it gives, as the amendment says, greater certainty and greater clarity, and it's more direct communication to the people that we're trying to write this legislation for.

The Chair: Recognizing the time, I invite brief comments. But rather than cut off debate, if you'd prefer we can carry this over to allow a more fulsome debate on the following Wednesday.

Mr Spina: The following Wednesday, which is—

The Chair: December 6.

Mr Spina: We have some concerns, but that's what the Chair is calling on, that this committee recess and we come back with—

The Chair: Actually, the Chair is pointing out that it's 6 of the clock, and according to our rules—

Ms Lankin: Unless you're ready to vote on it. If you need to talk to some folks, we've got to take some more time.

The Chair: I sense there is a need for further debate around the table. Seeing that we've got the other issue—

Ms Lankin: I have a technical question. The motion is moved; it's on the floor, and if another member subs in, that's entirely OK?

The Chair: Absolutely.

Ms Lankin: I won't be able to be here.

The Chair: That's OK.

Ms Lankin: But remember my arguments.

The Chair: I'm sure they'll be ably supported by whomever you send.

With that, the committee stands adjourned until Wednesday at 3:30.

The committee adjourned at 1759.

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Journal des débats (Hansard)

Mercredi 29 novembre 2000

Standing committee on general government

Ministry of Training,
Colleges and Universities
Statute Law
Amendment Act, 2000

Comité permanent des affaires gouvernementales

Loi de 2000 modifiant des lois
en ce qui a trait
au ministère de la Formation
et des Collèges et Universités

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LEGISLATIVE ASSEMBLY OF ONTARIO

ASSEMBLÉE LÉGISLATIVE DE L'ONTARIO

STANDING COMMITTEE ON
GENERAL GOVERNMENTCOMITÉ PERMANENT DES
AFFAIRES GOUVERNEMENTALES

Wednesday 29 November 2000

Mercredi 29 novembre 2000

*The committee met at 1541 in committee room 1.*MINISTRY OF TRAINING,
COLLEGES AND UNIVERSITIES
STATUTE LAW AMENDMENT ACT, 2000LOI DE 2000 MODIFIANT DES LOIS
EN CE QUI A TRAIT
AU MINISTÈRE DE LA FORMATION
ET DES COLLÈGES ET UNIVERSITÉS

Consideration of Bill 132, An Act to enact the Post-secondary Education Choice and Excellence Act, 2000, repeal the Degree Granting Act and change the title of and make amendments to the Ministry of Colleges and Universities Act / Projet de loi 132, Loi édictant la Loi de 2000 favorisant le choix et l'excellence au niveau post-secondaire, abrogeant la Loi sur l'attribution de grades universitaires et modifiant le titre et le texte de la Loi sur le ministère des Collèges et Universités.

CANADIAN COLLEGE
OF NATUROPATHIC MEDICINE

The Chair (Mr Steve Gilchrist): Good afternoon. I call the committee to order for the purpose of further hearings on Bill 132.

Our first presentation this afternoon will be from the Canadian College of Naturopathic Medicine. I invite them up to the witness table. Good afternoon; welcome to the committee.

Mr David Schleich: My name is David Schleich. I'm the president of the Canadian College of Naturopathic Medicine here in Toronto. You have before you on your desks our presentation, and I will be going through about one half of that in the allocated time.

The Canadian College of Naturopathic Medicine is a non-profit, charitable private educational institution which prepares graduates for entry to practise as naturopathic doctors in regulated and also in non-regulated provinces and states in North America. CCNM, which is the acronym for our school, supports Bill 132 and sees it as a positive and timely improvement to the current higher education system in Ontario.

As a complement to conventional medicine, naturopathic medicine's increasing integration in health care merits professional recognition in Ontario, which this

legislation would make possible. Historically, the affiliation route and the ministerial consent route have proven to be virtual cul-de-sacs for our school and our profession in its goal to have a professional education credential with international acceptance and currency. Our goal is to have a professional degree. We do not seek provincial funding for our school now or in the future.

With respect to CCNM, Bill 132 holds timely benefits for students, graduates and ultimately the Canadian public. As complementary and alternative health care increases in popularity, more university graduates are choosing to enter the natural medicine profession. Enrolment at our school, which offers a four-year full-time professional program leading to a doctor of naturopathic medicine diploma, has dramatically increased over the past several years. Currently there are over 500 full-time graduate students studying with us.

While accredited naturopathic colleges in the United States are able to grant degrees, CCNM, also accredited by the US Department of Education's Council on Naturopathic Medical Education currently can only issue diplomas to graduates because of the restrictive framework of the Degree Granting Act here in Ontario and the virtual monopoly the public sector universities have on the degree credential. This inconsistency confuses the general public and other primary health care professionals who increasingly work closely with naturopathic doctors, and it also undermines the Canadian naturopathic profession both nationally and internationally.

Moreover, our college can meet and exceed the criteria normally considered by the minister when considering degree-granting rights and privileges for non-publicly supported institutions.

Bill 132 will begin to address these inconsistencies, support the development of the naturopathic profession and recognize the professional expertise graduates achieve through their rigorous professional program. An understandable, portable and transferable credential in the form of a professional degree would not only be an appropriate culmination of a rigorous educational program, which graduates of other professional programs enjoy at the moment, but is also appropriate to the currency of the profession in Canada, as witnessed, for example, by the federal government last year in the establishment of the office of natural health products, whose director general is a graduate of our school. As well, the enabling legislation in other Canadian prov-

inces, such as Alberta and British Columbia contemplates a fair playing field for naturopathic doctors' credentials.

What we're looking for: we want to become a degree-granting institution to facilitate the recognition of the naturopathic profession in Canada and abroad. We seek approval to offer a professional degree as a credential because of its importance as a signal of quality to the primary health care community and to the university community in Canada. This will be a unique professional degree. We do not seek a secular degree. We are not seeking government funding for capital or operations now or in the future. With a degree-granting credential we will be able to link our institution with other Association of Universities and Colleges of Canada organizations across North America, finally making it possible for our students to transfer their education credentials to other institutions for further advanced study.

I would ask the committee to take note that our tuition is the lowest in North America and in fact we are comparable to the current tuition costs for medical schools in this province. Our rate-of-tuition increases in the last five years have been lower by a margin of 50% compared to public sector tuition increases. Our faculty are highly specialized and it's highly unlikely that we would have any impact on other post-secondary institutions in terms of recruitment.

I'd like to articulate for a few moments our concerns regarding Bill 132, those that we do have, and to iterate how supportive we are of the legislation.

First, we're concerned that the Quality Assessment Board not be overly dominated by current public sector university personnel whose understanding of graduate medical education or graduate professional education may be dismissive of an institution not in the apparent mainstream and with which they are not familiar. In fact, the Canadian College of Naturopathic Medicine's curriculum and delivery are entirely in keeping with the dominant epistemology of professional programs housed in research universities. We want to offer a unique professional degree which doesn't fall conveniently under the other provisions of the revised act.

Another concern is that, historically, the Degree Granting Act discriminates in favour of foreign institutions over institutions whose home is Ontario. The new act keeps this unfair process intact in some ways because it gives only temporary consent to colleges such as ours since we are based in Ontario. We have invested heavily in our campus, equipment, human resources and programs over the past 22 years. We want to expand all of these even further to meet the rapidly growing need, not only here in Ontario but across Canada. We need a stable and secure credential foundation to achieve this. We employ more than 125 people full-time, and the multiplier effect of our 500 graduate students to the local and Ontario economies is not insignificant. Thus, we would suggest that the act provide for well-established, non-profit private institutions to be accorded degree-granting status not unlike current Ontario universities. The Canadian College of Naturopathic Medicine wel-

comes the rigour of a periodic and thorough Quality Assessment Board review and accreditation process.

Ladies and gentlemen, what follows in our submission are statistics which I don't think I need to rehearse here, information about the academic requirements of our program, our recent accreditation process that we went through, which took 60 months and many thousands of dollars, and the historical overview not only of our school but of the profession which we serve.

We are technically incorporated under the Ontario Corporations Act and our school is the educational arm of the shareholder group within that act. I iterate that we are non-profit.

The final section of our submission is a description for those of you not familiar with naturopathic medicine about what it is that constitutes the core of our professional curriculum.

Through Bill 132, the Canadian College of Naturopathic Medicine as a degree-granting institution will be able to facilitate finally, after generations of not having been able to do so, and to ensure that only qualified professionals hold a meaningful credential that is understood by jurisdictions outside of Ontario and by our colleagues in other post-secondary institutions in Ontario and other primary health care professionals.

1550

We have pursued the affiliation route without success. Bill 132 changes all of that and we are excited by the possibilities and in strong support of the legislation. Thank you very kindly.

The Chair: Thank you very much. That does leave us time for questions, about three minutes. We'll start with the Liberals this time.

Mr Dave Levac (Brant): Mr Schleich, thank you very much for your presentation. Obviously, just by perusing the information, I would not doubt that you have a wonderful institution and what you provide for your students is already quite exceptional. A quick question, and then maybe another one. The quick question is, you have outlined some concerns regarding the bill. If those concerns are not addressed, will you still support the bill?

Mr Schleich: Yes. We are in support of the bill because we believe it levels the playing field and makes it more fair. We hope that in any subsequent amendments that might come from this process there would be other opportunities for us to achieve the degree credential.

Mr Levac: The way it works, if the amendments aren't coming at this committee level when we deal with the bill, you'll have to wait to change legislation at a later date. So your lobbying is going to require some arm-twisting of people to put in some amendments to make sure that those concerns are addressed. That could be anyone from any side.

The second question evolves around a part of the bill that hasn't been addressed today. There's a part of the bill that looks at privatization and there's a possibility that a lot of the bills that this government's put forward have these kind of double-edged swords: if you want the

nice piece, you've got to take the other piece that might not be so palatable. Have you got a judgment or an opinion on the other piece of the legislation that allows for-profit institutions to enter into the province?

Mr Schleich: Our considered judgment, and this is derived from conversations with our board of governors and our other stakeholders, is that diversification becomes more possible in the higher education sector in Ontario through this bill, and that, in the long term, is desirable.

If for-profit institutions—we are not one, so I'm speaking from the perspective of a non-profit institution—can meet rigorous criteria having to do not only with curriculum and learning outcomes but also standards that are applied in the delivery of programs, and also if the private institutions are not seen to be excessively expensive in terms of access, and if along with those two factors there's an opportunity for students to access student loans—I know there are conversations occurring federally and provincially about such instruments as income-contingent repayment systems and so on—if these are in place, then the private university component in the higher education sector, with the resulting diversification, can enhance post-secondary education in Ontario in our view.

The Chair: Thank you very much Mr Schleich, for becoming before us this afternoon and starting off our hearings. We appreciate it.

CANADIAN MEMORIAL CHIROPRACTIC COLLEGE

The Chair: Our next presentation will be from the Canadian Memorial Chiropractic College.

Good afternoon, and welcome to the committee.

Dr Jean Moss: Good afternoon, everybody. I'm Dr Jean Moss, the president of the Canadian Memorial Chiropractic College. I'd like to introduce my colleague, Dr Silvano Mior, who is dean of graduate studies and research.

On behalf of the college, I thank you for the opportunity to make a presentation to your committee on Bill 132. I have brought with me today a small information package which highlights our institution and our programs. A copy of my presentation has been included in the materials.

Bill 132 represents the culmination of a substantive and, in our view, comprehensive consultation process. We believe that meaningful public input into the public policy development process is essential to good government. The government's and the minister's efforts to reach out and seek the feedback of a wide variety of stakeholders should not go unnoticed. As many of you are aware, the Canadian Memorial Chiropractic College has a strong tradition of participating in the public policy development process.

This initiative was no exception. We submitted a paper in response to the government's consultation document and we were pleased to participate in one of their

several round-table discussions. We believe that we have had sufficient opportunity to be heard.

Suspecting that your day has been both interesting yet long, I will be brief and specific in my remarks. I particularly want to focus my comments on the newly proposed quality assessment board.

We are pleased to see that Bill 132 creates the legislative authority for the establishment of an arm's-length quality assessment board, along with certain mandated review requirements. We expect that the applications flowing through the QAB and its review process should create many interesting and exciting opportunities for Ontario's post-secondary students.

The key to that process, we believe, lies in the integrity, veracity and credibility of the rules and the measures adopted to review these new opportunities. We believe that much of the success of the new degree-granting portion of Bill 132 will rest heavily upon the regulation-making authority found in section 13. We believe that it is important that the rules regarding the application process be governed by regulation. This better ensures that as review standards improve or the quality assessment board identifies a gap, these standards can be easily amended.

The college, affectionately known as CMCC, is a unique institution. It was established in 1945. It is fully accredited by the Council of Chiropractic Education of Canada, which is recognized internationally, particularly with the Council of Chiropractic Education in the United States, which is in turn accredited by the United States Department of Education.

We have a limited enrollment. We are a self-supporting, professional educational institution which is significantly funded by the chiropractic profession across Canada. We receive no direct government funding and we rely on membership, tuition, and donations for support. We are a registered charity.

CMCC has achieved a seven-year accreditation, which is the highest level possible for chiropractic colleges in North America. At present, Canadian accrediting standards are higher than those in the United States, despite the fact that there are 17 chiropractic colleges in the United States. We have consistently chosen to set our own standards in excess of those required by our accrediting body. We believe in setting the bar high and aiming even higher. As such, we are a standards leader as well as an accreditation and quality leader. The standards and procedures by which we operate provide, we believe, a road map to quality and success. We are very proud of the rigour to which we hold ourselves accountable and believe that our standards have served the community well.

We have 615 students, 91% of whom have an undergraduate degree prior to admission. Seven per cent of our current first-year class has a graduate-level degree. We have graduated over 4,600 graduates since 1945; 49% of those are practicing in Ontario.

We employ approximately 180 faculty and staff and have an operating budget of \$10.5 million. We have no

direct government support, as we have already said, and we have managed to remain the most cost-effective chiropractic college in North America. As the naturopathic college has just said, our tuition is in the same range as tuition at a medical school today. We consider this a remarkable achievement while we have maintained the highest-quality standards and achieved the maximum accreditation award.

Not only do we have high-quality standards but also we continue to assess those standards. We cannot express strongly enough how important it will be for the province to commit to a rigorous QAB accreditation process. If the province is going to succeed, it too will need to be a leader in the accreditation process by setting high provincial standards.

I'd like to translate the term "accreditation" into its core components as it relates to CMCC. I believe that in doing so we may demonstrate some practices and objectives that can be transferred to the QAB accreditation process.

The main principles of achieving accreditation are to prove that the institution is financially viable, its programs are of sufficient quality, that the institution sets goals and then assesses itself against these goals, that the institution goes through a self-study process, identifies its strengths and its weaknesses and then establishes strategies to improve on the areas of weakness. Finally, the accrediting body completes an on-site visitation to verify that the institution is meeting the accreditation standards and is doing everything that we say it is doing.

IG600

It's extensive and it's expensive. However, we feel it's important that the QAB establish procedures to confirm and accept existing accreditation processes to ensure that institutions are properly accredited and don't have to undergo a further process that is financially and administratively cumbersome and unnecessary. In addition, the regulations should allow for responsiveness to increased quality standards as standards increase. The regulatory processes must be able to respond and must be able to set the bar higher.

We measure our success in a number of different ways. Our graduates consistently outperform other graduates on the Canadian licensing examinations, and last year we were very proud to have 100% of our graduates who took the exam pass. Our graduates have a very high employment rate, with 91% of them gaining employment in their professional field six months after graduation. We also have an extremely low default rate on OSAP loans at 0.9%. Compare that to 20% in the college sector and 8% in general in the university sector. We attribute these favourable outcomes to the quality of our students, our faculty, our staff and our academic program. We think it is a remarkable achievement, given that we offer our education within the private sector.

Ontario is in a wonderful position to learn from the experiences of others. We can continue to have institutions of the highest quality, but the bar must be set high from the outset. This bill provides the enabling frame-

work to safeguard high quality standards and to establish the statutory and regulatory means to assess and confirm programs of suitable quality worthy of degree-granting status in the province.

In closing, we would like to say that we support the government's intention to provide more opportunities for Ontarians to seek degrees in a wider variety of programs. We further support its commitment to maintain the reputation and value of an Ontario-earned degree. We believe strongly that there must be an effective, efficient and rigorous accreditation process for any new degree program to ensure that there is no erosion of this reputation. Ontario's future post-secondary students deserve no less.

We would be very pleased to have you visit CMCC for a tour of our facilities and have you meet with our staff and faculty and the next generation of chiropractors of Canada. We thank you for this opportunity and would be pleased to respond to any of your questions.

The Chair: That leaves us time for about two and a half or three minute for questions. This time it will be to the NDP.

Ms Frances Lankin (Beaches-East York): Perhaps with that shortage of time, I'll just make a comment, Jean, and perhaps to David, who presented as well. You know throughout the years I've been extremely supportive of your professions and your colleges. I think there hasn't been an initiative that you've brought forward that I haven't been supportive of. On this one, sorry. I guess the tide had to end.

I believe very strongly that the goal of both the chiropractic and naturopathic colleges to gain degree-granting status is one that should be supported, and there are methods that have been available and could have been promoted by government to help you with that. I think the block that you've run into in particular in affiliation and in discussions with the universities is because of, I hate to say it, the predominance of medical doctors in the health sciences and their view of chiropractic and naturopathic, and a monopoly point of view. I think it takes political will to overcome that.

I believe some of the cautions you raise around the accreditation process and who will be making those decisions and whether you'll be put through another process are very important ones. I believe the concerns that David raised with respect to, again, whether there will be a predominance of the existing university represented on those decision-making bodies, and how the traditional blocks will play themselves out in the future are very important, and they're not addressed in this bill.

If I may say, on the other whole section of the bill, if this was just about expanding degree-granting opportunities, I'd be 100% with you. But the other section of the bill, which allows the invasion of foreign for-profit universities in our sector—I heard David make a lot of cautionary statements about if, if, if, then it's OK. None of those ifs are contained within this legislation. I believe that we see the potential for a major assault on our publicly funded post-secondary education system and that

the answer to the problems you have had, which are very real problems and I'm very supportive of what you're trying to do—it's really unfortunate to see that they're being addressed through a bill that has such other odious aspects to it.

I find myself in the position of voting against this piece of legislation and I want to let you know that. But I believe that the work you are trying to do and what you're trying to accomplish is worthy and I continue to be supportive of that.

The Chair: That does exhaust our time, but thank you very much, Dr Moss and Dr Mior, for coming before us here today.

TYNDALE COLLEGE

The Chair: Our next presentation will be from Tyndale College. Good afternoon and welcome to the committee.

Dr Brian Stiller: My name is Brian Stiller. I have presented a brief brief. First, let me say that we are in support of the legislation.

Just a background to who we are: we began in 1894 down in Toronto, the amalgam of the interests of three churches. Founded originally as Toronto Bible College, it merged with the school of London and eventually migrated north and developed a seminary and changed the name in 1998. We have an undergraduate school, the college, which is the one that we're speaking about specifically here today, and the seminary, Tyndale Seminary, which is currently the largest Christian seminary in Canada and the 12th largest in North America.

The college is now in transition towards becoming a university college offering a range of majors in arts and sciences, as well as in various professional areas. The reason for this transition is that the seminary has become the primary place of preparing individuals for church-related vocations. The model of education which the board of governors has approved in part—this is for the college side—comes from other schools, such as Trinity Western in British Columbia, King's University College and Nazarene University College in Alberta, Redeemer University College here in Ontario, and Atlantic Baptist University in Moncton.

Tyndale is a diverse institution with over 45 different denominations and 24 different ethnic backgrounds represented within its community. The college enrolls over 425 students and the college and seminary together have some 1,200 students. The constituency which looks to Tyndale for educational programs of one sort or another in Ontario is about 15% of the population. We currently have 12 full-time professors at the college. In the overall college and seminary, we have some 62 professors and more than 80% of those have earned doctoral degrees. Although the college has offered courses in the liberal arts all during its history, this is now becoming a much greater emphasis as it moves towards becoming a university college.

In our view, three reasons why this legislation is needed: First of all, it's a matter of choice. We believe this legislation will allow for a greater educational choice for Ontarians. At the present time, private university colleges with a Christian ethos are allowed to offer degrees in several other provinces. Until recently, Ontario residents who wished this form of education had to go outside Ontario in order to access it. This legislation will allow Ontarians to choose such educational offerings within their own province.

The recent decision to allow Redeemer University College to offer the BA and BSc degrees is an important development. Now is the time to allow other such institutions to provide this educational offering for Ontario students. Tyndale, with its strategic location in Toronto, is well-placed to be the college of choice for a good number of students seeking such an educational experience.

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This legislation strikes a good balance between openness to innovation, on the one hand, and the understandable desire to ensure quality and world-class education. We believe it is important that educational offerings be held up to scrutiny so that what happens here in Ontario matches the finest of universities worldwide and continues to uphold the high level of education currently being offered by our public universities.

Universities such as York and Redeemer currently accept transfer credit from Tyndale and we are now in discussion with the University of Toronto about this issue as well. Our faculty hold earned doctorates from such institutions as York University, University of Toronto, Queen's University and, overseas, Aberdeen University. Our long-term desire is to become a member of the AUCC.

The second reason this legislation is needed is a recognition of the public benefits offered by private colleges. We believe this legislation is important because it provides a mechanism by which the government and the public can recognize and affirm the important public service that faith-based institutions like ours can provide. Historically in Canada many of the universities which exist today were founded by Christian churches and individuals, and many of these links continue to this day. Faith and higher education have always been intertwined.

As a private, not-for-profit Christian college, we seek to provide education to those who desire the kind of educational experience we offer as a public service at no cost to the taxpayers of Ontario. Ontario, in allowing this development to take place, is reflecting what other jurisdictions in North America are doing. Keeping Ontario students in Ontario is a benefit to the province, especially when the education received is at no expense to the taxpayer. Everyone benefits when greater choice exists.

Number three: it's a matter of fairness. We believe this legislation is important because it allows for colleges to offer degrees that accurately reflect the true nature of the content of their degree programs. We agree with the

proposed legislation that it is fair to permit institutions that offer traditional arts and sciences degrees at the university level to be allowed to name those degrees in such a way as to reflect their content. The same is true for various types of professional degree designations. We believe that allowing colleges that match the QAB's definition of quality to call degrees by their true names is good for students and the public and fulfills the need for Ontario communities to operate within an educational environment of fairness.

There are three recommendations. We suggest that the QAB include at least one person from the not-for-profit educational community; that the QAB allow schools that are in process to be fast-tracked; that the QAB focus its attention more on being an advisory body to the minister rather than being a full accrediting agency.

That is our presentation. Attached is a profile which will give you some further information about the nature of our school.

The Chair: Thank you very much. That affords us about four minutes for questioning. This time it will be with the government.

Mrs Tina R. Molinari (Thornhill): Thank you very much for your presentation. Some of the comments you've made in your presentation have been things we've been hearing in the consultations we have held across the province. We've met with various groups in small and large group settings, and a lot of what you're saying here is consistent with what we've been hearing across the province. I appreciate your taking the time to come and share your views with us as well.

The recommendations you've made are also helpful. This is a process we go through, taking the recommendations that come forth, and in moving up to final approval of the bill, all of these consultations will definitely be taken into consideration.

I want to assure you that the quality assessment board is in fact an advisory board; that is, it will advise the minister on which institutions will be given the authority to grant university degrees and those that will be given the authority to grant applied degrees within the college. That's also something we've heard.

The quality assessment board will also call upon expert panels to ensure that those being considered meet the criteria and the high quality that we as a ministry and as a government want to ensure, that we offer the best for all the students.

As you said in your presentation, this is about choice and offering choice and options to students. We have heard of a number of situations where students have had to leave Ontario, as you indicated in your presentation. We want to keep our students here in Ontario and this is one way of doing it.

There will be no cost to the taxpayer in that the institutions will not receive any public money. One of your comments is that it doesn't cost taxpayers. But the students will have access to the Ontario student assistance program once the institution is in place for a period

of time and we are assured that the institution will be credible and continue to offer programs for the students.

I appreciate all the comments you've made. They will certainly be taken into consideration with the rest of the presentations we hear today.

The Chair: Any other questions from the government? Seeing none, thank you very much for taking the time, Dr Stiller.

ONTARIO CONFEDERATION OF UNIVERSITY FACULTY ASSOCIATIONS

The Chair: Our next presentation will be from the Ontario Confederation of University Faculty Associations. Good afternoon and welcome to the committee.

Dr Henry Jacek: Good afternoon, Mr Chair, and members of the committee. My name is Dr Henry Jacek. I'm president of OCUFA and I'm also a professor of political science at McMaster University in Hamilton. I am joined here today by Henry Mandelbaum, my executive director, and Mark Rosenfeld, who is the director of government relations.

The Ontario Confederation of University Faculty Associations represents approximately 11,000 professors and academic librarians in Ontario's 17 universities and affiliated university colleges. We are pleased to present a brief to the standing committee today. The brief has been circulated. Appended to that brief is a report on private universities. This report is a detailed and, we believe, thorough study of some of the implications, unfortunately negative implications, of having an extensive operating private university system in Ontario.

As I think all the committee members are aware, we have strong reservations about private universities in Ontario. We are quite worried that Bill 132 does not expand real major choice for students, particularly our young people, nor does it, we think, promote general overall excellence in Ontario's university system.

Private universities, we believe, may very well lead to a two-tier system. Those who can afford to attend a private institution may do so, possibly circumventing the current stringent entrance requirements to Ontario's public universities. We really don't think the people of Ontario want a system where students are allowed to buy their way into university degrees. We believe they want a system where people have to meet stringent standards to attain those degrees. Qualified students who do not have the resources to attend a private university will have to depend on the current public system, which is already faced with enormous demand pressures from students and inadequate resources to meet that demand.

OCUFA, therefore, urges the committee to recommend that Bill 132 be withdrawn and studied further. Private, for-profit universities especially will not add to the quality, we believe, of post-secondary education in Ontario, nor will they add in any meaningful way to the capacity of the post-secondary community to meet enrolment demand increase. Nor is there doubt that public resources will in fact be expended on these private, for-

profit institutions. These institutions will not provide the broad scope of programs we need in Ontario—such as in the arts, sciences, humanities and professions—that are demanded by an increasing number of students, particularly our young learners. They will particularly ignore that group of people. It is therefore OCUFA's contention that the legislation does not promote greater major opportunities for students.

However, if we accept the role of private universities, which this legislation does, we believe this legislation is still flawed and needs to be amended. We have three specific objections to this bill in its current form, and our brief suggests amendments to that bill.

Of the first three major suggestions, our concern is the guarantee of public accountability or transparency within the legislation. We believe there are several gaps in the accountability provisions. The legislation does not provide for public debate on the creation of new universities. Any authorization of a new university, in our view, should be through an act of the Legislature in order that public debate can take place and the public interest can be protected. Authorization by ministerial consent does not provide these same assurances and safeguards and careful consideration.

There is nothing in the legislation that states that the Post-secondary Education Quality Assessment Board's decision and reasoning will be made public or that the public will have access to the documentation supporting the application. It is imperative, in our view, that any recommendation made by the board be transparent and open to public review. I'm sure you've heard this before, particularly from the Council of Ontario Universities.

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The proposed legislation allows the minister to make an exception to the restriction that colleges only grant applied degrees. The minister has the power to allow colleges to become universities. Essentially, these sub-sections of the legislation could be used to create a US-style system of junior colleges granting associate degrees. If this is the intention of the government, then we believe it should be the subject of a thorough public debate rather than allowing this change to happen incrementally through regulatory provisions not subject to public review or discussion. We would also point out here that there are very serious financial implications for this type of gradual descent into an American-style junior college system, and those financial implications need to be really carefully looked at.

Regulations can be made, according to this legislation, prescribing procedures for the Post-secondary Education Quality Assessment Board's review of applications, as well as prescribing policies and principles that the board must take into consideration in establishing criteria in reviewing applications. Such regulations could severely restrict the independence of the board, be in conflict with the high education standards now recognized in Ontario, and create a highly irregular system of quality control for higher education in the province. For example, we could have one standard for public universities, another for

private universities, still another for public colleges, and yet another one for public colleges transformed into universities. Let me emphasize: the educational standards that will be used by the Post-secondary Education Quality Assessment Board should be consistent and uniform in content and consistently applied to all institutions. Performance standards should be the same for all these institutions, not allowing lower standards for for-profit organizations.

In this act, the minister is provided with the power to appoint inspectors for the purpose of determining whether it is appropriate to change, suspend or revoke a consent or to determine if an institution has complied with the act. The real question here is whether there will be appropriate funding for these inspectors. Will enough inspectors be hired? Will they be given the resources to check that quality standards are being upheld in all institutions? This is always a worry in government, where there is a temptation to cut expenditures and inspection procedures. Therefore, a provision guaranteeing adequate resources for enforcement should be included in this legislation.

Our second of the three concerns is the quality of education provided by new degree-granting institutions. This quality of education must be guaranteed.

The proposed legislation specifies the criteria for reviewing applications by the assessment board and that they must be in accordance with educational standards recognized in Ontario and elsewhere. Such standards, however, are not spelled out in the legislation and may be subject to very wide interpretation. Moreover, the next clause in the bill specifies that the assessment criteria must comply with policy directions set by the minister. Cases could arise where the policy directions set by the minister conflict with recognized educational standards in Ontario. It would be better if the standards that will apply were delineated in detail now and applied fairly to all organizations. It seems crucial that a level playing field of quality standards is necessary, and they are not now contained in this bill.

Our third and final concern is that the legislation must guarantee that public funds not flow in any way, directly or indirectly, to for-profit organizations, especially foreign profit-making corporations.

No explicit exclusions in the legislation prevent this from happening. They will be able to benefit from tax deductions, from tax credits for students' tuition and non-tuition educational costs. They will be able to qualify for research funding, tax credits for research activities and the use of publicly funded infrastructure such as libraries, especially our overused and under-resourced university libraries. Moreover, the government has already pointed out that they will allow the provision for students who attend private universities to access OSAP funding. OSAP funding is a direct public subsidy of these institutions. The money will simply be handed to the students, who will in turn hand it right over to the private universities. The result will be less OSAP money for our students enrolled in our already existing universities such as Queen's, Toronto, Guelph, Waterloo and McMaster.

We would also note our concerns regarding this legislation's implications under NAFTA and the general agreement on trade in services. The move to open up the higher education market in Ontario will allow NAFTA and GATS rules to apply, and WTO rules as well. There is a potential for these regulations to override many of the powers assigned to the Lieutenant Governor in Council and the minister within the legislation. Similarly, under NAFTA, once a publicly provided service is also provided on a private, commercial basis, all the national treatment and investment provisions apply. The system will lose its protection. In effect, all the benefits and programs provided to Ontario's public universities would have to be extended to private providers, and they would have a legal claim to do so. As a result, even if the government claims that private universities would be ineligible for student assistance or research grants, NAFTA provisions and the provisions of the other trade agreements, including those now evolving, will override this legislation.

As such, we would recommend that the minister undertake to review the outlined concerns over these trade agreements and raise them with the Minister for International Trade at the earliest opportunity to ensure that Canada can maintain existing protection, as it has wanted to do in its previous treaties, for its educational standards and practices.

I would like to conclude our presentation by pointing out that there is a solution not contained in this legislation to ensure access and opportunity to students, and excellence in our university system. That solution is a rejuvenation, a reinvestment in Ontario's colleges and universities.

All members are aware that changes in population demographics, participation rates and secondary school reform will result in an increased demand for university education of approximately 90,000 students by the end of this decade. With the increased demand comes the need to expand the faculty in our public universities. Estimates show that we will need thousands of new faculty over the next 10 years in order to replace the ones now leaving the system to take account of the new students coming in and to deal with the inefficient ratios we now have. These two tremendous policy challenges of student numbers and the faculty shortage face the government. This bill really dodges that issue and will not in any way provide a solution, or even a partial solution, to this issue and these two problems.

To meet the needs of future enrolment, expand research capacity and improve the quality of the educational experience, the government of Ontario should commit to increase annual funding to universities by \$500 million over the next three years.

Let us be clear: if Bill 132 is passed, even with the amendments we propose, not one new space in a publicly supported university will be created and not one new faculty member will be hired. Bill 132 will therefore fail to meet the real needs of students and the province. Unless major reinvestments are made to our current universities, the future economic well-being of Ontario is

at serious risk, and with it the quality of life in Ontario will decline.

This is the conclusion of my remarks. I would like to thank the members for listening patiently to those remarks. I welcome any questions or comments any member of the committee may have. Thank you.

The Chair: Thank you. Actually, you've timed it perfectly. You have used your allotted time, but I do appreciate the detail in your brief and your taking the time to come before us here today.

ARGOSY EDUCATION GROUP

The Chair: Our next presentation will be from the Argosy Education Group. Good afternoon and welcome to the committee.

Dr Michael Markovitz: Good afternoon, Mr Chairman and members of the committee. My name is Michael Markovitz. I'm the chairman and founder of Argosy Education Group. With me is Mr Clarke Merritt, my associate.

We have delivered to you prior to today a brief which presents our views and background with respect to Bill 132, and we have delivered to you the most recent annual report of Argosy Education Group, which goes into considerable detail with respect to our finances, our plans, our history and the manner in which we operate.

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Briefly, Argosy Education Group was established in 1975 and is now a 25-year-old institution that operates 17 different schools and colleges across the United States. We have three campuses of what is the PrimeTech Institute here in the city of Toronto.

Our schools generally offer graduate-level education. We are variously authorized in nine different states to award bachelor's degrees, master's degrees and doctoral degrees. We award bachelor's degrees in business and in education. We award master's degrees in education, psychology and business, and doctoral degrees as well, mostly in applied clinical psychology, although we award the EdD degree as well as the DBA, which is a doctor of business administration. In addition, we operate a junior college in the state of Minnesota where we offer applied programs in the allied health sciences such as ultrasound technology, veterinary assisting and so forth.

All of our programs are accredited by the appropriate regional accrediting bodies that would be applicable in the United States. They are accredited either by the North Central Association of Colleges and Schools, which is a major accrediting body recognized by the Secretary of Education, or by SACS, the Southern Association of Colleges and Schools. Our professional schools are additionally accredited by the American Psychological Association and, for the two law schools with which we are involved, one is currently accredited by the American Bar Association and the second is approved in the state of Georgia and is in the process of working toward receiving accreditation from the American Bar Association.

I say this to demonstrate to you that Argosy and the schools programs which it operates are intellectually serious endeavours. We are and have been ever since the beginning of our company wanting to submit our programs to the scrutiny of our peers and to have the quality and content of our academic programs, as well as the preparation, integrity and background of our faculty, subject to scrutiny by their peers. As the speaker who preceded me commented, all the schools should be judged by the same criteria and standards. We absolutely endorse that idea and want absolutely to assure anyone and everyone that Argosy and its programs are intellectually serious and want to be judged in that vein.

There are several matters, though, that I want to discuss, and they particularly have to do with what our intention is in the province of Ontario should Bill 132 be enacted into law. It is not our intention to go into competition with the public sector and it is not our intention to duplicate programs that already exist and are offered by many of the very fine and excellent institutions that exist here. Rather, the types of programs that Argosy wishes to offer are programs which currently do not exist in Ontario.

Specifically, there is the applied clinical psychology doctoral degree, the PsyD, doctor of psychology degree, which we pioneered 25 years ago and which is now received by more than 50% of all students in the United States working toward a doctoral degree in clinical psychology. It is a practitioner-oriented degree rather than a research- and scholarship-oriented degree, and there are currently no opportunities in Ontario for students to pursue this type of education. In fact, at our 11 campuses throughout the United States we have a number of students from Ontario who have come specifically to our programs to receive the education that is not available here. Many of them have returned to the province of Ontario, and I believe that in recent years the president of the Ontario Psychological Association may have been a graduate of one of our schools.

In addition to that, we would like to offer programs in information technology that don't exist here: an applied program called bachelor of information technology, BIT, and at the master's level the MIT, master's degree in information technology. These are applied practitioner-oriented degrees that prepare their holders to work at serious managerial and technical jobs in an area and industry that everyone acknowledges is growing at a very rapid pace and for which current educational capacity has not been sufficient, not here in Ontario, not in the United States and not anywhere. The growth of jobs has far outpaced the ability of all the educational institutions to keep up with it.

With respect to offering degrees in information technology, note that private schools, such as Argosy, are able to invest in equipment and upgrades to technology at a more rapid pace than is available to the public sector. We, as a publicly traded company on the NASDAQ, have access to adequate funding and capital to buy the equipment that's necessary to train students to be prepared for jobs that are available today.

With respect to the quality assessment board, I would like to echo what other speakers have said, that we want the quality assessment board to be a serious undertaking. We want the quality assessment board to truly and adequately assess the quality and integrity, to act as an accreditor, if you will, of the academic programs that are being presented before it, by us, by our competitors and by other sectors that are going to come forward and want to field academic programs in this province.

The applied degrees, contrary to what some others may think, are not necessarily anti-intellectual and not-serious undertakings. Applied degrees often can be more serious than some of their academic counterparts. Surely no one would argue that a law degree or a medical degree, which are themselves applied degrees, after all, are not serious simply because they are not a PhD or a bachelor of arts degree, but rather represent a preparation for following a very serious profession.

To the end of trying to establish ourselves here in Ontario as being an academically serious institution, PrimeTech Institute, which is currently licensed as a private vocational school and has no requirement upon it whatever to do so, has independently sought the approval of the American Council on Education at great expense and trouble to itself for a variety of courses in the information technology arena that PrimeTech offers, and its courses have been judged by the American Council on Education to be the equivalent of 54 upper- and lower-division semester hours as would be offered at an American university.

As I've read some of the transcripts of the prior days of this meeting, it obviously has occurred to me that there has been mention of a number of schools in my sector, not always in glowing terms. I would urge you that this is not a question of whether a school is for-profit or not-for-profit, or whether it is public or private, but that the quality and integrity of the academic programs ought to stand and fall on their own merits. The distinction as to whether a corporation is a net taxpayer or a net tax consumer should not be a criterion on which to judge whether that institution ought to be capable of awarding academic degrees.

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Finally, I would say that while I don't want you to judge Argosy by our peer institutions in the for-profit sector in the United States and that I want the quality assessment board to judge each application on its own merits, I would like to add that the quality assessment board itself in its composition should be a mixed group and should represent the different sectors of this society that have an interest in the successful implementation of this bill. Thank you for your time and consideration.

The Chair: That leaves us about two minutes for questions. This time it would be to the Liberal caucus.

Mrs Marie Bountrogianni (Hamilton Mountain): Thank you for your presentation. I just want to make clear that my caucus and our leader agree with applied degrees at public community colleges here in Ontario. The part of the bill we disagree with is the private universities, particularly the for-profit, entering Ontario,

for the very good reasons that the previous presenters alluded to in their presentation.

You are for-profit and you have three campuses in Canada. Do you presently offer degrees in Canada?

Dr Markovitz: No, we do not. We are licensed as a private vocational school and are thus far prevented from offering academic degrees here.

Mrs Bountrogianni: At times during these hearings I feel like we're like the quality assessment board, judging whether people should be getting degrees or not. That's not the purpose of these hearings. I happen to have a doctorate in psychology. I'm looking through your handbook here, and although we don't have a PsyD in Ontario, we certainly have parallel programs where you get degrees in applied clinical psychology, you get registered as a psychologist, and we have clinical psychologists. For software programming engineer, we may not have that exact title, but we have computer software engineering programs. I think it's a little stretch to say that you would be offering programs we don't have. There might be different titles, a different focus here and there, but we have these programs. I think that's a stretch.

The other question I have is, do you offer BAs?

Dr Markovitz: Yes, we do.

Mrs Bountrogianni: What is your average tuition for a BA program?

Dr Markovitz: The average tuition is about \$14,000 a year.

Mrs Bountrogianni: American?

Dr Markovitz: Yes.

Mrs Bountrogianni: You probably know from your research on us that that's significantly higher than what we now charge—

Dr Markovitz: Yes, I'm aware of that.

Mrs Bountrogianni: —and it's also gone up by 60% over the last five years. Recently the government has put a 2% cap on it—this government, believe it or not, has put a 2% cap on it. My question is, who would be able to afford \$14,000 a year, in your opinion, in Ontario for a BA?

Dr Markovitz: My response to that is the market will decide. If \$14,000 a year—we have not yet determined—

Mrs Bountrogianni: It's \$14,000 American. I want that in the Hansard.

Dr Markovitz: We have not yet determined what our tuition would be here, but if we price ourselves out of the market, then we won't have students and we won't be successful.

The Chair: Thank you very much for bringing the perspective of your organization before us today.

CANADIAN FEDERATION OF STUDENTS, ONTARIO

The Chair: Our next presentation will be from the Canadian Federation of Students, the Ontario component. Good afternoon and welcome to the committee.

Ms Erin George: My name is Erin George. I'm the Ontario chairperson for the Canadian Federation of

Students. In Ontario we represent 185,000 college and university students and graduate students at 23 campuses. Across the country the federation represents 400,000 students at over 60 schools. With me as well is our government relations and campaigns co-ordinator, Pam Frache.

On April 28 the Minister of Training, Colleges and Universities, Dianne Cunningham, announced the government's intention to permit the establishment of private, degree-granting institutions in the province. According to the government, the introduction of private degree-granting institutions is about providing more choice for students by making available, at no government expense, educational alternatives currently not offered through the public system. The government asserts that this initiative responds to public demand for access to market-specific training, thereby increasing job opportunities for graduating students.

This government claims that by introducing private degree-granting institutions, it is expanding students' choice, but given that many private institutions will charge students upwards of \$10,000 in tuition fees per year—as we've just heard—we must ask, for whom is the government expanding choice? Choice, for most Canadians, was realized with the introduction of affordable, high-quality post-secondary education. Private institutions will have access to the Ontario student assistance program. The maximum amount an applicant can claim will be \$4,500. Assuming tuition fees of \$10,000 or \$14,000 or more per year, OSAP students will be left with a shortfall of several thousand dollars. For students dependent on OSAP, the introduction of private degree-granting institutions will hardly increase their choice. The federation believes that if the ministry were sincerely interested in expanding choice for students, it would reduce tuition fees, re-regulate tuition fees for all post-diploma, professional and graduate students and restore the \$400 million that has been cut to operating grants since 1996. It would also build publicly funded institutions in rural and northern communities.

The government also promises that no public dollars, other than those provided to students through OSAP, will be provided to private degree-granting institutions. However, the track record of US universities shows a different reality. In the US, about 30% of private university operating revenue comes from direct and indirect government subsidies. In fact, these institutions must state that they are publicly assisted as opposed to private.

Although the government claims that no public dollars other than OSAP will be made available, there are many ways in which public money will find its way to private degree-granting institutions. For example, students attending private institutions often use public libraries for their studies. With the tax incentives announced in this year's provincial budget, corporations may be able to donate to private institutions and withhold tax dollars that could otherwise have gone into funding the public system. For employers that pay for employees' training courses, there are also tax breaks.

The federation believes that there are too many loopholes that would have to be closed to prevent private degree-granting institutions from receiving public money and that it would be far better for the government to abandon the initiative altogether.

Post-secondary education is one of the most important factors in finding satisfactory employment. Already over 85% of university and college graduates find employment after graduating, and some institutions have even higher employment rates. In the meeting with Minister Cunningham that the federation held on June 6, the minister said that, at best, private institutions would provide only a few thousand spaces for students. Studies indicate an additional 90,000 spaces will be needed to meet the growing demand for post-secondary education. The federation believes that the plan to introduce private degree-granting institutions falls well short of what is needed to provide adequate spaces. Substantial reinvestment for university and college operating grants is the only reasonable solution.

There is no guarantee that the programs offered at private degree-granting institutions will be of high quality. Moreover, we have several examples over the past few years where private colleges have gone bankrupt. Students at such institutions have lost thousands of dollars in user fees, not to mention the months and years spent studying.

The government clearly recognizes these dangers. By proposing to establish a quality assessment board, the government is in effect anticipating problems and creating a new level of bureaucracy to head off the worst of them. But as ministry representatives admitted to the federation in the June 6 meeting, the government cannot foresee all potential problems associated with allowing private institutions to grant degrees. The federation is concerned that the government has already decided to gamble with students' futures.

The government has proposed to set up a quality assessment board to evaluate many aspects of private institutions to determine if they are degree-worthy. Since these institutions will supposedly rely only on private funding, these boards will undoubtedly comprise private sector representatives accountable only to their shareholders; there can be little doubt that public input will be marginalized. The government has stated that the quality assessment board will provide accountability and transparency to the review of bids for degree-granting status. But such a board would likely not be willing or able to disclose information about private institutions that may be deemed confidential. These boards have further implications for faculty evaluation, curriculum, and academic freedom.

The federation believes that there is no avoiding the conflict of interest inherent in allowing private sector representatives to assist in monitoring the performance of private institutions.

1650

Particularly ominous in the legislation is the provision threatening fines of up to \$25,000 for Ontario student assistance program recipients who are found to have

violated OSAP regulations. With tuition fees as high as they currently are, many students from low- or middle-income backgrounds will be forced to re-evaluate their post-secondary education goals. Instead of choosing to follow their interests, many will be forced to pursue those programs deemed affordable. However, with the added disincentive of perhaps accruing an additional \$25,000 in fines, many students may opt to avoid higher education altogether. This is especially true for traditionally disadvantaged groups in society. The federation believes that this measure will not expand access to higher education, but rather discourage those most in need and prevent them from having access to post-secondary education.

There are currently more than adequate provisions to redress that minority of students who consciously defraud the program. The federation believes that the threat of fines has been inserted into the legislation as part of an ideological assault on students to suggest to the broader public that OSAP is widely abused, that students are criminals and therefore less worthy of financial assistance in pursuing their studies.

In fact, student loans are one of the safest form of loans that can be issued. The vast majority of loans—80%—are repaid without incident. That students become a default statistic after only 90 days obscures the fact that even after a loan has gone into default, the vast majority—93%—are fully repaid. Because the annual OSAP award is so woefully inadequate to cover both tuition fees and monthly expenses, a minority of applicants may consider underestimating their incomes for the purposes of increasing their student loan. But given that these are indeed loans and given the fact that a majority of these loans are indeed repaid, this is hardly an unconscionable act of crime but rather a reflection of the inadequacy of student financial assistance. If the government were truly committed to creating a disincentive for students who may underestimate their incomes on their application, it should increase the annual OSAP award by creating a more comprehensive grant program.

If anyone should be called to account, it should be the Ontario government, which has been violating the agreement with the federal government on its use of millennium scholarship monies. The federal government's Canada Millennium Scholarship Foundation was intended to provide some measure of student debt relief for students graduating with thousands of dollars of debt. Currently in Ontario, loan forgiveness is applied to that amount of money borrowed over and above \$7,000. When the program was first implemented in Ontario, those millennium scholarship recipients who borrowed more than \$10,000 in OSAP loans saw no debt relief because the scholarship was simply applied to the portion of the loan that was forgiven. Although in May the government committed to reduce the threshold for loan forgiveness from \$7,000 to \$6,500 for millennium scholarship recipients, those same students will realize a mere \$500 of the intended \$3,000 in debt relief. If anyone should be investigated for fraud, it should be this

government, which is literally taking money out of the pockets of needy students and using it primarily to fund existing programs.

There is concern as well that under existing free trade agreements, the decision to introduce private degree-granting institutions may seriously undermine the government's ability to protect publicly funded post-secondary education. Under the North American free trade agreement, once a publicly provided service is provided on a private, commercial basis, then both public and private services must be treated in the same manner. Either private institutions will have to be granted public subsidies, or public institutions would have to see their so-called unfair subsidies eliminated. In either case, the accessibility of publicly funded higher education is seriously compromised.

In addition, if education is a negotiable item in the ongoing World Trade Organization talks in which the federal government has been actively participating, the decision by the Ontario government may prove to be legally irreversible. In his column in the *Toronto Star* on November 23, Thomas Walkom wrote: "Under WTO rules, a sector that is fully opened to the market must effectively remain so. The reason lies with the so-called 'national treatment' clause of the WTO. Nations are allowed to discriminate against foreign firms only in those areas dominated by government."

In other words, even if a government of the future becomes convinced that the decision to allow private degree-granting institutions in Ontario was mistaken, under current and future trade deals it would be illegal for the government to attempt to correct the error by re-nationalizing.

The federation believes the government should not proceed with its plans to privatize higher education without full and adequate research on the long-term implications of these measures under trade liberalization agreements.

The government launched a series of meetings in which representatives were selected without process, often at the discretion of local institutional administrations in the last round of public consultations on private degree-granting universities. The consultations were intended to provide the government with input on the creation of the quality assessment board, not question the premise of establishing private degree-granting institutions. The main organizations voicing opposition to the concept as a whole were not invited to participate in the round table consultations. Only after this matter was raised openly in the provincial Legislature did the ministry arrange for private meetings with the organizations critical of the government. The government has expressed its reluctance to even release the names and organizations of those who did participate in the first round of formal "public" consultations, citing concerns over the right to privacy and the freedom of information act.

In conclusion, the government has made a policy decision with little public input and even less study on

the long-term implications of allowing private institutions to grant degrees. We have already seen the impact of the private sector on curricula, access and quality of education. The government is now prepared to put students at further financial risk.

The consequences of establishing private degree-granting institutions have not been thoroughly examined in light of trade agreements as well.

Education should not be a for-profit enterprise, accountable only to shareholders. Education is a right. Thus, the federation calls on the government to withdraw Bill 132 and to restore funding to democratically controlled, publicly funded universities. If this government is truly committed to creating choice, it should reinvest in the existing public post-secondary education system. It must end deregulation of graduate, professional, post-diploma and college tuition fees, freeze and reduce tuition fees, and implement a comprehensive system of needs-based grants. Thank you.

The Chair: Thank you very much, and you have timed that virtually to the second. Congratulations on your planning. I appreciate you taking the time to make your presentation before us here this afternoon.

Ms George: We have no time for questions?

The Chair: No, no time for questions.

ONTARIO GRADUATE ASSOCIATION

The Chair: Our next presentation will be from the Ontario Graduate Association, Mr Boyko. Welcome to the committee.

Mr Ian Boyko: Hello. I just want to start off by saying that I believe, Mrs Munro, you were my grade 10 history teacher back at John M. Denison Secondary School in Newmarket.

Mrs Munro: That's right.

The Chair: I don't think that's a conflict of interest of any kind.

Mr Boyko: I just hope that my presentation skills have improved at least marginally.

As already stated, my name is Ian Boyko. I'm the vice-chairperson of the Ontario Graduate Association. We represent over 23,000 graduate students in the province of Ontario alone. I'm also a master's student at the University of Windsor, studying sociology.

I want to start off by stating my association's complete opposition to Bill 132 and everything it stands for in essence. All I have to do is point to a September study released by IPSOS-Reid stating that over 66% of the people polled were opposed to the introduction of private universities in the province of Ontario. I've decided not to produce materials today, mainly because I think most of my comments will echo those of the previous presenters, because we stand in solidarity against this bill.

I think tuition fees are one of the most important things to consider in this bill. It doesn't take a lot of research to demonstrate the effects that private universities could potentially have on the province of Ontario. Unregulated tuition at private universities of course is not the answer to the accessibility question facing the double

cohort and then the echo boom behind our double cohort. Even the minister acknowledges that there will be no way to predict the costs associated with these degrees, and of course earlier presenters have also stated that they don't really have a good idea of what the costs would be. The most chilling quote, and I've only been here for about 20 minutes, is that the market will decide who can afford to go to these institutions. That's very far from a guarantee of access.

1700

One of the arguments around Bill 132 that I find most frustrating is that the ministry has been using competition in Ontario as a kind of caveat to why private universities are so necessary. I can tell you that deregulation has only placed overwhelmingly upward pressure on tuition fees, and this kind of open market competition has done anything but produce a buyer's market. Competition is exactly the argument my university used last spring when it introduced a 45% increase in tuition fees to law students, citing what other schools had done before them.

We have to look no further than the tuition fees at some of the private universities that are knocking on our door. The University of Phoenix has historically charged up to \$40,000 for an undergraduate degree, and one of the previous presenters said that \$14,000 a year is possibly what we could expect from their franchise opening in this province.

I'll also talk briefly about the quality assessment board. Quality assessment boards are certainly not new to private colleges in the province. The quality assessment board, or its similarly named predecessor, didn't help 200 students at Shaw College when it went bankrupt and left them in the lurch. Even if, as this government claims, we can secure a kind of bonded tuition agreement with these franchises, if a college or university goes broke, that still doesn't make up for lost time a student spent in that institution. As the CFS already said, it's just an unneeded layer of bureaucracy. Universities in Ontario produce some of the highest quality graduates in the country, and this is evidenced by their own self-regulation. Most familiar to me is the Ontario Council on Graduate Studies, which does self-regulation.

What hasn't necessarily been mentioned in as much detail previously is how this government can ensure that public dollars won't be siphoned off into these universities in the form of research grants. Most research grants are doled out on the federal level through the Social Sciences and Humanities Research Council, the Canadian Institutes of Health Research, the Natural Sciences and Engineering Research Council and the newer Canada Foundation for Innovation. I want people to understand that the Canada Foundation for Innovation is structured so that 40% of the funding comes from the federal government and 60% must come from other sources. Typically, that has meant 40% of the research funding has come from the province, so I want to ask the panel whether you can guarantee that these private institutions won't receive research funding under the current arrangements.

Finally, as I think the CFS pointed out quite well, there are many disturbing questions around trade liberalization and private universities, which are inadequately answered. I find this very disturbing, because the answers we have received from the ministry to date are wholly inadequate, and I'm very skeptical that all the research that needs to be done around trade liberalization has been conducted. I was at some of the public consultations, and all the minister could say was, "Our research says no," that this wouldn't affect private universities. I don't think that's adequate. It's quite clear, based on precedents in other private sector disputes, that we could consider government grants to public institutions an unfair subsidy to a domestic operation or business, which, as you obviously know, is an illegal trade practice. I would like to receive a guarantee from this government that we've received assurances that this won't happen. If we try to kind of explain away that universities aren't a business and don't operate like that, I think Bill 132 kind of defines education as an industry *de facto*, and I'm afraid about how that would protect us under those kinds of legal battles.

In conclusion, I just came back from a conference of over 130 delegates from over 50 student unions across the country. There wasn't a single student union asking for private universities, and that's from coast to coast to coast. So it's very clear that this isn't something desired by students or by student leaders in this country, nor by the faculty, nor even by the administrations. I have to reiterate our opposition to this, in that it's difficult to imagine how these private universities and institutions would be accountable to the public. Their sole purpose—the very bottom line, by definition—is to generate profit for their shareholders. I fail to see how this serves the public good.

I think that's it, but perhaps you could answer my previous questions about how we can guarantee this wouldn't affect us under trade liberalization, and how this government would contribute to research at these private universities.

The Chair: Thank you. Normally the rotation would go to Ms Lankin. Do you mind? We've got lots of time for questioning. Do you want a response first?

Ms Lankin: How much time do we have?

The Chair: We've got about seven minutes.

Ms Lankin: Sure, if Ms Molinari wants to briefly respond to that, that'd be terrific.

Ms Molinari: Is that seven minutes in total, or divided—

The Chair: In total, and it's Ms Lankin's turn, so if you could restrict your comments to perhaps two minutes.

Ms Molinari: OK, thank you. In response to the question on funding for research—that was part of your presentation; that's what you were asking—the one that you were referring to in your presentation is a federal research grant and we have no control over what the federal government provides for research.

Research grants provincially are given from the various ministries. We can't guarantee that any ministry would not support research funding for any institution that would find that there's a program or something that they would be excelling in. It's each individual ministry that would determine that.

Mr Boyko: Would I be able to have a supplemental to that?

The Chair: Again, briefly.

Mr Boyko: This government has over and over guaranteed that no public funds will be siphoned off into these private institutions, that no public dollars will go there but, clearly, what I'm hearing is that that's not the case. You're not willing to enforce this in other ministries. I'm a little unclear, because research grants are quite clearly public funds, but I'm hearing that no public funds are going to these institutions, so that's an inconsistency.

Ms Molinari: You're asking whether the institutions will be supported? They will receive no capital grants and no operating grants. That's clear.

Mr Boyko: OK.

Ms Molinari: Students will be able to apply for the Ontario student assistance program, so OSAP will be available for students. Your question about research grants: those grants are given by different ministries and, no, I can't speak for all of the ministries on whether or not that would be something that they would consider.

The Chair: Thank you. Ms Lankin?

Ms Lankin: How much time do we have?

The Chair: We still have four and a half minutes.

Ms Lankin: I appreciate the presentation you made. Let me give my compliments to Ms Munro and her contribution to your education. Obviously she did a fine job in her previous career.

A couple of comments: let me just say on the GATT concerns that you raised, the free trade concerns that you raised, I think you're right to raise those concerns and I think that we are due an extensive response to that. Formerly, at a time when I was a member of the governing party as Minister of Economic Development and Trade and a participant in the internal trade negotiations, the interprovincial trade negotiations, as well as some of the various rulings that we were receiving, working through the federal government with respect to GATT and WTO, I have to indicate that there are two bodies of thought at this point in time. I've spent some time contacting people and I've spoken to people within the Ministry of Economic Development and Trade as well, and there are some grey areas. I think the government, at the very least, owes us a full explanation on which—they are proceeding on the premise that there are no GATT or trade implications, and I think that your demand to that is entirely reasonable.

I'd like to just explore the comments you made around the diversion of public dollars into the private institutions, and I think Ms Molinari's reluctance or inability to assure that public research grants won't be siphoned off in that direction is problematic.

I would also suggest that—I don't want to pick on Argosy, but just because I happen to have the report in front of me, and to be fair, this is an annual report, which is a financial record, so the focus is going to be on finances; it's going to be on the profits. For example, they talk about how they look at the niche market of the doctoral degree because it's a longer program and can be charged higher tuitions. That's a good thing for shareholders, right, that niche marketing?

Also, though, the role of philanthropists in donating to research programs in such niche marketers, and I would also say corporations: those are supported by tax credits at this point in time. You know and you would experience in your own studies in your own university the dramatic competition for research dollars that exists at this point in time in our public institutions. I think there is, again, a significant and a reasonable concern.

I wonder if I could end with a brief question: could you comment on the diversion of OSAP dollars, of student loans, student support dollars to the new potential for-profit universities and what that means overall in terms of the tuition-based support for our public universities and the security of their funding base.

1710

Mr Boyko: Yes. Just really briefly, my organization is opposed to the use of any public funds to be diverted into private institutions, and that includes student loans.

I think this government's claims that private universities will open up choice in the province—quick, think of a polite way to put it—aren't true. They're not true. If there is any lack of choice, it's because institutions are being forced to downsize and cut programs that aren't necessarily attractive to private donors. That would be the only instance where there's maybe not enough choice in Ontario and that can be easily solved by restoring the operating grants that we've seen cut.

The second part of your question, I'm not totally clear on.

Ms Lankin: I think you've covered it in there.

The Chair: Thank you very much, Mr Boyko, for coming before us here this afternoon.

Mr Boyko: Thank you.

The Chair: Is Professor Graham here yet?

ATHABASCA UNIVERSITY

The Chair: Seeing that our next presenter has not arrived, are the representatives from Athabasca University prepared to come forward? Good afternoon, welcome to the committee.

Ms Frances Gunn: You mean I can use both 15 minutes?

The Chair: You certainly may.

Ms Gunn: My name is Frances Gunn and I represent Athabasca University throughout the province of Ontario. I am here this afternoon on behalf of our president, Dr Dominique Abrioux.

I'd like to make three points with you this afternoon. The first is to introduce you to Athabasca University, and

the second and third are about some specific recommendations we'd like to make about Bill 132.

To begin, Athabasca University is Canada's open university. We are the premier and the largest provider of distance and on-line high-quality university education in Canada. We're publicly funded in Alberta and, as an open university, our mandate is to provide high-quality university education to all potential students. We're dedicated to removing barriers to access to education. That's how we're built.

Most importantly, I think, for the purposes of our discussion here is that we are a full member of the Association of Universities and Community Colleges of Canada. I'll be speaking about this fairly often so I'll refer to it as AUCC—quite a mouthful.

We currently have 24,000 students across Canada and the world. Six thousand of those are here in Ontario. Our students come to us for a number of reasons: firstly, they want a flexible route to a university credential and that means without having to leave home or their families or communities; secondly, they want to take courses for transfer perhaps to Ontario universities; and thirdly, they may want to complete a degree after doing a diploma at one of the Ontario colleges.

As a result of this, we would like to make a recommendation about section 2 of the bill. Section 2 refers to the authority to grant a degree, as you know. AU, or Athabasca, currently has hundreds of agreements in place now with community colleges across Ontario and with Ontario universities. These agreements provide for students to be able to transfer credits for other credentials; it allows them to complete degrees; it allows them to gain credit or recognition of their previous learning, and they are often collaborative programs.

All of these agreements are around parts of a degree. The wording in section 2 of the bill, particularly paragraphs 2 and 3, refer to a part of a degree not being offered by the people outside or inside Ontario. This wording would make these well-established agreements not only cumbersome but in some circumstances extremely difficult. As a result, we would like to recommend that the wording "part of ... a degree" be removed from section 2, paragraphs 2 and 3. Now, I believe you've already heard this in some other context, perhaps from some of the college presentations.

Most important, though, I would like to speak to section 4, which is about the terms and conditions of the consent of the minister. As I mentioned, Athabasca University is a full member of AUCC. Although there is no national accreditation of publicly funded universities in Canada, the default accreditation status is this membership in AUCC. The process is a very rigorous evaluation and it's capped by a visit from three presidents from member institutions, so three other university presidents. Because of this process, across Canada, members have equivalent standards to other members.

There are three results from this. The first is that there is a very homogeneous university community across Canada. There is widespread acceptance of credits and

degrees among that community. The second is that this provides for recognition that publicly funded universities are accountable to their government and to their students by this commonality of standards. The third is that AUCC members can generally provide on-site and/or distance education with only a pro forma declaration in other provinces.

Section 4 makes no provision for and/or any recognition of this consistency among publicly funded institutions across Canada. We would like to recommend that section 4 be amended so the new act includes an expedited process for AUCC members and that that process means that applications perhaps take three months for approval. This process should be very separate from the process for colleges and their applied degree applications and certainly for private institutions. Finally, this process should accept the AUCC membership as the primary stamp for AUCC members to conduct learner-centred activities in Ontario, and that AUCC members not have to have their institutional standards re-examined or reassessed with every application.

In summary, I'm glad to introduce you to Athabasca University, if you're not already aware of us. I would like to make a recommendation around section 2 but, most important, I would certainly like to make a recommendation around section 4 as it applies to publicly funded institutions across Canada.

The Chair: Thank you. That has left us time for questions, about five minutes. This time it will come to the government.

Mrs Molinari: I'll begin, and if my colleagues have anything to add, then certainly they can.

First I want to clarify one of your concerns in section 2 with regard to the wording of "or part of a program." I want to assure you that the government fully supports and encourages the co-operative arrangements that are presently there between colleges of applied and technology and our Ontario public universities. This bill will not affect any of those future agreements. Students will be provided with that seamless post-secondary educational experience and recognize that they study at all different levels. I hope that addresses your concern with that. That was not the intent of that wording.

Ms Gunn: Out-of-province institutions also, Ms Molinari?

Mrs Molinari: Those that presently have a co-operative program within Ontario will continue to have that, so having that in the act is not going to affect those that at present already have a good working relationship. As a government we support positive and good working relationships between various institutions and what they provide for the students. It's something that has been successful, and we anticipate that it will continue to be successful. It will not jeopardize that at all.

I want to thank you for your presentation. It's quite extensive. Also your brochures and everything you've supplied for us certainly can give all the committee members a very good picture of the success that Athabasca University has had over the years and that it will continue

to have. We appreciate your taking the time to come and make your presentation.

Ms Gunn: And section 4, at the risk of—

Mrs Molinari: The recommendations will be taken into account with the rest of the presentations that are coming forward in these hearings. That's what the hearings are for, and these will be looked at by the ministry to see if the concerns you've raised can be addressed. Hopefully we'll be able to cover those concerns as well.

Mrs Julia Munro (York North): Thank you very much for coming. I just have a quick question that does go back to section 4. I wondered whether or not you could give us any examples of other provinces where those negotiations or recognitions—my concern stems from the notion that there wouldn't be the same relationship in terms of accountability. I just wondered if you had other examples in other provinces.

Ms Gunn: I certainly have, and I can tell you that with every other province the only process for publicly funded institutions is a pro forma one. For example, if Queen's wants to do a weekend session of their MBA in Alberta, it's very much a pro forma process that involves notifying the government, "We're going to be here at this time and here are our activities." It really is to that degree of complexity. It's an even smaller process, if I can use that vernacular, in other provinces. For example, in BC a publicly funded institution can conduct activities—ie, put on classes or distance education activities—without notification or with very little notification.

Here in Ontario our experience is that it's been quite a long process of approval on applications. So we're also looking for this same sort of relationship that publicly funded institutions have with other provincial jurisdictions.

Mr Garfield Dunlop (Simcoe North): Just a quick question. Do you have any international clients?

Ms Gunn: Oh, yes, very much so.

Mr Dunlop: How about Americans?

Ms Gunn: The Open University out of Britain has just recently formed the Open University in the United States, and we are a member of that consortium. When you say "clients," if we're talking students, the answer is yes. We've got a whole pile of nurses in Texas who are taking our post-RN degree with us, for example.

The Chair: Thank you very much. We appreciate your taking the time to come and make a presentation before us this afternoon.

I will try again. Is Professor Graham here yet? We had received a call from his office that he was running late. Seeing no professor, how about a representative from the Canadian Union of Public Employees, Ontario?

Ms Lankin: Can we have five-minute recess?

The Chair: Ms Lankin has asked for a five-minute recess, and in that time I'll ask the clerk to contact the offices of those two individuals to see whether they are still intending to attend. The committee stands recessed for five minutes.

The committee recessed from 1724 to 1728.

The Chair: I am told we are now joined by our final presenter this afternoon.

CANADIAN UNION OF PUBLIC EMPLOYEES, ONTARIO

The Chair: Good afternoon. Thank you for arriving a little early and taking the space of someone who has not been able to make it.

Mr Brian O'Keefe: My name is Brian O'Keefe. I'm the secretary-treasurer of CUPE Ontario. We're very pleased to have the opportunity to give our views on this important piece of legislation.

We represent a large part of the workforce in the university system. We represent 180,000 members across this province and we have 19,000 support staff who work in the university system, including a lot of the maintenance and custodial workers, teaching assistants and contract faculty.

We have major concerns with this piece of legislation. We feel this is going in a direction that is totally contrary to everything we stand for in Ontario. This government has no mandate to go in this direction. This is not something that was put to the electorate. We see this as undermining the quality post-secondary education system we've got in this province, the 17 current publicly administered universities. We feel it will undermine those universities, and not only that, but it will erode access to quality education. What we're seeing more and more in this province is a drift toward a situation where post-secondary education is a privilege of the few, where there's a polarization between the rich and the poor, and where everybody is being shut out with the exception of better off people. We feel that is totally contrary to all the principles we believe in in Ontario.

I want to address three specific issues. The first issue I want to talk about is the creeping restructuring that's going on in the universities already. Although the main focus of this legislation is around granting private degree-granting institutions the right to set up in this province, there's a huge amount of privatization creeping into the system already. There are a number of different ways this is appearing. Through the research and development challenge fund, we're seeing partnerships with the private sector. We also have the traditional public-private partnerships. We have long-term leases that are being granted to the private sector for little or no money. We also have situations where we have minority shareholdings and also franchises.

There are a whole variety of different structures of privatization that are out there right now and this is creating a huge amount of havoc in the system. There's a huge amount of demoralization of the workers in the university system. Some bitter strikes have taken place over the last year, at the University of Toronto and now we've got a bitter struggle going on at York University. We see that as very much a symptom of what's going on in the restructuring in the post-secondary education sector. We feel that's very regrettable and that this piece of legis-

lation opens the door to the merging of programs and other restructuring. It all seems to be focused on the corporate model, the bottom line model. We don't see this as furthering quality education in any way, shape or form. That's not the agenda here. We feel the agenda should be toward providing quality education, not education that's delivered on the cheap.

The main issue I want to talk about is granting the privilege to private degree-granting institutions to set up in this province. It's a myth to think that public money isn't going to go to these institutions. It will go there in a variety of different forms, whether it be through the tax system or through the use of existing university and public libraries. That is certainly going to happen. What we see in the United States is that, on average, private universities get about 30% of their funding from the public sector. So it is not true that public money won't go there; it will. The most obnoxious part about this is that it will siphon money away from the existing universities we have in this province and will undermine them. You're going to see a deterioration of standards in the existing system to finance these private degree-granting institutions.

Also, we see with the existing private universities we know about in this country, and I'm talking about the University of Phoenix in British Columbia and Unexus in New Brunswick, that the fees for those universities are about triple what they are for the average university in Ontario. This is catering to the elite, to those people who are better off. It's certainly not going to do anything to deal with the issue of accessibility to post-secondary education in this province. You're probably well aware that over the past 10 years, tuition fees have risen on average by 140%. Students are footing the bill for the education system to the point where middle-income people and poor people are rapidly reaching the point where they're not going to be able to attend these institutions. So private degree-granting institutions are not going to do anything to help the accessibility issue.

Then there's the issue of increased enrolment. As you're well aware, enrolment in universities is probably going to increase by about 40% over the next 10 years. That issue has to be addressed. We've also got the double cohort issue that's coming up in a few years' time. Both of these issues have to be dealt with. If there's some notion that private degree-granting institutions are going to solve that problem, they certainly are not. It's going to make the issue much worse because the existing institutions are going to be undermined.

Another issue that's really important is the creaming that's going to take place. These private groups that we know of are primarily centred around delivering post-graduate degrees in the business sector. Those are going to be creamed away from the existing system. It's going to shift resources out of the public sector into these private institutions, and I think that's extremely regrettable.

As far as the treatment of students is concerned, this is also a major concern. I think you should look very carefully at the record of the University of Phoenix in the

US. They have been up on a number of different charges. They were fined half a million dollars for sloppy reporting and record-keeping. They gave inaccurate information around eligibility for student loans and were fined \$6 million for that. This is the sort of thing we're going to see if these institutions set up shop here. Furthermore, we've got to look at the possibility that some of these institutions may go bankrupt or get themselves into serious financial trouble. What is going to happen to the students who are attending these bodies? That is a major concern.

There's another part of this legislation that I have real concern about and that deals with the accessibility issue again. There's a really strong tone around streaming that appears in this legislation, where you're trying to parallel what's going on in the school system where people are being forced into making a choice at grade 9 whether they want to go into an academic field or a technical field. It seems to me that what's being advocated in this legislation is to parallel what's going on in the school board system. This is regrettable. It's not the Canadian tradition and certainly our union is going to fight that with everything we've got. Streaming is not going to advance the interests of working people in this province. If we want real accessibility, we've got to go in a very different direction to that.

On the funding issue, I think it's really important to talk about funding because there are some real choices here. The government decided to go in a direction toward the private sector, trying to farm out as much of the post-secondary education system as possible, over to the private sector to deal with the demands that are out there. That's the first thing they've done. The second thing they've tried to do is to increase the level of funding coming from tuition. It's my understanding right now that less than 50% of the funds are coming from the government, somewhere in the vicinity of 30% is coming from students and the rest is from the private sector. This is a very sad state of affairs that has come to this province, where it appears the government is bailing out of its responsibilities for post-secondary education.

This government has cut the funding to the existing 17 universities by \$280 million. That was back in 1996-97. If you project that to the current date, it's a much higher amount of money. So a significant amount of money has been cut out of the system. The solution is not a private-sector solution; the solution is to properly fund the existing education system.

Another issue that's really important is the quality assessment board, that somehow or other this is how there's going to be accountability in the system. I see this as giving away the store. The government wants to get out of making the serious decisions that need to be made in post-secondary education by farming it out to an arm's-length body. This is a very unfortunate trend. Previously, to set up a university in this province, there had to be a piece of legislation that was properly debated, and people were consulted. What's going to happen here is that we have a body—we don't even know who is going

to be on this body—making decisions that should rightly be made in the public forum.

There's another issue that's of great concern here, and that is, is this quality assessment board in the final analysis going to have the power to give the existing public institutions the right to transfer over to the private sector if they so desire? If that's the agenda, that's going to be a sad loss for everybody in this province.

As to the inspectors who are going to be checking up on various different aspects of the system, we have a real concern that there are going to be people checking up on students in terms of their eligibility for loans, checking their T4 slips against their loan forms and stuff like that. We see this as a real invasion of privacy. The energy is not going in the direction it should be.

In summary, we are totally opposed to this direction. We feel this direction is totally contrary to the principles we believe in in this province, of a quality, publicly administered, accessible education system that's available to everybody. We see some very serious impacts here for working people, both those who are attending education, the children of families who want to attend education and the actual workers who work in the system. This will be a disaster and it is not going to do anything to provide quality post-secondary education in this province.

The Chair: You've timed your presentation to the minute. We very much appreciate your coming before us

and the very detailed submission you've brought with you. Thank you for coming early and accommodating us. It's my understanding we have a vote in a couple of minutes, anyway.

With that, committee members, since I don't believe Professor Graham—I've seen no one else come in. Mr Levac?

Mr Levac: Mr Chair, thank you for the indulgence. If Professor Graham has submitted a package, would it be possible to have it?

The Chair: We will circulate anything we receive from Professor Graham or anyone else who makes a submission to the committee.

Mr Levac: I have a question of clarification. That being said—there were comments made by the members on the other side that we'd take these into consideration—I'm assuming that all presentations are collected by the committee that's doing the research, and the amendments and all that kind of stuff, and they are taken into consideration even though they weren't able to make presentations.

The Chair: Absolutely, and all written correspondence is circulated to all the committee members.

With that, the committee stands adjourned until 3:30 next Monday.

The committee adjourned at 1744.

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First Session, 37th Parliament

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Première session, 37^e législature

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Journal des débats (Hansard)

Lundi 4 décembre 2000

Standing committee on general government

Ministry of Training,
Colleges and Universities
Statute Law
Amendment Act, 2000

Comité permanent des affaires gouvernementales

Loi de 2000 modifiant des lois
en ce qui a trait
au ministère de la Formation
et des Collèges et Universités



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LEGISLATIVE ASSEMBLY OF ONTARIO

ASSEMBLÉE LÉGISLATIVE DE L'ONTARIO

STANDING COMMITTEE ON
GENERAL GOVERNMENTCOMITÉ PERMANENT DES
AFFAIRES GOUVERNEMENTALES

Monday 4 December 2000

Lundi 4 décembre 2000

*The committee met at 1551 in committee room 1.*MINISTRY OF TRAINING,
COLLEGES AND UNIVERSITIES
STATUTE LAW AMENDMENT ACT, 2000LOI DE 2000 MODIFIANT DES LOIS
EN CE QUI A TRAIT
AU MINISTÈRE DE LA FORMATION
ET DES COLLÈGES ET UNIVERSITÉS

Consideration of Bill 132, An Act to enact the Post-secondary Education Choice and Excellence Act, 2000, repeal the Degree Granting Act and change the title of and make amendments to the Ministry of Colleges and Universities Act / Projet de loi 132, Loi édictant la Loi de 2000 favorisant le choix et l'excellence au niveau post-secondaire, abrogeant la Loi sur l'attribution de grades universitaires et modifiant le titre et le texte de la Loi sur le ministère des Collèges et Universités.

The Chair (Mr Steve Gilchrist): I call the committee to order for clause-by-clause of Bill 132, An Act to enact the Post-secondary Education Choice and Excellence Act, 2000, repeal the Degree Granting Act and change the title of and make amendments to the Ministry of Colleges and Universities Act.

As is our protocol, instead of opening statements, members are free to speak to the section and/or anything that comes to mind, but your invitation to do that would be my calling for any questions, comments or amendments to section 1.

Mrs Tina R. Molinari (Thornhill): Mr Chair, are you starting with some opening comments and opening statements? Are we all doing that?

The Chair: If anyone wanted to make opening statements, this would be a good time. If you'd rather reserve your comments to the relevant sections, that also is in order.

Mr Rosario Marchese (Trinity-Spadina): Mr Chair, I want to put on the record the fact that the parliamentary assistant has made some effort to work with the opposition members as a way of—I'm not sure how collaborative it is, but it is encouraging to see that some members are interested in working with the opposition to try to get some amendments through on the basis that they are fair and reasonable and they would probably improve the bill.

I just wanted to congratulate Ms Molinari for the efforts she is making. Quite frankly, I don't see it too often, I must admit, since we've got a few moments. I recall in the past when I used to do this, as a government member, and found that some things you folks were saying on the other side were reasonable. Finding them reasonable, I would go to the staff and say, "What's wrong with that?" Then we'd go to the whip and say, "I'm going to support this," and they would go crazy. They would accuse us of freelancing and say, "What are you doing?"

It is my view that often opposition members can, obviously, contribute to making the bill better, even if we disagree with parts of it or most of it. It is the duty, I think, of the government members, while they are in committee, to listen very carefully to what opposition members have to say—that's not always been the case—and in so doing, adopt some of the changes we are making. I wanted to say that for the record.

On this bill, I am completely opposed to the privatization of our university system. I think it's wrong. I think there's no need for that. We believe that very few people in Ontario believe there is a need for them. You would have to scratch your head awfully hard and dig deep into the ground to find a couple of them who might well agree with private universities. I don't know too many, but I'm convinced some of you know a couple who want private universities.

Generally speaking, governments respond to a perceived need, or we respond to the fact that people are demonstrating in the streets, saying, "We want private universities." That's the way it works generally, right? I suspect some of you might argue that you're leading on this issue. Even though there is no groundswell of support out there, you, as brilliant as you are—because you folks are omnipotent and omniscient and so much more—know better than the general public. For their benefit, because you are so benevolent, you have introduced a measure that is really, really going to help the people out there who are looking for choice and excellence; not just choice, but excellence too. As I say, while I haven't seen too many, I suspect you are looking way ahead, anticipating the crowd and the groundswell of people who will demand it some day, and you're ahead of the pack.

I wanted to make those couple of points to suggest as well that you're not going to solve our enrolment problem, our capacity problem. We have a capacity prob-

lem that you're not fixing very well. You would rather spend \$1 billion in tax rebates than building capacity of our university system to accept these students who we should be accepting in our universities. That's your priority. You don't want to spend like the old governments. No, no, that would not be your way, or certainly M. Eves's way, who said today, "We're not going to go back to the tax-and-spend ways." But \$1 billion of tax rebates is something that maybe you can afford to do. I understand. You found \$1 billion by cutting education funding: elementary and secondary, \$1.6 billion; post-secondary, \$500 million; and I would say in total about \$1.4 billion in operating funds. While you restored a couple of dollars, by and large, you cut a whole lot of money.

You're not dealing with the capacity problem we've got and students are going to be strapped to find a place. So you say, "That's why we're introducing private universities, to deal with the capacity issue." Well, how many students do you think that will accommodate? I don't think you know. It might accommodate a couple of thousand students, maybe. Some claim and say—

Mrs Marie Bountrogianni (Hamilton Mountain): A couple of thousand rich students.

Mr Marchese: A couple of thousand rich students—God bless. There are rich and poor. They all need to have choice and excellence.

The estimate is that you would need, by the end of the decade, about 90,000 spaces for our students. At the rate you're going, we're in trouble. You've also got the double cohort problem you've got to deal with in three or four years, and that's something I don't think you're planning for very well. And, by the way, this will happen when the recession is in full force, so you're going to face a whole heap of problems. So while this private university of yours will accommodate the wealthy young men and women who need choice, it simply won't solve the capacity problem. To say that it does is dumb. It's not logical. It's absurd. It's really dumb. What need does it solve? I'm not quite sure. I really don't know why you folks are doing this.

My opposition is particularly to this introduction of private universities. We are afraid that once the North American free trade agreements are applied to this bill, we're going to face problems. Once you allow private universities to come in, you have to apply fair treatment laws or fair treatment principles to them, which means they will have to be treated equally along with other public institutions. If that is so, a whole lot of people are going to be unhappy about what it means to treat them equally when they are presumably a private university and presumably they're going to have to pay their own way. You say the government is not going to provide any funding, which, by the way, I doubt. That's why we've got some amendments, to try to make it more difficult for the private universities to have access to the dollars they're hoping they're going to get.

Anyway, I don't want to bore you too much. We'll have an opportunity, once this comes for third reading, to speak to the public directly, and I will have more to say on this and other things.

The Chair: We certainly look forward to those comments.

Mr Marchese: Of course.

Mrs Bountrogianni: I just want to make it clear that the Liberal caucus does support this part of the bill. We agree with the part that gives applied degrees to community colleges. We think that's a timely and correct choice and it will make them more competitive. We will be watching that those degrees are of quality level and they're not just Mickey Mouse degrees, just a piece of paper saying you've got a degree without an employer actually respecting that piece of paper. We like that part of the bill.

The part that we're against is the private universities. We understand it's a majority government, so of course it's going to pass. Our amendments are made to protect the students. I too want to thank the parliamentary assistant, Ms Molinari, for working with us in the hopes that our amendments will either pass or be part of regulation or be part of some process so that students are protected during the enactment of this bill.

1600

We too believe that part of the motivation for this bill was the fact that the double cohort is coming and the government hasn't planned appropriately for it: over 90,000 more students in 2003, and then the echo boom means that this problem will continue even after those years. If this is a solution, I think we're going to have difficulties in 2003.

Tuition has increased. Deregulation of some programs, particularly medicine and law, has made it the area of the rich right now. Research has shown that students with families under \$50,000 are accessing these deregulated programs to a significantly lesser degree than nine years ago. Those are some of the concerns we have. We don't think this bill will address those concerns, but as an opposition all we can do now is lessen the blow, protect the students, and hope that times will change and that the public education system will be funded more appropriately so that the need for private institutions won't be there and they will close on their own because the public institutions will continue to offer the programs that they offer.

Just one last note: in all of the Canadian embassies across the world, one of the bragging points is the fact that we have only public universities, by and large, in Canada. That ensures consistency of quality, and that's one of the selling points of this country. It really saddens me to see that the beginning of the end of this is in the province where I reside.

With that, I go in good faith that the government will at least acknowledge that some of the amendments are good and that they will protect the students when this bill is enacted.

Mr George Smitherman (Toronto Centre-Rosedale): I am happy to take the opportunity to put on record my concerns with respect to what I do see as the slippery slope toward the loss of the traditional, and I would have hoped enduring, values that Canadians relate to. With

bills like this to allow for private universities I think we see the essence of what is Canada heading down a very, very treacherous and slippery slope.

It seems to me that Canadians associate well-funded systems of public health and public education as key elements, defining characteristics, of their country. We saw in the recent federal election campaign extraordinary debates around one-tier or two-tier. In my view, this is the two-tier equivalent of the debate that went on with respect to the health care system.

I would say that, for those who, like me, feel a great sense of angst in the face of this increasing trend on an economic level toward globalization and the threats that come with it in terms of whether our country—a small country in the grand scheme of things—will be able to sustain itself and the things that we value in the face of these extraordinary global pressures, the government has caved in on this for what amounts in some sense to a land play, as I hear about it discussed in York region and from prominent members of governments past. Traditional Canadian values are put at risk by this legislation, and the hope that Canadians share in these common values of a well-funded system of public education and public health—they are made much less likely to be enduring Canadian values as a result of the government's willingness to allow a different set of rules to play for those who have no limit to cash. Thank you.

The Chair: Thank you. Further debate?

Mrs Molinari: I welcome the opportunity to speak for a few moments before we get into the actual debating clause by clause of the bill.

I want to first of all thank all the presenters who came and took the time and effort to make presentations before this committee, and also all of the people who participated in our ongoing consultation process that the minister and I engaged in through the months of May and June. Some of the issues that came through those consultations and the presenters—there was a consistent theme, and I believe the legislation that is put forward addresses that theme that we heard through the consultation process.

I want to also thank the opposition members for their interest in the bill. Although we differ philosophically in a number of issues, I think the time and effort that they spent in putting together the amendments that they've presented and in the research that they've done certainly says they have a real interest. I thank them for their effort and their willingness to work co-operatively. I really appreciate that.

I want to clarify the intent of this legislation. If enacted, the proposed legislation would allow the government to implement its access to degree programs initiatives to provide more choice to students and promote improvement and excellence in our post-secondary system.

I also want to clarify that this bill is not designed to address the double cohort or increasing enrolment, as has been stated by both the opposition members. The government invested over \$1 billion through SuperBuild to

create 73,000 student spaces. In essence, this bill is about choice for students. We have never said that this bill would be what would be addressing the capacity issue.

I also want to put on record some of the concerns that were expressed in some of the presentations; specifically, the impact of NAFTA and GATS, the General Agreement on Trade in Services. Under the existing North American free trade agreement, Canadian governments have the right to adopt or maintain their own policies in respect of social services such as public education and public training. Ontario's ability to provide financial support to its public universities will not be affected by NAFTA. As Canada's Minister for International Trade advised the House of Commons in May 2000, "It is Canada's right to regulate and protect fundamental Canadian values within the health care sector as well as in education."

With respect to the GATS, education is not part of the existing GATS agreement. The federal government has consistently stated that education will not be part of the negotiations for a new GATS agreement. With respect to the current GATS negotiations, Canada's World Trade Organization ambassador and former Minister of International Trade, Sergio Marchi, appeared before the House of Commons standing committee on foreign affairs and international trade in March 2000 and stated, "Let me assure you that Canada's health and education services will not be on the table during these discussions." This position has been supported by Ontario's Minister of Economic Development and Trade, who has stated on numerous occasions that Ontario will not support any new WTO trade liberalization agreement that jeopardizes the provision of public education, health and social services in the province.

With respect to some of the comments about provincial research funds, at present, only publicly assisted universities, colleges of applied arts and technology, not-for-profit research institutes and research hospitals qualify for research funding under the competitive programs at the Ministry of Energy, Science and Technology; ie, the Ontario research and development challenge fund, the Ontario Innovation Trust and the Premier's Research Excellence Awards. If a private university were to request eligibility or wished to partner with a publicly assisted university, the issue of institutional eligibility would have to be re-examined. A private university would not qualify under the existing criteria.

Thank you, Mr Chair, for allowing me to put that on the record. I am prepared now to continue on with the passage of the legislation through the committee and to go through the clause-by-clause.

Mr Marchese: Just a couple of remarks. The issue of capacity is on the table. Her minister and her government generally speak to this issue all the time. I'm surprised Mrs Molinari says, "It is not an issue for us or this bill," as if they're not connected or related and we shouldn't even talk about it, because they have said it deals with the issue of capacity on a number of occasions in a

number of speeches that have been made. So it surprises me that she would say that.

As a corollary, she then said, "Ah, but we have the SuperBuild fund. That deals with capacity." The SuperBuild fund is an inadequate fund. Just to remind you, New Democrats used to spend more on capacity building in a recessionary period than you folks are doing in this wonderful economy of yours that you are so proud of. While you're saying the SuperBuild fund is taking care of that, it is inadequate. Proportionate to this great wealth of this economy, it is less than what we were spending. Proportionate to the needs, it is hardly commensurate. We've got a problem is what I'm saying to you, Tina.

I know you've got to put a good spin on it. That's fine, I understand, because that's what you folks do all the time here in committee and in the Legislature, and you're always performing, right?

1610

We always have to tell the folks, on television or in print, these are the facts. I love your minister. Today she says, "Our facts are different." She knows about her facts, right? She has never put out these facts by way of research, saying, "Here we've got the research." She just says, "You're not telling the truth." You can't say that, but she says to the opposition members, "No, no, no, those facts are wrong." Does she say that, more or less? Presumably her facts are right and she says that all the time. But it's not just she—

Interjection.

Mr Marchese: She's the minister. She's omnipotent; exactly.

With respect to the issues of NAFTA and the multi-lateral agreement on investment, GATT is the old group of people who were negotiating. That has been disbanded. Now we've got a new group, MAI. Now we've got another little group dealing with services.

You may not have heard about it, Tina, but a whole lot of people in the background—those rich countries that hire a whole lot of good bureaucrats, who work out agreements for us little people—have services, which by the way include health, education, culture and so on, on the table. The Americans want this on the table and so do a few other countries.

By the way, while you quoted M. Marchi as saying one thing, some of those people federally are doing another in the back scene. We've got to be vigilant at all levels here. It's not just provincial members not knowing what's happening out there, but at the federal level we may not be getting the straight goods either. So services are on the table.

I am quite concerned about the fact that health is a big industry, and a whole lot of people who want to make money want health to be on the table. You know that. Education too is a big industry, and a whole lot of people could stand to make a lot of money, and they want that on the table too. International agreements, not just between us and the Americans, right? I thought I'd put that on the record for you.

With respect to the fact that they wouldn't qualify for research, maybe I haven't seen any amendment that you might have made, but you might want to clarify that in the amendments, so you would say they don't qualify for research funding. You might want to specify what they don't qualify for so that we know, as opposed to saying they don't qualify—you might want to spell it out in the bill, which would be helpful. I would support it, I think.

Mrs Bountrogianni: Quickly, I want to corroborate my colleague Mr Marchese's comments. The minister has in fact addressed the capacity issue through this bill on a number of occasions and said, "This is one way; we can't do it on our own." Also, even if—and it's a big if—the SuperBuild was enough, that's only walls and buildings.

Not one more professor was hired, or there isn't any plan to hire one more professor, or equipment, and those are operating dollars. So to say that you have fulfilled the space problem for 2003 just by building buildings is inaccurate.

As far as public monies, thank you for reading that, but what you were quoting started with "At present," which means the future is unknown.

I also want to go back to last week's hearings, where the parliamentary assistant herself said, "I can't guarantee you what other ministries will give or not give, with respect to public monies, to these private institutions." I saw the ministry employee squirm a little bit when you said that, so maybe it was a mistake. Maybe there is some sort of guarantee so other ministries cannot give to private universities. Again, there is no assurance, so that part of the bill is wishy-washy at best.

We should probably just be honest with the public and say, "We believe in this and therefore we'll give public money. Judge us at the next election." But this wishy-washiness is very bothersome and I want to put that on the record.

The Chair: Thank you. Further debate? To section 1?

Seeing none, shall section 1 carry? Section 1 is carried.

Section 2, any comments or amendments? Debate?

Seeing none, shall section 2 carry? Carried.

Section 3: Mr Marchese, you are first up to bat. It would be the motion entitled A1.

Mr Marchese: Subsection 3(7) of the bill, section 12 of the Ministry of Training, Colleges and Universities Act.

I move that section 12 of the act as set out in subsection 3(7) of the bill is amended,

(a) by striking out subsections (1) and (2); and

(b) by striking out "\$25,000 if the person is an individual or" in clause (5)(a).

The Chair: Do you want to speak to your amendment?

Mr Marchese: No. I think we can go through most of these things really quickly.

The Chair: OK. All those in favour of the amendment? Opposed? The amendment is lost.

Further debate on section 3? Seeing none, shall section 3 carry? Section 3 is carried.

Mrs Molinari: I move that section 4 of the bill be struck out and the following substituted:

“Commencement

“4(1) Subject to subsection (2), this act comes into force on the day it receives royal assent.

“Same

“(2) Sections 1 and 2 come into force on a day to be named by proclamation of the Lieutenant Governor.”

The Chair: Do you wish to speak to the amendment?

Mrs Molinari: Yes. This amendment is administrative. The Post-secondary Choice and Excellence Act, 2000, will be proclaimed at a later date if the bill is enacted. The current Degree Granting Act will be repealed. Until the proclamation of the Post-secondary Choice and Excellence Act, 2000, the current Degree Granting Act will remain in force. All other parts of the bill will come into force on the day of royal assent if the bill is enacted.

The government feels it would be prudent to give itself some administrative flexibility to determine when sections 1 and 2 come into force. The new Post-secondary Education Quality Assessment Board that will provide the continuing quality control has not yet been appointed. It has not yet developed criteria, which we feel should be done carefully and with full consideration of maintaining quality. When the board is appointed and has developed its criteria and processes to ensure the competency and ability of an applicant to provide a degree program and to ensure consumer protection, we intend to proclaim these sections.

The Chair: Further debate? Seeing none, I'll put the question.

All those in favour? Opposed? The amendment is carried.

Shall section 4, as amended, carry? Section 4, as amended, is carried.

Section 5. Any debate or amendments? Seeing none, shall section 5 carry? It is carried.

Schedule, section 1. Shall schedule section 1, carry? Carried.

Schedule section 2.

Mrs Molinari: I move that section 2 of the schedule to the bill be amended by adding the following subsection:

“Exception

“(2) Despite subsection (1), a person may directly or indirectly advertise and provide a program or part of a program of post-secondary study leading to a degree if,

“(a) the person provides the program or part of the program under an agreement with another person who is authorized by an act of the assembly or by the minister under this act to provide the program or part of the program; and

“(b) the degree to which the program or part of the program leads is conferred only by that other person who is authorized to provide the program or part of the program.”

The Chair: Do you wish to speak to the amendment?

Mrs Molinari: Yes. This adds a subsection to section 2 of the schedule to Bill 132. This schedule is the Post-secondary Education Choice and Excellence Act, 2000. Because we are suggesting adding a new subsection, the numbering of section 2 will change. The current section 2 would become subsection 2(1).

1620

In submissions to the committee I have heard, and the minister has also heard, that there has been some confusion about the regulation of collaborative programs between colleges of applied arts and technology and other institutions. We believe this proposed amendment clarifies and provides more concrete and specific wording. It does not change the bill's intent from the previous wording. The government encourages and, through this amendment, confirms that collaboration agreements between colleges and other institutions will be permitted as long as one of the partners has authority to offer a program or part of a program and to offer the degree under the proposed provisions of this act.

The Chair: Further debate? Seeing none, I'll put the question.

All those in favour of the amendment? The amendment is carried.

Shall section 2 of the schedule, as amended, carry? It is carried.

Schedule 3 of the section.

Mr Marchese: I move that section 3 of the schedule to the bill be amended by striking out “or by the minister under this act.”

The Chair: Do you wish to speak to that?

Mr Marchese: No, it is quite obvious. I'll speak to this in the House when we have time.

The Chair: Any further debate?

Mrs Molinari: I could speak on and explain all these amendments. We won't be supporting this. This is in the opposite direction of the government initiative and cannot be supported. Sufficient scrutiny of the new private universities will occur, under the bill's proposals, by expert academic assessors, by representatives of all interested parties serving on the Post-secondary Education Quality Assessment Board and by the transparency process. The giving of a consent for a fixed term will allow for further scrutiny on an application for renewal, which presently doesn't exist. We will not be supporting this amendment.

The Chair: Further debate?

Seeing none, all those in favour of Mr Marchese's amendment? Opposed? The amendment is lost.

Shall section 3 of the schedule carry? It is carried.

Section 4.

Mr Marchese: Here I go again, Tina. I move that subsection 4(1) of the schedule to the bill be amended by striking out “sections 2 and 3” and substituting “section 2.” I want to hear from Tina.

The Chair: Further debate?

Mrs Molinari: It is basically the same as the previous one, so we will not be supporting it.

The Chair: Any further debate?

Seeing none, all those in favour of the amendment? Opposed? The amendment is lost.

Mrs Bountrogianni: I move that section 4 of the schedule to the bill be amended by adding the following subsection:

“Exception

“(1.1) Despite subsection (1), the minister shall not give a written consent to a person to do one or more things described in section 3 if they are seeking consent as a private university.”

We believe the term “university” should only be in the public domain. These private things can call themselves institutes or schools, but we prefer the term “university” be in the public domain.

The Chair: Any further debate?

Seeing none, all those in favour of the amendment? Opposed? The amendment is lost.

Mrs Bountrogianni: I move that subsection 4(4) of the schedule to the bill be amended by striking out “and” at the end of clause (a), inserting “and” at the end of clause (b) and adding the following clause:

“(c) that the person has made arrangements to ensure that students will receive a partial course credit from another educational institution if the person ceases to teach a course before the scheduled end of the course.”

Basically, this is to protect students if these institutions, like their private college cousins, either go under or professors or teachers—I have part-time instructors in mind—quit in the middle of a course. It just protects the students.

Mr Marchese: Very reasonable, I think.

The Chair: Further debate?

Mrs Molinari: Just a comment on this amendment. We will not be supporting it. There is no jurisdiction anywhere, of which we are aware, that requires institutions to accept transfer students. We intend to make it mandatory for consent holders to advise students of transfer arrangements where they exist, and to let students know if they do not exist. It is covered in a portion of the bill, number 13(e) under the regulations.

This is unduly restrictive, as the board will assess the viability of proposals and we do not expect proposals to be recommended that will result in closure.

The Chair: Any further debate?

Mrs Bountrogianni: There is a jurisdiction, and that’s the province of Alberta, but we’ll go on to the vote now.

Mr Marchese: Excuse me, they don’t know that?

Mrs Bountrogianni: Obviously not.

The Chair: Any further debate? Seeing none, I’ll put the question.

All those in favour of the amendment? Opposed? The amendment is lost.

Mrs Bountrogianni: I move that section 4 of the schedule to the bill be amended by adding the following subsection:

“Minimum requirements

“(4.1) The Minister shall not give a consent unless he or she is satisfied that,

“(a) the person seeking the consent will have physical facilities containing equipment and learning resources appropriate to the educational programs to be offered and a sufficient number of full-time teaching staff with appropriate educational qualifications to teach the programs; and

“(b) the quality of education and training to be offered will be comparable to or better than the quality offered by educational institutions operating in Ontario on a non-profit basis.”

Again, this is basically to protect the student with respect to the quality in the institution. I understand there will be a board that will be okaying the quality of institutions, but this is an added insurance.

As well, I want to refer the government members to the institute in Mississauga—I can’t remember the name—which defrauded the government of \$18 million of OSAP. When investigated, it was a two-room joint. I just want more assurance that that won’t occur at the university level.

The Chair: Any further debate? Seeing none, I’ll put the question.

All those in favour of the amendment? Opposed? The amendment is lost.

Mr Marchese: I move that subsection 4(5) of the schedule to the bill be amended by striking out clause (b).

The Chair: Do you wish to speak to the amendment?

Mr Marchese: I want to hear from Tina.

The Chair: Any further debate?

Mrs Molinari: I can just say it’s the same as the other motions. They’re all consistent, so the same comments I made on your amendment number 3 pertain to this one.

The Chair: Further debate?

Seeing none, all those in favour of the amendment? Opposed?

Were you jumping the gun, or are you opposed?

Mr Marchese: I couldn’t hear you well.

The Chair: All those opposed? The amendment is lost.

Ms Molinari, with what will likely be the last one under the wire at 4:30.

Mrs Molinari: I move that subsection 4(6) of the schedule to the bill be amended by striking out “section 3” and substituting “section 2 or 3.”

The original subsection, along with subsection 7, which I will address later, provided the minister with the authority to consider future development and evolution of our Ontario college system beyond the granting of applied degrees.

We think it is prudent to provide this flexibility now, even though we are not contemplating allowing Ontario colleges to grant other than applied degrees or to have a college evolve into a university at this time.

The original wording of the subsection, along with subsection 7, however, allowed this evolution to happen only if a college first became a university. This presented an either/or situation for the future evolution of colleges. In order to grant ordinary degrees, a college would first have to become a university. There would be no middle

ground for a college to be a polytechnic institute or a university college with the authority to grant a limited number of ordinary degrees. Such an evolution would require scrutiny by cabinet before it happened, and any changes would need to be by regulation.

The Chair: Any further debate? Seeing none, I'll put the question.

All those in favour of the amendment? Opposed? The amendment is carried.

With that, I remind everyone that—and I quote from the order given to the committee—"Pursuant to standing order 46 that at 4:30 pm on the final day designated by the committee for clause-by-clause consideration of the bill, those amendments which have not been moved shall be deemed to have been moved and the Chair shall interrupt the proceedings and shall without further debate or amendment put every question necessary to dispose of all remaining sections of the bill and any amendments thereto."

Therefore, you will find the amendments numbered at the top of the page. We will proceed on that basis.

The next amendment up is number 10, an NDP motion.

All those in favour? Opposed? The amendment is lost.

Amendment number 11, a government motion. All those in favour? Opposed? The amendment carries.

Shall schedule 4, as amended, carry? Schedule 4, as amended, is carried.

Schedule 5, amendment number 12, a Liberal amendment. All those in favour? Opposed? The amendment is lost.

Number 13. All those in favour? Opposed? The amendment is lost.

Number 14. All those in favour? Opposed? The amendment is lost.

Shall section 5 of the schedule carry? Section 5 of the schedule is carried.

Shall section 6 of the schedule carry? It is carried.

The next amendment is number 15, a Liberal motion. All those in favour? Opposed? The amendment is lost.

Number 16. All those in favour? Opposed? The amendment is lost.

Shall section 7 of the schedule carry? It is carried.

Amendment number 17. All those in favour? Opposed? It is lost.

Number 18. All those in favour? Opposed? Lost.

Shall section 8 of the schedule carry? It is carried.

Section 9, amendment 19. All those in favour? Opposed? The amendment is lost.

Shall section 9 of the schedule carry? It is carried.

Shall section 10 of the schedule carry? It is carried.

I am ruling amendment number 20 out of order. Money bills or any amendment that purports to spend money must first be assented to by the Lieutenant Governor, which means we have no section 10.1.

Shall section 11 of the schedule carry? It is carried.

Amendment 21. All those in favour? Opposed? That amendment is lost.

Amendment number 22. All those in favour? Opposed? That amendment is lost.

Shall section 12 of schedule carry? It is carried.

Shall section 13 of the schedule carry? It is carried.

Shall section 14 of the schedule carry? It is carried.

Shall the title of the bill carry? It is carried.

Shall Bill 132, as amended, carry? All those in favour? Opposed? Bill 132, as amended, is carried.

Shall I report the bill, as amended, to the House?

All those in favour of my reporting the bill to the House? Opposed? I shall report the bill to the House tomorrow.

Thank you to all who presented and to all the committee members for your attention to this bill.

The committee stands adjourned.

The committee adjourned at 1634.

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Journal des débats (Hansard)

Mercredi 6 décembre 2000

Standing committee on general government

Motorized Snow Vehicles
Amendment Act, 2000

Comité permanent des affaires gouvernementales

Loi de 2000 modifiant la Loi
sur les motoneiges

Chair: Steve Gilchrist
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LEGISLATIVE ASSEMBLY OF ONTARIO

ASSEMBLÉE LÉGISLATIVE DE L'ONTARIO

STANDING COMMITTEE ON
GENERAL GOVERNMENTCOMITÉ PERMANENT DES
AFFAIRES GOUVERNEMENTALES

Wednesday 6 December 2000

Mercredi 6 décembre 2000

*The committee met at 1547 in committee room 1.*MOTORIZED SNOW VEHICLES
AMENDMENT ACT, 2000LOI DE 2000 MODIFIANT LA LOI
SUR LES MOTONEIGES

Consideration of Bill 101, An Act to promote snowmobile trail sustainability and enhance safety and enforcement / Projet de loi 101, Loi visant à favoriser la durabilité des pistes de motoneige et à accroître la sécurité et les mesures d'exécution.

The Chair (Mr Steve Gilchrist): Good afternoon. I call the committee to order for continuation of clause-by-clause hearings on Bill 101, An Act to promote snowmobile trail sustainability and enhance safety and enforcement.

As members will know, we left off with two matters deferred for further consideration. I believe you all have before you not only the copies of the relevant amendments but some legal opinions that have been obtained from the legislative counsel and, I believe, Mr Spina you have also sought input from the relevant ministries. So I guess the first order of business would be to put back on the table amendment 6A. It's been read into the record; no reason to read it again, but I will invite debate.

Mr John Gerretsen (Kingston and the Islands): Which one is 6A?

The Chair: It is the Liberal motion on section 5, an amendment to section 5 of the bill.

Mr Dave Levac (Brant): I want to put back on to the table section 5, subsection 10.1(4) of the Motorized Snow Vehicles Act. Do I repeat it?

The Chair: No, there's no need to read it into the record again, but I would certainly invite debate, if anyone has any comments.

Mr Levac: I will continue. Having read the information provided to me by Mr Spina—and from that I am assuming that it's advice that was asked of by the House in terms of legal and all of the different relevant people that had input on that.

I also understand that Mr List has contacted Mr Spina's office to discuss the concerns regarding the municipalities. What I understand is that Mr List's request was far-reaching in scope, and the fact is that there were several outstanding issues that were pointed out at the

hearings. Subsequent to that, in his contact with Mr Spina, there was discussion again about asking Bill 101 to cover off quite a few of the issues which that particular spokesperson for the municipality had.

Speaking specifically to the amendment, the purpose of this amendment was to address the one area which I believed was contained inside of 101, and some of the rationale behind recommending against it indicated that it's far beyond the scope of the bill.

I have a question about that; it's not specific and if somebody wants to tackle it, I don't have a problem with that. How can restricting or removing municipalities' liability from the use of the unopened road allowance for the use of snowmobiles in a bill that is called the Act to Promote Snowmobile Trail Sustainability and Enhance Safety and Enforcement be considered beyond the scope? We're talking about the use of snowmobiles on municipal properties' unopened road allowances. Their concern was again—I repeat it—the liability that the municipality would incur. Two other of these pieces of research that were provided to me say that it's already covered off. The municipality during the hearings made it quite clear that they didn't believe that it really was covered off. That's why they were asking for us to have that particular liability covered in this act.

Further to that, I do have a concern about maybe the tone that was presented at the hearing, almost as if to say, "Well, then, if you're not going to help us in this liability question, we may then very well have to deny access to the snowmobile clubs if they are using this road allowance as a connector," so to speak, "or as an adjoiner to the trails that are already in existence on other properties." They named several different types of properties, in terms of personal farm property, crown land etc.

My concern here again is, are we addressing that need? And if we're not addressing that need, what response are we going to get from the municipalities who may step back and say, "Well if you're not going to do it, then sorry about it, snowmobile clubs, we're going to have to work out some other way to get this covered off?"

That's my general comment about that and that's why I want the amendment to stand. I know that I had an opportunity to withdraw this; I will not withdraw it. I do want to have a vote on it. If there's further rationale to discover in discussion that the snowmobile part of this,

that's asked of in the amendment, is indeed not part of 101, I'd like to hear the logic behind that.

Mr Joseph Spina (Brampton Centre): We appreciate the comments that Mr Levac made and there's no question that Mr List's comments made in the public hearings were very important and valid comments, enough certainly that we needed far more information and background in order to be able to really decide whether or not this was in fact within the scope of this bill. The response from municipal affairs and housing and also the Ministry of Finance, the Financial Services Commission of Ontario—I'd like to put it in the record, if I may—reviewed the motion for the amendment and provided some of the following comments.

The proposed amendment has implications for users of the municipal road allowances which go beyond the scope of Bill 101. They say there are currently two existing legal frameworks which deal with the issue of unopened road allowances and are designed to protect both the municipalities and the landowner from possible liability. I'll get into these in just a moment and then have a final statement.

The first act is the Occupiers' Liability Act, and subsection 3(1) of the Occupiers' Liability Act provides a special provision for dealing with unopened road allowances. It indicates that a landowner owes a duty to take reasonable care to ensure that a person entering the premises is reasonably safe. However, in the case of an unopened road allowance, if the landowner has posted notices and hasn't expressly permitted the entry, or if entry is for the purposes of recreational activity and no fee is paid other than a payment from a non-profit recreation club, section 4 provides that a person is deemed to have willingly assumed all risks. Where the person is deemed to have assumed the risks, the landowner owes only a duty to the person to not create danger with the deliberate intent of doing harm or damage to the person and not act with reckless disregard of the presence of the person.

The other act that was brought forward to us from municipal affairs was the Municipal Act. Under subsection 284(1) of the Municipal Act, "municipalities are required to keep their highways in a reasonable state of repair." However, under subsection 284(3), "no legal action can be brought against the municipality for accidents that occur on the untravelled portion of the highway (which would include an unopened road allowance) for damages caused by, among other things, the presence or absence of fences, railings or barriers, or caused by obstructions such as rocks and trees."

I guess essentially the proposed amendment has implications for users which go beyond the scope of this bill, as Mr Levac correctly indicated, and it was the opinion of the ministry that there were sufficient legal statutes presently in place that protect both the municipality and the snowmobiler from liability. The recommendation is that they support the decision of both the Ministry of Municipal Affairs and the Ministry of Finance to not proceed with this proposed amendment.

In conclusion, I would just say that with respect to unopened road allowances—and I defer to the two members opposite who clearly spent time on municipal council; I have not, so I certainly respect their elements. You didn't know he was council, did you? I certainly respect their opinion, but if we exempted the liability essentially of the municipality for snowmobiles, under this act we have boosted the mandatory element of requiring insurability by snowmobilers—of the sleds. In addition to that, we've clearly stated that where an unopened road allowance has risk, the municipality perhaps should crack down, even if it is a connector road.

That being said, where it goes beyond the scope of this bill is that wherever a piece of unopened road allowance is used, it can be used by far more than a snowmobiler. It could be used by a 4x4 vehicle; it could be used by an all-terrain vehicle, an ATV; it could be used by a motocross motorcycle for a connector trail. If I recall Mr List's concern, it was that the only elements, I gather, that were permitted under an unopened road allowance, according to the more than 100-year-old clause of the Municipal Act, were for a footpath or a bicycle path. With due respect to Mr List's opinion, which is, I think, quite justified, the Municipal Act is what should be changed, to broaden the scope of usage, because those were the only methods of movement, if you will. I was surprised they didn't even permit a horse and buggy when this particular clause was put into the act.

It's far broader than what we can do here. This would end up having to be repealed at such point where municipal affairs addresses that issue. If anything, instead of this amendment, I would suggest that perhaps—and Mr Chair, I ask your ruling on this—a directive could be sent to municipal affairs from the committee to address this issue, over and above the scope of this bill. I'm not sure that's within the mandate of the committee.

The Chair: Arguably, while we are in clause-by-clause, it might be outside our responsibilities to create such a motion, but it would certainly be in order as soon as the bill is finished. I would entertain such a motion if any of the members of the committee were so inclined.

1600

Mr Gerretsen: I just wonder if I could respond to Mr Spina. Look, we're making this all much more difficult than we need to. This bill deals with the use of snowmobiles. There may be many other problems that relate to unopened road allowances that have been around for years and years, and probably will be around for years and years until a government actually comes along and does some major amendments to the Municipal Act.

But you know, we're only talking about snowmobiles here. The ministry has been very clear with respect to the fact that there can be no crown liability. All the municipalities are asking is that they want to be given those same assurances that the ministry, in this act, is basically giving itself. That's really what it all boils down to.

I can't understand the reluctance of putting that very simple statement in there. Municipalities have problems enough right now. They've got enough on their plates

and I won't get into all that or else we'll be here until 6 o'clock tonight, but they don't need this headache. They don't need to be placed into an interpretative position. If it's clearly stated in the act that they are not going to be held responsible, then there can be no actions against them. That's really all they're asking for. They're asking for the same thing the government, in effect, is giving itself.

In dealing specifically with your amendments, or with the notes that have been prepared by the ministry to deal with this act, it states, for example, "The proposed amendment has implications for users," which you read earlier, "which go beyond the scope of this bill, and treats the snowmobiles differently from other users of unopened rural allowances."

I say, so what? If other users are not being dealt with properly and there should be amendments made to deal with their use of these unopened road allowances through the Municipal Act, then let that follow later on. But why should we extend a current defect that exists with respect to unopened road allowances to now allow that defective Municipal Act to, in effect, work with respect to snowmobiler use as well? I don't understand it. I know we're only limited here to snowmobiles, so let's deal with that problem and not with the other problem that will be resolved, hopefully, at some point in the future.

The other reason that's given, "All snowmobilers are required to have insurance to operate their snowmobile, and it is felt that there are sufficient legal statutes presently in place that protect both the municipality, landowner and the snowmobiler from liability."

Well, that's wonderful, and yes, a snowmobiler should have the necessary liability. All municipalities are asking for is that they don't even want to be placed in a position where they could be potentially named as a party in an action. That's all they're asking for. They don't need these kinds of problems.

You go on to say that under the Occupiers Liability Act, "In the case of an unopened road allowance, if the landowner has posted notices and hasn't expressly permitted the entry, or if the entry is for the purposes of recreational activity and no fee is paid other than a payment from a non-profit recreation club, section 4 provides that a person is deemed to have willingly assumed all risks."

Well, that may be so, but you're going to get into all sorts of arguments as to whether or not the fees that are being paid to these snowmobile clubs in order for the snowmobiler to get their licenses—some lawyer, I can tell you now, Mr Spina, is going to argue somewhere along the line that in their particular situation it is not a non-profit recreation club, that they may be making some money on selling some coffee and doughnuts, and that they are in effect a profit-making club. I know it sounds like a bizarre argument.

All I'm saying is that if you pass this amendment, then you take those kinds of bizarre arguments out of it for the future. You're basically telling municipalities, "You have no responsibility for the unopened road allowances," and

you're putting the municipalities in exactly the same position as you're putting the crown. They don't want to be placed in a better position, but they also don't want to be placed in a worse position.

And yes, I agree with you. All sorts of amendments have to be made to the Municipal Act, but let the municipal affairs people look after that. It'll probably be long after we're all gone before we'll ever see any meaningful amendments to the Municipal Act, as far as that particular issue is concerned, because it's been around for years.

Let's at least deal with the narrow problem that we have here, that municipalities want to be absolved of responsibility for snowmobilers to use unopened road allowances, and that's what this amendment does.

The Chair: Further debate?

Ms Shelley Martel (Nickel Belt): Actually I have a question for Mr Gerretsen, and I apologize for not knowing this. Just so I'm clear, where in Bill 101 is the crown put in the same position in terms of not being liable? I'm not trying to test you, John.

Mr Gerretsen: You can test me. Why not? If you look at section 10.1—and I know we're talking about delegation there—it says, "No action or other proceeding shall be instituted against the crown, the minister or any employee of the ministry," and it goes on to a number of different sections. Maybe the question could be put to Mr Spina: are there any sections in the act that he is aware of that in effect absolve the crown from any liability, that the crown can't be sued by snowmobilers using these trails on unopened road allowances?

The Chair: You might want to invite forward the legal representative from municipal affairs or MNR.

Mr Spina: Actually, this is MNR, and I'm not sure we have anyone from MNR here.

Interjection.

Mr Spina: We have someone from finance. It's a broad-ranging, broad-covering bill.

It's my understanding that where the trails are on crown land, they're there by land use permit under the Ministry of Natural Resources. Whether or not the crown is liable, I don't know. I know that this act does not exempt the crown. But I think that in the opinion of Municipal Affairs and Housing, this motion, I reiterate, is so broad in nature that it could potentially protect the municipality even if it were at fault, and it would have other implications for other users.

To address the comments of Mr Gerretsen particularly, a municipality is going to have a blanket coverage policy in any case. Every municipality has one. If you cap that for snowmobilers, that's not fair to any others. In addition to that, with respect to the issue of non-profit clubs—and I would perhaps seek the opinion of legislative counsel here—I would assume that the issue of defining a non-profit club would be whether or not it is registered as such. I suggest to you that all 200 and some-odd clubs in Ontario are registered as non-profit organizations, so I don't think that's an argument.

The real issue is that there is no cap for the crown that I can see in this bill, so why should we extend it to the municipalities? Therefore, if the municipality has its blanket coverage, what's wrong with that?

Mr Gerretsen: You keep talking about if this could extend to other individuals as well. The amendment is quite clear. It says, "No action or other proceeding shall be instituted against a municipality with respect to an accident involving the operation of a motorized snow vehicle that occurs on an unopened road allowance." We're just talking here about motorized snow vehicles. We're not talking about any other situations.

I always get a little bit leery when a ministry says, "We don't want this amendment in there," when it's to everyone's common sense. And you people are all about common sense—ideological or real is a question for debate. Why can't you put this section in here? We're only talking about motorized snow vehicles. We're not talking about anything else, about all the other areas where you're leaving municipalities vulnerable because of amendments to the Municipal Act that should have been passed many years ago.

1610

Mr Spina: In all fairness, we are not here to fix the world's problems.

Mr Gerretsen: Right on. I agree.

Mr Spina: What we are trying to do is address the snowmobile issue. From a snowmobiling perspective, from the objectives of this bill, this is far greater than what we could expect in this instance. This bill is intended to address the sustainability, the safety and the enforcement of snowmobile issues.

In my opinion, the insurance blanket coverage for the municipalities would be sufficient from the snowmobiler's perspective. If you want an opinion from counsel from the Ministry of Transportation, they have offered to provide that. They need a few more minutes. It's your choice.

Mr Levac: That's probably the specific reason I still want the amendment to stand: to address the concerns that were raised by the municipalities while they were discussing the bill at hand. To me, their concern was emotional enough. When I heard them they basically said, "We need to solve this problem, or..." They never said what was after the word "or," but the implication that was given to me was, "We are not going to give people access to these road allowances because we don't believe our liability is covered off." I repeat what my friend beside me has indicated to us. We are addressing the specific the bill is addressing. The specific is the snowmobiles.

My concern, as I hear the discussion, lies with what we do with this. There is the possibility that the municipalities may act in ways that require us to look at their vulnerability to a lawsuit. They may indeed do things. My understanding of liability is that negligence does not allow lack of liability to run into it. If you're negligent, you're negligent even if you're not declared liable.

Mr Spina: That's right. Even if you are declared liable, that happens.

Mr Levac: If that's the case, it means that even if the broad stroke of this brush says we are concerned about how large a liability you are exempting from this municipality using a snowmobile, if they're still negligent, if they park a rock right in the middle of the path or they park a school bus or one of their snowplows there and a snowmobile hits it and it is shown that they were negligent by allowing that plow to stand there, they're still liable, because negligence is negligence. It goes beyond liability.

Even if there is a statement in here that protected them from that, the municipalities are asking for common liability. That means that if the snowmobiler is doing things he or she is responsible for, they can't go to the municipality and say: "We're suing you because that path is there. We're suing you because we were using a piece of city property and we want to name a bunch of people so we are after somebody for our negligence."

By doing it that way, we are providing the municipality with that one piece of wording that says, "The concern you had about snowmobilers using municipal property is now covered off in this bill promoting snowmobiling sustainability." It is specific to the snowmobile bill. A snowmobiler using a tract of land owned by the municipality can't hold the municipality liable. As I said before, negligence eliminates either side. But it covers it off for the common liability of the municipalities.

I agree with my colleague: whether or not we include 4x4s, RVs or anything else is for another day, another moment, another time. The municipalities made it clear that they weren't talking about all-terrain vehicles for that specific request. When I spoke to Mr List, I said, "If I offered you an amendment that said 'snowmobiles,'" he said, "It's a good start." He did refer to 130 years' worth of municipal law that didn't allow anything other than walking and, I think, running—

Mr Spina: And bicycles.

Mr Levac: Sorry, bicycles were included in that. So I guess this is the first baby step toward cleaning that up, but it's all within the scope of this particular bill.

The second comment I would make to that, if in the long run this is voted down, is I would recommend somehow, if it's within our prerogative to do so, to indicate clearly the notes that were presented to us to the municipalities. I don't know how that gets disseminated and I don't know how the interpretation is done, whether or not that's within our scope, our mandate. I'm not looking for the reasons why my amendment didn't pass. What I'm looking for is an explanation to the municipalities that, indeed, your words were heard very clearly by the hearings and by the committee. We understand that you have concerns about it and our research indicates very clearly that you already are covered off. If anything, I'm looking for one more step that may be beyond this committee—I don't know—but if this amendment is not to pass, then the municipalities at least know there's a reason why it

didn't pass and the interpretation, because I do have a sneaky suspicion that we will be getting more than one interpretation of whether this is advisable or ill-advised.

The Chair: In fact, I saw a lot of head shaking among the lawyers in the back of the room when you made some of your comments. I won't offer my own legal opinions, but there seemed to be some interest in perhaps getting involved in the debate. I don't know, Mr Spina, whether it would be appropriate for you to invite someone forward to deal particularly with Mr Levac's suggestion that negligence would still be something that could be pursued in the face of this amendment if it were to pass. But dealing with your second point, Mr Levac, it would be quite appropriate when we're done with the bill if you wish to make a motion that the committee request the Ministry of Municipal Affairs to transmit to all municipalities in Ontario the findings of their reviews occasioned by your amendment.

Mr Levac: I do have a concern—and Joe knows this—that the municipalities may act in a reactive way for the snowmobilers, and I do not want to see that. If that answers their question I think that would help.

The Chair: Exactly. If you want to make your motion any more specific, you might ask them in that letter to invite responses if any municipality is getting contrary opinions. Any further debate?

Mr Gerretsen: Just a couple of comments. First of all, I agree with everything that my colleague says, except for one thing. When he said that there's a possibility this amendment could be voted down, I know for a fact that this is not a government-whipped vote, and surely to goodness I appeal to the good, clear common sense of each one of the government members to use your own good sound judgment to see whether or not this amendment makes sense. I'm absolutely positive that it will carry the day ultimately.

But I just wanted to make one other comment. That's twice now you've mentioned, "Oh well, a municipality's liability insurance policy will cover this." I'm not sure whether you're aware of this, but in the mid-1980s—and I know this government quite often likes to talk about what happened in the mid- to late-1980s—municipalities were put to a huge expense in the liability policies that they then had to get for their municipalities, basically as a result of a couple of rather famous or infamous court decisions in which individuals were awarded millions of dollars as the result of, I believe, a child falling down a cliff in a quarry. It put the whole municipal sector at that time in a tremendous spin because all of a sudden they were facing all sorts of unforeseen costs as a result of premium increases that they simply didn't anticipate. I think that may very well happen again as a result of the extra potential liability that may fall on municipalities as a result of this act passing. You could say that may only be marginal because municipalities take on many, many risks, but let me remind you that unopened road allowances are basically in rural municipalities that are very small municipalities operating usually on very small budgets. These are exactly the municipalities that may

very well, as a result of insurance risks that are undertaken that they didn't have to absorb before, be subject to these higher insurance costs and premiums. So, in effect, smaller municipalities that have got more unopened road allowances may end up paying more.

1620

I would not like to see anything, particularly with respect to the fact that municipalities are already under the financial gun for a variety of reasons that I won't go into right now because I don't want to be here until 6 o'clock—but you and I know them and you've heard them all many times before. We shouldn't be doing anything here that could potentially increase municipal costs, particularly for the small, rural municipalities that are represented by Mr Barrett, for example, who I find to be an extremely honourable and engaging individual and I'm sure that he will see the wisdom of passing this resolution. I'll just leave it at that.

The Chair: Any further debate?

Mr Spina: The last point is that I know the case that Mr Gerretsen refers to because in fact it was in my own home town of Brampton where the case happened. That's where there was a quarry; it was municipal land. The child went on a bicycle and did his little motocrossing issue. They ended up suing the municipality. That's what sent the municipality scrambling to ensure their liability was in place. The end result was that all municipalities have already upgraded their coverage, but, in addition, I might add that the case was overturned in Superior Court after that.

The Chair: Any further debate? Seeing none, I'll put the question. All those in favour of the amendment? Opposed? The amendment is lost.

Shall section 5 carry? Section 5 is carried.

That takes us now to section 9.1, the amendment from Ms Lankin. Again, it's been read into the record and there's no need to do that for a second time. But I will invite debate on that point.

Ms Martel: Just to follow up on Frances's point when she raised this during the debate on November 22, the purpose of the amendment is to make it clear to the snowmobile community that within their own piece of legislation, which obviously Bill 101 is, they would understand what their powers are and what those designated powers are as well. She made it clear at that point, and I think she's correct, that most snow clubs would not normally reference the Provincial Offences Act to determine what the discretion of the Solicitor General was with respect to making such appointments. So it would be better that it would be clear in this act that the Ministry of Transportation had that power to designate such people to exercise the powers that are outlined in this piece of legislation.

I understand, I think, the legal reply. I'm not convinced, however, that it couldn't be done if the only reason is that it's felt that the proposed amendment might be redundant and therefore the Red Tape Commission might be concerned with that. Frankly, for me, that's not a good enough reason not to do it. The Red Tape Com-

mission has enough other things to worry about. To not do it because they might consider it to be a duplication is not a good enough reason for me.

I was concerned about the section, though, that said that consultations with the Ministry of the Solicitor General—with police organizations it was felt that this would be an incursion into their area of responsibility. I'm concerned about that because I just wouldn't have understood that that would be a problem for them. I would think that most police officers have better things to do than to be on the trails dealing with people who are speeding and who don't have permits. I actually would have thought this would have been of some assistance to them. Now maybe there's someone here from the Solicitor General's ministry or someone from legal staff who communicated with the Solicitor General's office to determine if I'm wrong in my reading of that. But I would have thought that this would have been a benefit by taking away some of the responsibilities that they would otherwise be better left to in terms of policing on the streets of our community. I don't know, Mr Chair, if we have someone here who could respond that to tell me if my read of that is wrong.

Mr Spina: There is counsel here from the Solicitor General, if you wish.

The Chair: Ms Martel, you're free to invite anyone forward if you like. Good afternoon. Perhaps you gentlemen could introduce yourselves for the purposes of Hansard.

Mr Chris Diana: My name is Chris Diana and I'm counsel with the legal services branch of the Ministry of the Solicitor General.

Mr Leonard Lee Tung: I'm Leonard Lee Tung, policy analyst, Ministry of the Solicitor General.

Ms Martel: If I can repeat my concerns about one of the bullet points—I'm sure you've got the two pages in front of us—the third bullet point, second page. The consultations with police organizations by your ministry found that police (a) would generally view the amendment as an incursion into their area of responsibilities, and (b) are concerned with the liability issues associated with it. I wonder if you can clarify those two concerns for me?

Mr Diana: With respect to the first question, on the incursion into police enforcement jurisdiction, legally it doesn't go into the police jurisdiction at all. It's really a resource issue and not a legal one. That's what it sounds like your question is asking. It doesn't derogate from the powers of the police.

Ms Martel: Why would the police have told the Solicitor General's office that they view this amendment as an incursion into their area of responsibility?

Mr Diana: I think that's Leonard's area.

Mr Tung: The feedback we got from police circulars is that they felt any type of enforcement should be done by the police. There is a program called the Snowmobile Trail Officer Patrol program, a joint program between the police and the Ontario Federation of Snowmobile Clubs, which provides enforcement on the snowmobile trails. It

is felt that that program should be the proper one to enforce the certification as well.

Ms Martel: Their concern was that only STOP officers should be allowed to do enforcement, not trail wardens. Am I correct?

Mr Tung: That's right.

Ms Martel: Can I apologize by asking you what the distinction is between the two? I'm sorry, what is the difference?

Mr Tung: There is a special selection and training process for our program and there is supervision by police services in their respective areas. That is the major distinction there.

Ms Martel: And the trail wardens are strictly OFSC staff people who are not supervised by police with respect to any kind of enforcement. Is that correct?

Mr Tung: That's right.

Ms Martel: How is it then, after you've said that, that OFSC trail wardens can still enforce mandatory trail permits on private property? The police don't see that as taking away some of their responsibilities as well?

Mr Tung: The type of enforcement they do on private property is that if they notice someone operating a snowmobile on private property, they can ask them to leave the snowmobile trail. Under the Trespass to Property Act, they can ask them for information as to their name and address and provide that information to the police.

Mr Spina: Shelley, the basic difference is that the STOP officer is a sworn special constable under the OPP; the trail warden is a volunteer member of the local snowmobile club. The STOP officer is also a volunteer. The difference is that the STOP officer essentially has, as a special constable, almost the same powers as a police officer.

Ms Martel: Because they've been deputized. Is that why?

Mr Spina: Because they've been deputized, exactly. A trail warden at this point, under the current legislation, has the ability to lay a charge under the Trespass to Property Act, and that's it.

Ms Martel: Only on private property.

Mr Spina: No, they can also lay a charge where there is a land use permit under the Ministry of Natural Resources, where there is an LUP, on the vehicle only.

Ms Martel: Sorry, I was just reading bullet point number one and it says that they do not have that ability on crown land.

1630

Mr Spina: They do not have that ability on crown land. OK. That's new to me. They don't have the ability to lay the Trespass to Property Act on crown land? Is this what I'm hearing, Chris?

Mr Diana: To my understanding, they do not have the ability, not the provincial offences officers.

Mr Spina: No, I'm not talking about them. I'm talking about the trail wardens under the current legislation.

Mr Diana: I do not believe that, although I'd have to go back and review. I can't give you a definitive answer on that.

Mr Spina: There is a current memorandum of understanding between the federation and the Ministry of Transportation, but I'm not sure about the crown land issue. I do know they can lay charges under the Trespass to Property Act, on private lands, certainly. I was always under the impression they can also do so where a land use permit has been issued by MNR. What was asked in the public hearings by the various regions of the snowmobile clubs was that the trail wardens be empowered to enforce the permit, as we have outlined in this bill, and have the opportunity to enforce that permit.

It's a question of whether they would only be allowed to enforce the trail permit on the trail, where it has been designated a trail, or whether they would be allowed to enforce other elements of the act, such as a STOP officer or a police officer would be entitled to ask for essentially the four or five pieces: the registration-ownership from the Ministry of Transportation, an insurance certificate, a valid driver's licence or operator's licence and then the trail permit. Those items would all be able to be asked for by a police or a STOP officer designated under the Provincial Offences Act.

The concern here is that in the Provincial Offences Act it says that "a minister of the crown can designate" and it doesn't define within that act what is meant by "minister." So essentially, the federation could solicit any minister to put a case forward to have them deputized to whatever degree you want them deputized or given powers of enforcement. If you don't understand, just ask, OK? So any minister can do that. It could be the Minister of Transportation, it could be the Solicitor General or it could be the Minister of Tourism for that matter.

Technically, under the Provincial Offences Act, by putting this amendment in this act, the references to "minister" in this act are specific to the Minister of Transportation. The Solicitor General has personally indicated to me and to us that he would rather retain that power to the Solicitor General rather than relinquish it to the Minister of Transportation specifically. That's a political policy point I bring forward which these gentlemen would not be in a position to do.

Ms Martel: It sounds like a turf war to me.

Mr Spina: In a manner of speaking, except that from what I understand, both the Minister of Transportation and the Solicitor General tend to agree on this. The Minister of Transportation is saying, "Fine, give it to SolGen," and SolGen says, "Let me look after it."

Ms Martel: Can I just be clear? I'm sorry, I don't want to prolong this. The issue started as one of resources, I would think: do snowmobile clubs have enough resources to actually make this act work? For example, if you don't have enough STOP officers, there are parts of this bill you are not going to be able to enforce only with a trail warden. Correct?

Mr Spina: Yes.

Ms Martel: This ongoing issue of are you going to have enough STOP officers or are you going to have police officers out on the trails when they could be doing something else is not really resolved. The issue is that the

clubs will now have to go to the Ministry of the Solicitor General instead of MTO—

Mr Spina: Or any other minister under the POA.

Ms Martel: —to try and get designation of officers who would have the ability to carry out all aspects of the act. Is that correct?

Mr Spina: Or even certain portions of it.

Mr Diana: Perhaps I can help clarify this. One of the problems with this proposed amendment is that it is inconsistent with the Provincial Offences Act. As stated, the Provincial Offences Act allows any minister to designate a class of persons as provincial offences officers. The effect of this amendment is to allow only the Minister of Transportation to make this designation in that one narrow respect. So for legislative drafting, it's not proper form.

From what I understand, the way it usually works in practice is that the minister who has jurisdiction over the act, in this case the Minister of Transportation, may enter into a protocol with other interested ministers. For example, if the Ministry of the Solicitor General wishes to have a team of persons classified as provincial offences officers, the minister may enter into a protocol with the Minister of Transportation, who actually does the designation.

I think that to allow this amendment—I mean, you can make this amendment with a lot of acts, state for greater clarity that such and such minister has the power to do this. But that's why it's been put into the Provincial Offences Act rather than having it in every other act.

Ms Martel: So the way to deal with Frances's concern would be a protocol developed between the two, if that becomes necessary.

Mr Diana: Certainly.

Ms Martel: Mr Chair, based on what I think I understand, I would probably withdraw the amendment that we proposed, given what I have heard, and assume that if there's an ongoing problem, there will be a protocol developed between the two ministers.

The Chair: The motion is withdrawn.

You can still speak to a motion that has been withdrawn, Mr Gerretsen.

Ms Martel: If he would like to put a—

Mr Gerretsen: No, no. I'm a little bit concerned, though, as to what power these trail wardens in effect will have. I know they have power on private property, provided that they have the authority of the landowner to act under the trespass act. They don't have powers on crown lands. What I'm concerned about is that the general public that uses snowmobiles are somehow left with the impression that these people have greater powers than they really have. All they can really do is enforce that snowmobilers have permits; that's all they can do. They can't get involved in any other provincial offences, because the police don't like it, and I can understand that. They don't want all sorts of people running around with police powers that maybe they shouldn't have except for very limited purposes, as we

quite often have for traffic violations in the sense of parking tickets and stuff like that.

Are you concerned at all, Solicitor, over the fact that these trail wardens are really being—an impression is being left with the general public, whether we agree to that here or not. The general public is going to think, “Hey, there’s somebody in authority. They’ve got a right to do something,” when that person in authority can really only do one thing, and that’s issue a trail permit so that the organization can get more money. I mean, that’s really what it’s all about, and perhaps rightfully so. But are we not concerned over the fact that there may be a perception that these people, as trail wardens having this right to stop people on private property and issue them permits, are going to be viewed by the general public as being greater enforcement agents than they really are? Is there almost like a threat of an intimidation factor here? Is that a concern to you as a lawyer?

Mr Diana: Frankly, I can’t speak to the perception of the general public, but I think Leonard might be better able to answer this.

Mr Tung: I don’t know whether there’s a representative of the OFSC here. Is there a representative from the OFSC?

The Chair: With the greatest respect, I’ve indulged Mr Gerretsen just to satisfy his curiosity, but considering that the motion has been withdrawn, there’s nothing to debate, strictly speaking, Mr Gerretsen.

Mr Gerretsen: Well, what indulges my curiosity are the good points from the ministry here, which quite frankly are very clear, and I’ve got to congratulate you, Mr Spina. You’re doing your job. But the problem is that people may be left with the general impression that these trail wardens are more than they were really intended to be, and I’m sure you’re concerned about that.

1640

Mr Spina: I’d be happy to make a short clarification, Chair, with your permission.

The Chair: Absolutely, Mr Spina.

Mr Spina: Currently, if an individual is caught on the trail without a permit within the jurisdiction of the trail warden, so they don’t get issued a charge under the Trespass to Property Act they can buy a trail permit for the \$150 and a \$30 surcharge. This bill, if and when passed, would make that redundant. In fact, it could no longer be in place, because it would then appear to be, and would be, in fact, extortion. If you’re enforcing a provincial statute, you can’t say, “Buy the permit from me now, pay the surcharge, or I’m going to fine you.” We have parking meter guys who would go to jail for that.

Essentially, the fact that we implement this in the bill would negate the power of the trail warden to do that kind of thing. The powers that they would end up with in the long run would strictly be left to the circumstances of the regulation and the minister, should they decide to empower them in any other way.

Mr Gerretsen: So we’re leaving it to regulation, in which the general public won’t have any say.

Mr Spina: They got it in the bill.

The Chair: Given that that has been withdrawn, we shall proceed to pose the question.

Shall Bill 101, as amended, carry? It is carried.

Shall I report the bill, as amended, to the House? All those in favour? Opposed? I shall report the bill to the House tomorrow.

With that, the clause-by-clause is concluded on Bill 101.

Mr Levac:

Mr Levac: Mr Chairman, I don’t know if a motion is required, or just a request?

The Chair: It doesn’t matter, but it might have greater import if the committee endorses a motion.

Mr Levac: I’ll try to do it as such, then, so forgive my inability if I don’t get it right.

I would move that following the clause-by-clause consideration of Bill 101, municipalities be notified of the findings of senior counsel of the Ministry of Municipal Affairs and Housing regarding the briefing notes provided to us on the liability of municipalities in the use of the unopened road allowances.

Is that close?

The Chair: Sorry. Was the word “request” in there?

Mr Levac: That we “request municipalities be notified.”

The Chair: Does everyone understand the motion?

Mr Spina: It was my understanding that if we were going to put a motion forward, it would be a directive to the Minister of Municipal Affairs, as opposed to all of the municipalities.

Mr Levac: Through the Minister of Municipal Affairs and Housing.

Mr Spina: Yes. Could you repeat it then, please?

Mr Levac: I wish I could. I’ve been jostling as I’ve been going around through this. The essence of the motion is to request the Ministry of Municipal Affairs and Housing to notify the municipalities of the findings of senior counsel regarding liability on unopened road allowances.

Did that clarify it, Joe?

The Chair: Mr Levac, are you asking they send the actual pages or a précis of that in letter form?

Mr Levac: I’m open to a package that they get, so that they understand that counsel believes it’s already covered off—

The Chair: We are talking about the briefing note related to the 6A that we debated.

Mr Levac: To the amendment, yes.

Mr Gerretsen: Would it be appropriate at this time to move an amendment that Mr Spina go as a delegation and visit each and every municipality and advise them of the ministry’s position?

Mr Spina: No.

Mr Gerretsen: No? OK. I was just curious.

Mr Levac: Just speaking quickly and briefly, my hope is that since the amendment didn’t pass, municipalities would be given the interpretations of counsel so that this

would address their concerns brought to us at the hearings. That's basically what I want.

The Chair: Does everyone understand the motion on the floor?

Mr Ted Chudleigh (Halton): I'm just a little concerned and I think it's downloading costs to municipalities. I don't think I can support the motion on that basis.

Mr Levac: Downloading costs?

Mr Chudleigh: You're suggesting that they may have to take out increased liability because of this bill.

The Chair: Perhaps this is the hazard of not having the written motion in front of you. The motion is that the Ministry of Municipal Affairs will simply send a letter to every municipality informing them of the conclusions they've arrived at pursuant to the debate on this amendment. That's it.

Mr Chudleigh: How will that be interpreted by municipalities?

Mr Gerretsen: That's why I wanted to go with the delegation.

The Chair: Might I suggest, Mr Levac, that the preamble could simply cite the fact that a municipality raised this during the debate.

Mr Levac: Yes.

The Chair: In our request to the Minister of Municipal Affairs, that would be the legitimacy for our motion: for information only. Is there any further debate? Is anyone unclear on the motion? You're not clear on it?

Mrs Julia Munro (York North): Only because we've had it tossed around, not having it in writing and so forth. My concern is the weight that a motion from this committee has.

The Chair: To answer that, all we can do is make the request. We do not have the power to compel. Recognizing that there seemed to be a coincidence of opinion, Mr Levac is posing the question: Are we interested in asking the ministry to do something?

Mrs Munro: My reaction is—and perhaps it is covered by this as a request—that the committee recommends; has a recommendation as opposed to a motion.

The Chair: Strictly speaking, even that could be deemed—if you're suggesting that we do it just by general agreement, without a vote, that's really not all that different from the way many amendments are decided anyway. If no one disagrees when you put a question, you could argue that there wasn't, strictly speaking, a canvassing of all the members. I'm in the hands of the committee. If you simply want to put it on the record as a request and know that the representatives from the Ministry of Municipal Affairs are here in the room now, that would be—

Mr Spina: They're not here.

The Chair: They're not?

Mr Levac: I'm OK with that. I'm just after informing the municipalities, who came to us with a direct request to amend this, with the rationale that was used to defeat the amendment. Quite frankly, they deserve that no less than the information that was used to defeat the amendment. It has no ulterior motives other than to simply inform and request that that information be disseminated to the municipalities, to say, "Hey, by the way, we believe you are already covered on liability." That's all I'm asking for. If it is to remove the motion and just simply ask it as a committee—

The Chair: There's a motion on the floor right now that the committee make that request. Any further debate? All those in favour of the motion? It carries.

Actually, as an action, might I suggest the motion say that the clerk be requested to write to the Ministry of Municipal Affairs. I think that was the motion we just voted on, was it not? Yes.

Mr Levac: That's what I thought I said.

The Chair: If there's no other business before the committee this afternoon, the committee stands adjourned until the call of the Chair.

The committee adjourned at 1649.

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Mr Chris Diana, counsel, legal services,

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Mr Leonard Lee Tung, corporate policy branch,

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Official Report of Debates (Hansard)

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Journal des débats (Hansard)

Lundi 11 décembre 2000

**Standing committee on
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Medicine Amendment Act, 1999

**Comité permanent des
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Loi de 1999 modifiant la Loi
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GENERAL GOVERNMENTCOMITÉ PERMANENT DES
AFFAIRES GOUVERNEMENTALES

Monday 11 December 2000

Lundi 11 décembre 2000

The committee met at 1531 in committee room 1.

MEDICINE AMENDMENT ACT, 1999

LOI DE 1999 MODIFIANT LA LOI
SUR LES MÉDECINS

Consideration of Bill 2, An Act to amend the Medicine Act, 1991 / Projet de loi 2, Loi modifiant la Loi de 1991 sur les médecins.

The Chair (Mr Steve Gilchrist): Good afternoon. I call the committee to order for public hearings and clause-by-clause consideration of Bill 2, An Act to amend the Medicine Act, 1991. Mr Kwinter was up first but he's indicated he'd prefer to have a few words at the tail end to record comments. So our first presenters will be Citizens for Choice in Health Care.

Interruption.

The Chair: Not a problem. You can inform the clerk when your colleague—on the assumption we have someone to take your place.

CONSUMER HEALTH ORGANIZATION
OF CANADA

The Chair: Are the folks from the Consumer Health Organization with us here? Excellent. If they could join us at the witness table here. Good afternoon, welcome to the committee. We have 10 minutes for your presentation, to divide as you see fit between either a presentation or a question-and-answer period.

Mr Marcel Wolfe: Ladies and gentlemen, on behalf of the Consumer Health Organization of Canada and its members, we wish to express our support for Bill 2, also known as the Kwinter bill.

This organization has supported the Kwinter bill since its inception more than three years ago, and our members have written thousands of letters of support whenever this bill came up for debate in the Ontario Legislature. The basic principles on which this bill is founded are central to Canadian thinking. We believe in human rights. That's why we, as a nation, signed the Helsinki accord in 1989.

We also believe in medical science. That's why Canadians have, ever since Sir William Osler a century and a half ago, contributed so greatly on the international scene to the advancement of medicine. We also believe in our health care system. Without the kind of protection Bill 2

is intended to provide for the freedom of medical practice and the freedom to choose the treatment that works best for the individual, Canada will not be able to continue to be a leader in science and a protector of human rights. Without personal choice in health care modalities, no competition among therapies will be fostered and both science and the patient will suffer.

Tragically, so many excellent Ontario doctors leave Canada for the US and other countries, many because they are tired of the arbitrary prosecutions by the College of Physicians and Surgeons of Ontario, who seem to fear excellence and innovation in medicine. We have a shortage of doctors, and our medical climate lacks innovation. Even more tragically, many excellent doctors, without patient complaints against them, have actually had to fight for their licences, sometimes losing that fight only because they were practising innovative and internationally recognized medicine.

The press has covered the astonishing cases of Drs Jozef Krop, Frank Adams, Sukhdev Kooner, Gerry Green, Felix Ravikovich and so many others over the last decade. All of them are doctors of excellence for whom their grateful patients have fought big fights in the press and with the governments. We have covered these cases in our publications extensively. Indeed, it was Dr Green's use of nutritional medicine in conjunction with traditional cancer therapy that caused him to lose his medical licence; and it was through Dr Green that MPP Monte Kwinter learned of the great need for Bill 2 to become part of the Medicine Act of Ontario.

On behalf of our members and all those Canadians who demand freedom of choice in health care as a basic human right, and who agreed to Canada signing the Helsinki accord more than a decade ago, we urge you to pass Bill 2 as soon as possible. It is badly needed and very timely.

The Chair: That leaves us time for questions, if you wish. The rotation will start with the Liberals.

Mr Monte Kwinter (York Centre): Thank you very much for your presentation.

I think that I'd like to really put into the record at a very early stage in this proceeding that, to my knowledge, the only opponent to this bill historically has been the College of Physicians and Surgeons. You've alluded to the problems that these various doctors have had with them. I think it's quite significant that when the clerk contacted their representatives, they declined to come to

the meeting, indicating that they had no problem with the bill, which was a relatively dramatic change, not in the short term but in the long term, because when I first introduced this bill in 1997, they were quite opposed.

What has happened, of course—and I think we're going to hear from the Ontario Medical Association—is that they now have a section on alternative or complementary medicine and it has been given permanent status. So things have changed quite dramatically and I think they've changed because of organizations like yours. I want to thank you for that.

Mr Wolfe: Thank you. We are solely dedicated to educating the public and it is due to the public's increased awareness that a lot of the positive changes that are needed are going to be taking place.

Mr Brad Clark (Stoney Creek): The way the act that Mr Kwinter has put forward is worded now—I'm reading the actual wording from it and then I read in your documentation about this one particular case where the individual doctor's use of nutritional medicine in conjunction with traditional cancer therapy caused him to lose his medical licence.

Now, I don't know all of the details of that particular case but I'm wondering whether or not this section couldn't be used in the exact same way by the College of Physicians and Surgeons as it is written here. They've added the terminology "solely" to the section, "on the basis that the member practises a therapy that is non-traditional or that departs from the prevailing...." There's a comparison. At what point does it become the judgment call in terms of what actually failed the patient?

Mr Wolfe: Again, I don't know specifically the case in detail, but I'm sure that it's all a matter of record.

The Chair: Thank you very much for taking the time to come before us here this afternoon. We appreciate your comments.

1540

GATEKEEPERS OF HEALTH

The Chair: Gatekeepers of Health, you're up next, if you're prepared. Welcome to the committee.

Dr Aileen Burford-Mason: A word about Gatekeepers, first of all. We are an issues-driven consumers group that was formed in 1997 to lobby for freedom of choice and access to reliable, safe and affordable complementary medicine and therapies, practitioners and health care products. We were actually driven by the issues that were related to the natural health care product controversy at the time. Our name, Gatekeepers, reflects our interest in extending the rights and freedoms of individuals to choose health care options which they believe will promote and maintain their own optimal health status. That is why we support Bill 2.

I might add that none of the surveys suggest these therapies are used solely. If you look at the opinion polls, as well as at the academic surveys that have been done on the use of non-traditional medical therapies, they are used in conjunction with mainstream medicine. Only about

5% of the population ever use them as alternatives, so "complementary" is perhaps a better term.

Therapies like acupuncture, chiropractic, homeopathy, vitamin and mineral therapy and herbal treatments are growing in popularity. The latest estimate is that about 50% of Canadians are using these therapies. The reasons they use them are that they consider them to be safer, gentler and more natural, with fewer side effects than conventional medical care, or because they have failed to respond to conventional medical care for ongoing chronic problems. That is well documented.

The medical profession has been generally skeptical about the benefits of these treatments and, therefore, have taken up a position where they have fought the use of such modalities by their own members. The College of Physicians and Surgeons of Ontario has a long-standing history, as we've just heard, of disciplining doctors who use complementary and alternative practices. I personally know some very fine people who decided not even to stand up to the college in terms of the disciplinary hearings, but just to give up practising medicine. Certainly in Toronto we lost a number of good people that way. Most of the cases in recent years have involved doctors who have been fervently supported by their patients. Nonetheless, the College of Physicians and Surgeons appears to have pursued these doctors with almost fanatical zeal. We feel there is such a polarization of viewpoints that it's worthwhile trying to understand what is at the root of this polarization.

I think there are two reasons there is a polarization in terms of the allopathical, the conventional or traditional medical care and those doctors who want to use both. The new buzz term is integrative health care, where we integrate both types of medicine, doctors who want to use mainstream medicine alongside some of these new, and many of them very old, therapies. The mainstream conventional doctors say that these practices are not proven, that there's no convincing evidence they work or they're safe. That's their first argument. The second argument they put forward is they say the biological basis—maybe I should have explained beforehand that I'm a PhD immunologist with a background in medical health care research, and I also am director of scientific affairs for the Acupuncture Foundation of Canada, so I'm very familiar with these arguments. The other argument is that we don't know how these things work, therefore they can't work and we're like to stop them happening.

We at Gatekeepers believe both those arguments are untenable. We believe that healthy skepticism is important in an evolving health care system, as we have at the moment, but that some of the arguments are not rational. That's where we're concerned and that's where a Bill 2 would fit in: when the response to the use of non-traditional therapies becomes irrational.

There are two particular points we'd like to make. First of all, we live in a very highly multicultural society in Toronto. We have representatives of every nation on earth, and many of what we call non-traditional are actu-

ally traditional in those societies. They have a long history of use.

But even within western medicine, there's no standard medical scientific practice. If we look at the simple examples I have listed, in Germany herbal medicines are frequently used as a first line, and it's only when herbal medicines don't work that they turn to pharmaceutical drugs. Recently there's been a lot of research looking at the evidence for something like St John's Wort, which they have always used as a first-line treatment for depression. Sure enough, when you put it to the test, it is as good as pharmaceutical drugs but has fewer side effects. The evidence and the reference is in there.

Homeopathy in the UK: there are six hospitals in the UK that are supported by the National Health Service. Family physicians can refer their patients to those hospitals, and those hospitals cover the full spectrum of medical specialties from allergy treatment to behaviour problems to adjuvant treatment following cancer therapy, surgery etc. The hospitals are free to patients and they're funded by the National Health Service.

An issue we had in Ontario: for some of the doctors who were censored by the College of Physicians and Surgeons, one of the rationales for censoring them was that they suggested mercury amalgam in fillings was not a good idea and might be detrimental to health. Sweden has banned mercury amalgam since 1994, but the College of Physicians and Surgeons was still listing this as an acceptable practice for doctors to be recommending to their patients, rather than that they don't have mercury amalgam or that they have mercury amalgam they already have in their mouth removed.

The other point we want to make is that there is an awful lot of good research out there that tends to get lost in the information explosion. We have an unprecedented explosion of information. The first time I came to Toronto—I didn't live here—was in 1986 when I came to an immunology conference. There were 7,000 of us here. We were told then in 1986 that there were 2,000 new papers a day being published that were relevant to us. This is becoming a major problem, that you can have traditional doctors saying there is no evidence, but they don't know how to search for the evidence and they perhaps don't even know how to evaluate it when they do come across it.

There's an enormous amount of good research in the literature that is not being pulled together. Fortunately the people who are accessing it are patients. They are going through all sorts of resources like libraries, the Internet and the media. They are looking at many of these good peer-reviewed studies and are going to their doctors with them. So the pressure is for the doctors. We cannot say there is not good evidence for some of these modalities, nor can we say we don't really understand the biological rationale, because that's not a good enough argument.

We had a study published last year done by some Italian doctors, where they looked at something called moxibustion which is the burning of a herb on an acupuncture point to turn breech-birth babies rather than

manual turning, which our traditional doctors do. They burn a herb on a point near the nail of the little toe, and when these Italian doctors—not Chinese doctors—set up studies comparing manual turning and moxibustion for breech births, the moxibustion won hands down. So just because we don't understand something doesn't mean to say it doesn't work. The fact of the matter is the public is going to all sorts of alternative resources. They need doctors who are prepared to take the time to find the information, to actually bring together the body of knowledge, to pursue research in alternative and complementary medicine.

With an amendment like the one in Bill 2, we at least have protection for doctors who are prepared to take a non-traditional look. We hope, at Gatekeepers, that with the adoption of this bill we will have more open-mindedness, that we will exclude irrational prejudice and that there will be a greater emphasis on preventive health care.

As consumers who value their access to complementary and alternative practitioners as well as to top-quality conventional medicine, Gatekeepers of Health feel that Bill 2 is a good first step to ensuring that practitioners who are open to the possibilities of health care practices from other cultures and perhaps even other times, and who carry out those practices with due regard for the safety and health of their patients, remain free to do so. We support the bill as in the papers.

The Chair: Thank you very much. That's slightly over the 10 minutes, but we certainly wanted you to able to—

Dr Burford-Mason: Sorry.

The Chair: No, that's fine. That's the advantage of having a handout. We could follow along and knew you were getting near the end. Thank you very much for taking the time to make your presentation before us here today.

1550

JANE BALLOW

The Chair: Our next presenter will be Jane Ballow. Good afternoon. Welcome to the committee.

Ms Jane Ballow: Ladies and gentlemen, I am Jane Ballow, a member of a recently formed group, Friends and Patients of Dr Frank Adams. We are a group of chronic pain sufferers who finally found help with our excruciating pain when we found Dr Frank Adams. I am here to speak without prejudice in support of Bill 2, not only on behalf of the group but myself as well.

Bill 2 puts into Ontario law the principle of human rights as they affect doctors and patients and the practice of medicine. I understand that in 1989, Canada's Minister of Foreign Affairs signed the World Health Organization's Helsinki agreement, which spells out the essence of Bill 2. This agreement was signed on behalf of all Canadians. I find it very interesting that the College of Physicians and Surgeons of Ontario, the CPSO, has disregarded these principles and needs the enactment of

this bill. This agreement should have been adopted as merely a matter of course at that time. Since the essence of Bill 2 was good enough for Canada's representative and the world to sanction, surely Ontario could have no reservation in incorporating it into the existing laws governing medical practice in this province.

On October 4 of this year, Dr Frank Adams, an internationally known and well-respected pain specialist of Kingston, had his licence suspended by the CPSO. Dr Adams has the knowledge and the skill and was practising within the World Health Organization guidelines for non-malignant chronic pain management, and still the CPSO disregarded this and suspended his licence. Not one patient had complained. No patient was proven harmed at Dr Adams's hearing. Dr Adams, as one of Canada's recognized authorities on pain management, helped formulate the pain guidelines for the World Health Organization and for the federation of medical licensing boards of the United States.

The mandate of the CPSO is to serve and protect the public and to guide the profession. I feel assured it was established with all good intentions, but it has lost its focus. It is failing not only the public but also the profession. Due to fear of the CPSO, many doctors are reluctant to use any, let alone non-traditional, means of alleviating pain. When Dr Adams's licence was suspended, approximately 200 of his former patients were left without a doctor, without medication and without anywhere to turn for the quality of care, the expertise and the compassion that he, our world leader in chronic pain management, afforded us.

The CPSO registrar, Dr John Bonn, on Michael Enright's Sunday Edition of October 22, 2000, wanted the public to be well assured that we, Dr Adams's patients, were being cared for. This is not true. After Dr Adams's suspension, I personally called the CPSO, asking for the name of an Ontario doctor who would help me with my pain management. I was shifted from one person to the next and was finally told it was not the job of the CPSO to help me find a doctor, and my call was disconnected. I can only conclude from the cavalier handling of this simple request that the CPSO is not interested in helping chronic pain patients like me.

The CPSO claims that opioid use is addictive in chronic pain patients, even though recent research has proven that we are no more likely to be addicted than the general public. The CPSO appears to disregard this fear of addiction in cancer patients because they are terminally ill. Are we any less sensitive to excruciating pain than they are? Why should chronic pain sufferers be doomed to a life of pain because the CPSO arbitrarily chooses to disregard international standards of pain management? Why should the CPSO be so self-serving to its own prejudices that it sentences us to a life of continuous suffering? Why aren't we worthy of better treatment? Why aren't our rights being addressed?

Bill 2 is long overdue. It should have been passed long ago to prevent the unfair persecution of doctors who are practising the excellence and the advancement of

medicine. Bill 2 will go a long way in stopping turf wars, power struggles and sheer ignorance from contaminating the doctor-patient relationship.

While it is my belief that Ontario likes to perceive itself as the province in Canada that is on the cutting edge, it is certainly not so in this arena of medicine. Nova Scotia has already adopted the World Health Organization pain guidelines. In 1996 the Alberta Legislature enacted legislation that "allows Alberta doctors to perform any alternative therapy provided that it cannot be proven to do more harm than conventional drug and surgical treatments." All three readings were passed on the same day. Yet in Ontario doctors stand to lose their licences to practise pain medicine even if they follow the World Health Organization guidelines on pain management. I know this is true because our doctors have told me and many members of our group that they were afraid of repercussions from the CPSO and its attitude toward the prescribing of opioids for chronic pain.

We know through pain management expert Dr Peter Rothbart of the Ontario Medical Association that pain doctors are especially targeted for harassment by the CPSO because of its outdated attitudes toward pain medications. Why is the CPSO so far behind and out of touch in pain management? How could it suspend the licence of such a well-known and well respected doctor as Dr Adams? An action like this is stifling the doctors of Ontario in their ability to deal not only with chronic pain sufferers, but I have to assume other areas of medicine too.

The human rights of patients appear to be of no interest to the CPSO and they have stated, "Patient outcome is not relevant." I like to think that if a patient who has been denied proper medication should happen to die, then patient outcome would be quite relevant. Some of Dr Adams's patients might be suicidal because the rate of suicide in chronic pain sufferers is higher than in the general population.

Medication that has been in existence for many years is available. It will ease our suffering, thus allowing us to function more normally, not only as family members but as members of the community at large. The CPSO has failed Dr Adams's patients abominably. I feel the CPSO would better protect us if they allowed doctors like Dr Adams to monitor our medications rather than have us self-medicate on large amounts of legal substances like over-the-counter drugs, or alcohol, or maybe even other substances of a less legal nature or a mixture of any or all of the above.

Dr Adams's patients have been left with drastically reduced amounts of medication and many have been left to go off their medication cold turkey, which any pharmacist will tell you is not wise. I feel this is not only unjust, but shows a real lack of foresight on behalf of the CPSO. What is the matter with the CPSO?

Please give us Bill 2 to allow our physicians the freedom to prescribe effectively for our needs and to explore, within sensible and safe guidelines, all avenues of pain management without fear of the CPSO.

The CPSO claims it is protecting us. It cannot protect the public from something if it isn't first doing something for us, if it isn't first servicing our needs. The government has an obligation to the public. It must get to the root of this large provincial problem. It must ensure that the CPSO fulfills its mandate to serve and to protect the public and to guide the profession by "considering first the well-being of the patient."

The Minister of Health and Long-Term Care has the duty to ensure the public is treated with sensitivity and respect. Where is the sensitivity to my, my group's or the public's needs?

It is my hope, as a chronic pain sufferer of 11 years, that the government of Ontario will see fit to pass Bill 2 in an expeditious manner. By doing this, persons like myself and the public will be able to receive proper treatment and have our medical needs served. Let the government of Ontario ensure our rights to personal, professional and progressive medical treatment. Pass Bill 2.

The Chair: You, too, have timed your presentation on the button. Thank you very much for taking the time to come before us here today.

1600

CITIZENS FOR CHOICE IN HEALTH CARE

The Chair: I am told that both parties of the Citizens for Choice in Health Care are now with us, if they'd like to come forward. Good afternoon and welcome to the committee.

Mr Bruce Lofquist: We're making this submission in support of the Act to amend the Medicine Act, in particular in support of Bill 2, commonly known as the Kwinter bill.

Eleanor and myself are both members of Citizens for Choice in Health Care, a public interest organization. We focused our work on attempting to ensure that people have freedom of choice in health care in terms of both products and services.

"This government is determined to make Ontario a place where new ideas and innovations are encouraged." In other contexts the government has emphasized the importance of encouraging new ideas and innovations. This is an important aspect of the Kwinter bill, in addition to protecting freedom of choice and fairness for both physicians and patients concerned with safe and effective therapies that depart from the prevailing medical practice.

Similar choice-in-health-care legislation is already in place in Alberta and eight American states: Alaska, Washington, North Carolina, Oklahoma, our neighbour New York state, Oregon, Georgia, and Colorado.

The Helsinki accord on human rights, signed by Canada in 1989, made provision that such choices of new diagnostic and therapeutic measures be available. Passage of Bill 2 is necessary to make Ontario legislation consistent with the intent of the Helsinki accord.

Bill 2 is consistent with the objectives of the health professions legislation review process that lead to the current regulatory system, including the RHPA and the Medicine Act.

Status quo thinking can be enforced by using the inherent bias of the current regulatory system. Physicians are judged by how well they maintain the unwritten standard of practice of the profession as interpreted by experts of the CPSO's choosing. The choice of experts is crucial. By definition, approaches that depart from the prevailing medical practice are not considered standard by mainstream physicians regardless of how good a patient outcome they achieve. Positive patient outcome is therefore essentially irrelevant to the CPSO. It would not be fair to a physician to hold him or her responsible for the outcome of the inevitable progression of terminal cancer or unavoidable side effects of chemotherapy if he or she had provided a high standard of practice of conventional care. Likewise, it would be extremely unfair to physicians, patients and progress in medicine to find a physician incompetent for failing to maintain the standard of practice when the physician is achieving good patient outcomes using safe and effective innovative approaches. If true peers, that is physicians with expertise in the relevant areas of medicine, are selected to do the assessing, a fair assessment is possible.

The discipline process can be misused to settle differences of scientific approach that should be reviewed in broadly based, ongoing professional discussion and weighing of ideas by knowledgeable peers. A discipline hearing is not a level playing field or an avenue to deal with turf wars.

Despite the inherent bias of the system, we are not at present aware of serious problems of this nature at colleges other than the CPSO.

The CPSO's actions in a number of cases have shown very serious procedural improprieties that CCHC believes threaten all physicians and patients concerned with innovative approaches and seriously undermine public trust in the regulation of the health care system. CCHC sponsored a press conference on May 10, 2000, at which Michael Code, former assistant Deputy Attorney General, criminal law, described his findings after reviewing nine cases of CPSO's investigations against physicians. A transcript of Mr Code's comments at the press conference is attached.

Serving and protecting the public interest should include serving and protecting the interests of those whose medical needs are not met by current prevailing medical practice. Medicine does not yet have effective treatments for many conditions and therefore must have a climate open to new ideas, a climate that allows physicians to assist patients now, while research continues searching for better answers. Patients are willing to pay for such treatments because they are pleased with the results. Patients do not want to be protected from accessing safe and effective therapies that meet their needs or to be forced to go outside of Ontario to receive such care, with further inconvenience and expense.

Methods that depart from the prevailing medical practice are particularly important to patients with chronic conditions which represent an important sector in health care.

Should complementary or alternative medicine be available from physicians? This of course is a rhetorical question. Complementary or alternative medicine covers a very broad range of approaches, in effect everything that is not conventional, and much of it is practised by lay people. From this broad wage of approaches physicians responsibly select, based on training and available research, those therapies they judge may be helpful to offer patients in particular circumstances in conjunction with conventional care. There is increasing professional interest and research in complementary areas. Eventually some complementary ideas or therapies may become mainstream.

Complementary therapies are within medicine's scope of practice. Scope-of-practice statements are very broad. However, not all practitioners would choose to acquire skill in and use all possible therapies, just as not all physicians choose to be neurosurgeons. Scope statements are usually read in conjunction with the controlled acts that a profession is authorized to use. The medicine scope and list of controlled acts is substantially different from those proposed for the regulation of naturopathy. We do not understand how the Health Professions Regulatory Advisory Council's report on naturopathy would be particularly relevant in considering the passage of Bill 2.

Some complementary therapies are available only from physicians. Other health professionals are not allowed as broad a range of controlled acts. Physicians practising orthopaedic medicine and environmental medicine both involve controlled acts 1, 5 and 8, and environmental medicine also act 12. Clearly patients could not get such care from non-physicians.

Guidelines and training programs from relevant professional organizations are important in advancing knowledge and promoting high quality of care. Many, however, are outside Canada and have been arbitrarily rejected by the CPSO.

Provisions for safeguarding high standards of care and professional conduct already exist in the current professional misconduct regulations—if a true peer, knowledgeable and experienced in a particular therapy or area of practice, assesses how well a physician maintains the standard of practice. If a patient receives a complementary therapy, they should be confident that the physician is skilled in the complementary therapy in addition to conventional medicine.

Unfortunately, the ministry's intention is being circumvented. Although CPSO's words say that it is currently safe to offer complementary therapies or therapies that depart from the medical practice, CPSO's actions show that physicians risk being treated most unfairly and risk being found guilty of professional misconduct or incompetence for offering such therapies, regardless of how safely and effectively they are used. Therefore the public interest is not being served and protected.

Quality assurance regulations procedural protections cited by the CPSO as evidence of CPSO's fairness to physicians using alternative or complementary treatments are a red herring. Quality assurance provisions in sections 79.1 to 83 of the RHPA do not apply to complaints and discipline processes, with their much more serious consequences for professional misconduct or incompetence in sections 25 to 56 and sections 75 to 79. The only reason those procedural promotions exist in quality assurance is that Health Minister Ruth Grier, in May 1994, in response to concerns raised by members of the public, insisted over CPSO's strenuous protests that the procedural protections be added.

The College of Physicians and Surgeons has been entrusted with the mandate to regulate the profession in accordance with the Medicine Act, the RHPA, the regulations and bylaws and has a duty "to serve and protect the public interest." It appears that the college in a number of circumstances has failed to abide by the procedural requirements and has failed to serve and protect the public interest. These are serious failings. This is like a police force that has gone bad.

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It is appropriate for the public to turn to the government for action under these circumstances. The public wants and needs the protection of Bill 2 and the assurance that the provision is in a form that the college can't readily alter. Bill 2 is a useful step, possible within the limitations of a private member's bill.

Historically, professional misconduct has been dealt with by regulation, but we doubt that another college historically has acted in such a way as to undermine the intent of the regulatory framework. Decisive action is required, especially given the requirements that provincial legislation be in keeping with the provisions of the Helsinki accord. Self-governance is a privilege that should not be abused.

Physicians and patients and progress in health require passage of Bill 2 so that it will be safe for physicians who want to use therapies that are non-traditional or that depart from the prevailing medical practice to "consider first the well-being of the patient," as the Canadian Medical Association code of ethics requires, and without living in constant fear of the college.

The Chair: Thank you very much. It sure makes our job easier when everyone obviously timed their presentations. You have used just fractionally over 10 minutes, but we appreciate your taking the time to come before us here today.

Our next presentation will be the Canadian Society for Environmental Medicine. Is their representative here?

Interjection: They seem to be stuck in the snow.

The Chair: Well, we will keep juggling if folks are late arriving, given the circumstance of the weather. Have we a representative from the Ontario Society of Physicians for Complementary Medicine?

Ms Helke Ferrie: They are coming in the same car.

The Chair: OK. How about Jarmila Onley? Rainet?

Ms Ferrie: A similar problem.

HELKE FERRIE

The Chair: How about Helke Ferrie? Good afternoon. Welcome to the committee.

Ms Helke Ferrie: Ladies and gentlemen, my name is Helke Ferrie. I'm a science writer specializing on issues of medical politics. I write for both mainstream and alternative publications here in Canada and in the United States.

I came to this work by two routes: (1) through my training in physical and medical anthropology, and (2) through contracting a degenerative illness mainstream that medicine considers incurable. Because my anthropological training predisposed me to researching diseases in terms of environment and biochemistry, and because academic training inculcates doubt about everything, I found my way out of medical labelling and into the practice of Dr Jozef Krop. Today I am here before you, able to speak and move because of his treatments.

The experience of recovery led to many questions, such as why an excellent doctor was being prosecuted for putting current knowledge of biochemistry to clinical use; another being why there was this "Kwinter bill," now Bill 2. Reading it made me wonder what could possibly have made it necessary. Why state the obvious? I decided to find out.

I interviewed MPP Monte Kwinter and learned that he had decided such a bill was needed after finding out that Dr Gerry Green had lost his licence for using nutritional therapy in conjunction with cancer treatment. I also attended many disciplinary hearings at the college and researched the cases of more than 40 doctors, all greatly cherished by their patients, all prosecuted by the College of Physicians and Surgeons for reasons that made no sense. Lawyer Morris Manning once said that the disciplinary process at the CPSO is "truly Kafkaesque."

Writers like to focus on specific events which have the power to illuminate an entire issue dramatically. I will therefore give you three short scenes, real events I witnessed. Each of these will tell you why Bill 2 is vitally needed in Ontario.

Scene one is now also found in the more than 7,000 pages of transcripts from the disciplinary hearings in the case of Dr Krop. The college sought to prove incompetence on the basis that Dr Krop was not meeting Ontario's standards of medical practice. However, there are no written standards, which is only logical. Medical science in the past 50 years is like a video stuck on fast-forward. By the time the standard has been formulated, it would be outdated.

Dr Krop's lawyer, in an effort to nail the Jell-O to the wall, put the deputy registrar, Dr John Carlisle, on the stand for cross-examination on this point. Dr Carlisle is in charge of the discipline process in the CPSO. Mr Manning asked him if there were any written standards and Dr Carlisle said no. So Mr Manning asked, "So, who sets the standards?" To this Dr Carlisle answered without hesitation, "I do."

Scene two has been repeated several times in a number of physicians' disciplinary trials, most recently in

the cases of pain expert Dr Frank Adams of Kingston and allergy and asthma physician Dr Sukhdev Kooner of Windsor. Both have a flawless record of practice and are supported by hundreds of very angry patients. They sent thousands of faxes to the CPSO and the government, and hundreds of letters detailing harrowing stories of illness and pain and how Dr Adams and Dr Kooner were able to help.

In both cases, the lawyer for the prosecution, Mr Donald Posluns of the CPSO, instructed the disciplinary panel as follows: "Patient outcome is of no relevance to your decision. You have to determine whether" Dr Adams and Dr Kooner "have met the standard of practice in Ontario. They have not and, therefore, must be found incompetent."

Patient outcome is, by the way, the fundamental criterion by which medical practice in the United States is judged through their equivalent of the Canadian colleges, namely, the Federation of Licensing Authorities. Not that things are perfect south of the border, but at least they acknowledge this most fundamental principle of medicine.

The next time you have to deal with a child's asthma attack or sign up for a vasectomy or pick up a prescription, remember what our provincial medical authority thinks of patient outcome.

The third scene took place in October of this year during the trial of Dr Sukhdev Kooner. He is a member of the Pan American Allergy Society, which has some 20,000 members worldwide. Its methods of treating allergy and asthma were developed in mainstream universities in the United States before antibiotics came on the market and they are now part of many current university medical textbooks. Several hundred Canadian doctors are trained members of this organization. Dr Kooner's patients seek him out because these methods are especially effective in asthma and allow patients to be weaned off all drugs.

The CPSO is seeking removal of Dr Kooner's licence. In his summation for the prosecuting CPSO, Mr Donald Posluns told the disciplinary panel: "You have never heard of the Pan American Allergy Association and therefore it is not part of the standard of medical practice in Ontario and you must rule against him." The decision yet has to be rendered.

To summarize: the CPSO seems to prosecute modern medicine and does so arbitrarily. This sanctifies the meaning of the word "parochial" to the level of an absolute, scared value. That is why MPP Monte Kwinter noticed and decided it was high time for Bill 2.

Indeed, Bill 2 should be seen as a piece of emergency legislation. Ontario needs Bill 2 for the same reasons that more than a decade ago the Helsinki accord on human rights considered it vital to define medical practice in terms of basic human rights, both for doctors and patients.

We need Bill 2 because medicine in Ontario is in crisis. An excellent measure of this is the number of angry patients. Three years ago it was possible for me to

interview most of the patients supporting an accused doctor. Today it is necessary for me to meet them in groups of hundreds.

Another measure is public perception. Three years ago people would say, "Oh, that Krop case. Surely there must be something wrong with him or the authorities wouldn't have gone after him." Now people say to me about whichever doctor I am writing about, "Oh, he must be good if they went after him."

We need Bill 2 because human rights—by this I mean especially the rights of the patient—must take precedence over arbitrary, autocratic rule in medicine. We need Bill 2 because the abuse of power in medicine is intolerable in a country that professes to be civilized and a democracy. This bill will begin to put medicine back on track in this province.

The Chair: Thank you very much. We appreciate your bringing your presentation before us today and having your comments. Have we had anyone else join us, who's on the list? Might I ask the last presenter, you seemed under the impression some were on their way. Have they given you an idea what time they expect to arrive?

Ms Ferrie: The driving is terrible. I expected they were coming.

The Chair: I would be pleased to call a recess if you had a way of contacting them. Do you have a cell phone number?

Mr Kwinter: Mr Chairman, might I ask for a few minutes. If we were going to have a recess, maybe I can use my time.

The Chair: Excellent idea.

1620

Mr Kwinter: I just want to bring to the attention of members of the committee some of the key concerns that led me to bring in this bill, and to also address Mr Dunlop's comment about how Bill 126, which was the initial bill, was reintroduced as Bill 2 after the House prorogued. It was identical to Bill 2 with the exception of one word, and that was "solely."

You should know I had no idea this would turn into an attack on the College of Physicians and Surgeons by virtually everybody. That was not my intent. I think the college, by and large, does a good job. I think they somehow or other have a problem in this particular area. One of the concerns they had was that my bill, and that was when it didn't have the word "solely," would be used by doctors who were practising beyond the bounds of what anybody—I'm not just talking about the college—was doing, that they would use this particular amendment to justify what they were doing. Their feeling was that they had found doctors guilty of practices that were not acceptable, and that notwithstanding that some of these doctors were proposing it was only because of their practice of complementary or alternative medicine, this wasn't the case.

When I took a look at the Helsinki accord again, I found, really to my almost embarrassment, that the Helsinki accord actually had the word "solely" in it, so

this was really proposing that no doctor would be found incompetent or subject to discipline solely because they practised alternative medicine. That is why the bill was amended and that is what it is.

Having said that, I want to give you a case history of mine. It wasn't me as a patient; it was me as a member of the board of directors of Branson Hospital. On January 14, 1997—I'm going to read verbatim from a letter by the president and CEO to the board members. I remember it exactly. What happened was that the head of the physiotherapy department came to a board meeting as an information item only. There was no requirement for any action; it was just information because the College of Physiotherapists of Ontario is a self-governing profession under the Ontario health practices legislation.

The head of physiotherapy announced that at Branson Hospital two of her physiotherapists had been certified as acupuncturists and as a result would be offering this treatment to patients who came in. They didn't require the approval of the doctor, unless a doctor had prescribed or referred a patient to them. Then they had a professional obligation to let the doctor know what the treatment was and how it was progressing. You could actually walk in off the street to the physiotherapy department of Branson Hospital, claim you had some problem and they could determine on their own that acupuncture was the required and preferred treatment.

Immediately the chief of medicine, who has since retired—he retired only because of age, but he was, and I don't mean it in a derogatory sense, an old-time doctor. As soon as he heard this, he said: "There is no way that acupuncture will ever be practised in my hospital. There is no way." The chief of physiotherapy was a little embarrassed to say: "With all due respect, doctor, we're not asking for your approval. This was an information item only and we are within our mandate to do it."

Here is a letter that, as a result of that meeting, the president sent out to the board members: "At the January 7 meeting of the board of directors, a request from the physiotherapy department to introduce acupuncture at North York Branson Hospital was introduced. Acupuncture is within the scope of the College of Physiotherapists of Ontario and the board appears to be looking with favour upon introducing the practice at Branson Hospital. However, the board is also anxious to demonstrate due diligence, and for this reason has asked the physiotherapy department to make a brief presentation at the February 4 board meeting to discuss the scientific support and evidence-based analysis which supports this practice."

I should tell you that at the February 4 meeting it was approved. Mount Sinai Hospital has a department the Minister of Health attended when they opened it, for acupuncture. There are all sorts of treatments that have become mainstream.

The problem you have is that there are people at the College of Physicians and Surgeons with the attitude, "If it ain't invented here, it ain't invented." This isn't what they were taught, and as a result they are not prepared to support any additional treatments that don't fall into what they consider to be good medicine.

As a result of my bill, Bill 126, immediately after it was given unanimous consent at second reading in 1997, the college had an ad hoc committee hold public hearings, very much like the hearings we're sitting in today. Nobody came to this meeting and opposed it—nobody. Everybody, and I haven't heard from everybody on this list, came supporting this bill. As a result of that, they have changed their policy. They issued a statement saying that doctors have nothing to fear from the college for practising complementary medicine.

Having said that, it did not stop them from continuing to prosecute and persecute doctors. You've heard doctors who have suffered as a result of this. There was a doctor who came to see me, Dr Rave Kovitch, who has a treatment where his patients—I mean, they were desperate. It was such an important treatment that he had hundreds and hundreds of patients. He was the feature of a television show where these people came to the television studio—they couldn't accommodate them—to say that their children cannot survive in a way that is acceptable without this kind of treatment. Notwithstanding that, the college said to him he can't do that because it isn't within the realm of what is taught at medical schools.

Just to address that particular situation, in the United States the majority of universities now teach complementary medicine, either as an additional subject or as a required subject. I don't know if we have anybody here from Hamilton, but—

Mrs Marie Bountrogianni (Hamilton Mountain): Yes.

Mr Kwinter: Of course. Allan Rock is in negotiations with McMaster University and they're talking about a \$100-million facility in Hamilton to deal with alternative medicine.

So the basic thrust of this bill is not to second-guess doctors. It is absolutely constrained to medical doctors only. This is all we're talking about. This is an amendment to the Medicine Act and it is for doctors only. It is meant to give freedom of choice for the doctor and freedom of choice for the patient, with informed consent, provided it can be shown that the patient isn't put at any greater risk than with conventional medical treatment. That is the basis of the bill.

I want to go back to a statement that I made at the beginning of these hearings, that the college—and it's interesting. They have a publication, and when my bill came back as Bill 2, they had an announcement in their monthly publication basically saying, "Monte Kwinter's Bill 2 has been given unanimous consent in the Legislature, and when it goes to the committee we will be there to aggressively object to this bill."

Subsequent to that, we had the Ontario Medical Association establishing a probationary section, which meant they had to follow the general precepts of the Ontario Medical Association, they had to have at least 200 members who were prepared to affiliate with this, and they had two years to show that they could maintain this. After two years they were given permanent status and they are now a section of the Ontario Medical Association.

So you have this anomaly, and I have copies of a document where the Ontario Medical Association is holding conferences on complementary medicine where they have speakers from all over the world coming in talking about it, and their licensing body is still fighting as to whether they should be doing it or not. We have that problem. All this is going to do is to ensure that doctors have the comfort level that if they are doing things always with the same criteria, in the best interests of their patients—and we're talking about outcomes, the best interests of their patients—they will not have anything to fear from the College of Physicians and Surgeons. So it's freedom of choice for the doctor, freedom of choice for the patient.

1630

Mr Clark: If I may, I'd just like to ask a question of MPP Kwinter. I'm not opposed to what you're proposing here; I'm just trying to get my head around it, OK? We do support it in principle and in intention. Section 26 of the CPSO's quality assurance regulation states, "The fact that a member uses or recommends a non-traditional treatment is not, by itself, determinative of deficient clinical ability." It seems remarkably similar to what your wording is in 5.1 of your amendment to the Medicine Act.

The question that I have is, if this bill does pass, I don't want it to be perceived in public that this is going to be the great fixer, that this is the panacea of all that ails the CPSO. Because as I read the two acts, in theory, we shouldn't be here talking about it. Based on their own regulation, we shouldn't be here, this amendment shouldn't be before us. If they were doing their job, we wouldn't be here, because it's already covered off and they would not have gone after any physician because they were solely using an alternative form of medicine.

So the concern I have is that we're moving this regulation to an act into the Medicine Act. That's my first concern. I'm not sure how it's actually going to work and I'm not sure if you have a handle on it.

The next question I have is, under the Regulated Health Professions Act, there are 21 professional colleges and 23 professions. Any one of them could be using alternative forms of medicine, but we're only talking about an amendment to the Medicine Act.

Can you comment on the two concerns that I've raised?

Mr Kwinter: I agree. You're absolutely right that when you think back, at the 1989 Helsinki accord, where Canada, as a signatory, in fact committed all of the provinces to this particular concept. The wording is virtually verbatim in the Helsinki accord as to what I've introduced in this bill. So you're quite right. You would think that the first reaction would be, "What do we need this for? We already do it."

Mr Clark: And it's in the regulation by the CPSO—

Mr Kwinter: But if that were the case, then you say, "OK, I agree with that." Why then are you opposing this bill, not saying it's redundant, we don't need it, we already do it; just saying no, no. I didn't want to bring

this in, because I'm not trying to bash the College of Physicians and Surgeons. That's not my purpose. But anyway, they violently objected to this bill. They also had public hearings. So you say, "Why would you have to have public hearings if there's no need for the bill?" And then why did they say in their publication that when it comes to committee, they will be aggressively opposing it? You ask that question. Why do you have doctors—I am not prepared to re-argue that whole thing; I brought this to the House three times and got unanimous consent three times. But at that time I had letters from doctors all over Ontario saying, "This is absolutely critical because I'm being harassed by the college. I am not allowed to do the things that I think are in the best interests of my patients." There is a definite sort of miscommunication between the college and the profession, because when you talk to doctors, they tell me all the time, "Great, this is what we need."

Now all it's really going to do is give doctors, who are responsible practitioners, that comfort level that they can do the best for their patients. This doesn't in any way absolve the doctor of any responsibility or any responsibility to the college. It is absolutely critical that the licensing body be responsible for the licensing and management, if you want, the professional qualifications, of the medical fraternity.

Mr Clark: I guess my concern is that in conversations with the CPSO this morning, they're basically stating that it's redundant; that's exactly what's in their regulation already. So how is the new act, the amendment to the act that you're proposing, going to change anything? How is it going to change the behaviour of the CPSO? If it's basically redundant to what the regulation already says and based on what we're hearing from testimony they didn't honour that—my concern is that this is going to be seen as the panacea; we all go home, everyone's happy, we're now moving forward.

Mr Kwinter: If I could just respond to that, the main reason for putting this in—in a perfect world there would be no reason to put it in, but unfortunately we don't have a perfect world. The other problem we have is that we are subject to the vagaries of the administration who happens to be at the college at any given time.

Again, I didn't want to get into this, but I have a letter that was written to the then Minister of Health, Jim Wilson, when the bill came forward the first time, by Dr Geoffrey Bond, who is both a lawyer and a doctor, who wrote in effect that if this bill goes through, it will be the end of medicine as we know it, and not only that, but went on to use two examples. Those two examples, I maintain, are probably the reason why he's no longer the president of the college.

The first one was an example of a baby who had been wrapped in cabbage leaves. This baby had been wrapped in cabbage leaves and had died. Then he put in brackets "by a non-practitioner." What relevance does that possibly have to anything, that he says it's a non-practitioner? It would be like saying, "In the jungles of Africa they have witch doctors who do things, and if you

allow this bill to pass as it is, we're going to be subjected to that." That was just one example.

The second example was, he said doctors would be able to sexually assault their patients and claim that this was an alternative treatment. Again, doctors are subjected to the same laws as everybody else. Without trying to knock doctors, if you take a look at the publication of the College of Physicians and Surgeons that we all get, if you bother to read it, by law they must publish the results of their disciplinary hearings. More often than not there are five, six, seven, eight cases every month, and most of them are sexual assault cases by doctors on their patients.

The point is that this will, if nothing else, emphasize that there is a need for the college to recognize or for the act to recognize that doctors should have the freedom of choice for themselves and freedom of choice for the patients, the patients certainly with informed consent. Secondly, there's the old precept "Do no harm"—as long as it can be shown that it's not going to create any greater risk for the patient than conventional treatment.

That is why it's so important, and if it wasn't, you wouldn't hear the stories we're hearing today. This is absolutely just the tip of the iceberg, and I can tell you, when this first came to light, when I first introduced this bill in 1997, I was inundated. I was going to public rallies where I was talking to them; I was going to meetings of doctors, who were all saying, "Go for it. It's about time we had something like that."

So you're right; in a perfect world there would be no need for it. But there obviously is a need for it and all you have to do is listen to what has been happening here today.

Mr Clark: If there aren't any other witnesses, we're ready to go on to clause-by-clause.

The Chair: We do have one other witness, who has appeared so far, but Mr Marchese has been waiting to say something.

Mr Rosario Marchese (Trinity-Spadina): Just briefly, I obviously support this bill and would like to suggest to the next speaker, who might be Dr Krop, to comment on the question that Mr Clark has raised, because I'd be interested to know the answer to that question.

He raises another question about how this act only changes the Medicine Act, as opposed to many other areas of interest. I would be interested in that as well. Hopefully Dr Krop or others might want to comment on that. I'm interested to know whether Mr Clark is saying that we should be broadening this, which I would support. I don't know whether Mr Kwinter has any suggestions, and I'm not sure whether you're proposing that or not, but I would be interested to know the answer to that question as well.

Mr Clark: The Health Professions Regulatory Advisory Council is already conducting a review of the act, looking at a number of things. It's a five-year review and we should be getting it sometime in December or January at the latest. I'm not sure exactly what all is going to be in that review, but they're supposed to be looking at all the colleges, all the professions, everything. We'll have to wait and see what happens.

1640

CANADIAN SOCIETY
FOR ENVIRONMENTAL MEDICINE

The Chair: With that, Dr Krop has joined us. Come forward to the witness table, please. Good afternoon and welcome to the committee.

Dr Jozef Krop: Mr Chair, do you want me to address the question of Mr Clark first or would you like me to present and then address—

The Chair: Whatever you're more comfortable with, Doctor. Normally it's up to the witness to make those decisions. Make sure you get all the points on the record that you would like to make.

Dr Krop: I will make you my points first, and we will come to it once you get excited.

First of all, it is with pleasure and deep conviction that I am here today to support Bill 2, also known as the Kwinter bill. As a doctor I fully appreciate the great importance of this proposed legislative amendment to the Medicine Act of Ontario.

I represent my colleagues, physicians in the Canadian Society for Environmental Medicine, which is a subsection of the approximately 400 members of the complementary medicine section of the OMA. In environmental medicine we deal with links between human health, poor nutrition and contamination of food, water and air in our communities, homes, schools and workplaces.

In Europe, complementary medicine is fully integrated, giving patients the best possible options for their individual health care. I assume that Canadians want the same options.

Bill 2 originated when Mr Kwinter learned three years ago that physicians were terrified of losing their livelihood if they trained in and offered complementary methods to meet patients' needs. Patients with chronic illness who are not helped by mainstream medicine want to try other safe modalities. They rely on their physician to assist them to make informed choices.

Bill 2 is of fundamental importance for the health of Ontarians, for illness prevention, for containment of skyrocketing health care costs and for advancement of scientific medicine.

For practising physicians, this bill serves two purposes: first, to protect valuable old knowledge. We are referring here to traditional medical knowledge that is not readily replaced and to which people wish to have access because it is, quite simply, working. The frenzy for the "new and improved" may be fuelled in part by patent applications and may not live up to initial high hopes. The second purpose of the bill is to protect valuable new knowledge from being stifled and to help insure that Ontario physicians are able to offer effective treatment for their patients.

I have personal experience of the need for Bill 2. Without patient complaints, the College of Physicians and Surgeons charged me, in effect for teaching my

patients to change their lifestyle in an effort to improve their health. My investigation and prosecution lasted a decade and ended with a misconduct conviction for using safe therapies, techniques and philosophies of environmental medicine, even though my patients gave informed consent and were satisfied with the results, with the good outcomes.

The emotional, physical and financial costs of this ordeal have been immense. Nevertheless, I am appealing to overturn the CPSO decision so that the internationally recognized therapies I use for chronic illnesses and environmentally linked diseases may be recognized in Ontario. My prosecution occurred despite the fact that members of the Canadian Society for Environmental Medicine had repeatedly attempted to dialogue with the college about the difficulties encountered in trying to help patients with chronic illnesses not responsive to mainstream medical methods.

My situation is not unique in Ontario. Other physicians are highly intimidated. It is intolerable that the patients of this province never know which doctor will be prosecuted next and on what arbitrary grounds. The 1989 Helsinki accord, to which Canada was a signatory, specifically recognized the need for medicine to be protected as a human right for both doctors and patients. It stated:

"In the treatment of the sick person, the physician must be free to use a new diagnostic and therapeutic measure, if in his or her judgment it offers hope of saving life, re-establishing health or alleviating suffering.

Yet in the 11 years since Canada signed the Helsinki accord, doctors have continued to be prosecuted in Ontario because of their use of internationally recognized, safe and effective innovative treatment methods.

On May 10 this year a press conference was held in this building. One of the speakers was one of Canada's leading criminal lawyers, Mr Michael Code, formerly assistant Deputy Attorney General of Ontario. He spent a year studying 10 such doctors' cases and he said in his press conference:

"I reviewed ... these doctors and the replies to them from the college which revealed to me a consistent pattern of unfairness in the way they were dealt with and a consistent pattern of improper use of powers and—arguably in some cases—even an abusive way of using powers. And, finally, what came through loud and clear, was a very strong bias against doctors working in innovative areas of medicine ... and trying to find new solutions to new problems....

"I would certainly invite the responsible government officials to look closely at whether the college is exercising its powers appropriately; whether this is the kind of Ontario, and the kind of medical climate, and medical community that we would all like to live in, whether it is appropriate that doctors are treated in this fashion."

After providing a detailed analysis of these 10 doctors, Mr Code observed further on, "It is my view that there is a very serious public policy issue here that the govern-

ment ought to look at carefully, to see if the people of this province are being served properly."

Ladies and gentlemen, with such serious abuse of process impacting on the needs of patients, it is essential that this government ensure that the Helsinki accord on human rights in medicine finally become recognized as a basic human right in Ontario and be protected by law. Bill 2 follows the example of eight states in the United States as well as Alberta, where similar bills have already been legislated.

Bill 2 was intended to protect Ontario physicians' freedom to offer expanded diagnostic and therapeutic options to their patients in harmony with the Helsinki accord. We urge you to pass Bill 2 as soon as possible so that medical science and innovation in health care can progress in Ontario.

The Chair: That used the allotted 10 minutes. Thank you very much for taking the time to make the presentation before us. We appreciate it.

1650

ONTARIO SOCIETY OF PHYSICIANS FOR COMPLEMENTARY MEDICINE

The Chair: We have Dr McAlister joining us from the Ontario Society of Physicians for Complementary Medicine. Good afternoon and welcome to the committee.

Dr Kenneth McAlister: Good afternoon. I'm a little out of breath; I was rushing to come here from Richmond Hill. As you will soon find out, it's slow going out there. So I'll just have to speak to you between breaths.

I'm a general practitioner; I've been in practice about 15 years doing complementary medicine. I'm a founding member of the Ontario Society of Physicians for Complementary Medicine. With this group we managed to establish a complementary medical section of the Ontario Medical Association.

I've been at this long enough to see how things are changing in a very positive way. My practice is full; I have many, many people who are on a waiting list. Most of the patients I see—in fact, all of them—are very excited about the possibility of having a conventionally trained physician who understands something of what most Ontarians are trying now in terms of vitamins, herbs and various traditional forms of medicine. Certainly this is what the people of Ontario want: an integration of conventional medicine with other modalities. I think this is the way of the future as well, a so-called pluralism in medicine and in science.

Just a word, then, about the patients. This is what I think they really want. From the point of view of the professional, I've been in the trenches long enough to know how difficult it was even five years ago to practise anything that fell outside the parameters, definitions, directions of the conventional medical training. As a physician, many times I'd find myself sitting in front of a person suffering from one illness or another that I couldn't understand with conventional methods and I

couldn't help with conventional treatments. Almost from compassionate grounds I developed these other modalities, which I have not found helpful in all cases, but in many cases I can bring something to the patient that I wouldn't be able to bring from the conventional point of view.

In the early years of my practice I did this at great peril, recognizing that at any time the college could stop my practice just really on the grounds that I was doing something that they couldn't understand, wouldn't acknowledge or wouldn't recognize as being valid. So I'm very excited about this bill coming out of Parliament to state once and for all that physicians, within careful guidelines which we have created and which I think need more work, can practise other forms of therapy in their office, with the consent of their patients, in addition to what they have learned in medical school.

That used to be the definition of complementary/holistic/alternative medicine: what you didn't learn in medical school. This definition no longer applies because many medical schools in the United States, and some in Canada, are now also offering courses in complementary medical therapies. So this whole definition is really outmoded. Nonetheless, as a physician I'm very happy that this august body is considering passing such a law so that we in the trenches are able to bring modalities to our patients that maybe some of our other medically trained colleagues don't necessarily understand or support for a variety of reasons.

These very basic comments were what I wanted to bring today, and I wanted in the time remaining to give you the possibility to ask questions if you have any.

The Chair: Thank you very much. This time the questioning will start with Mr Marchese.

Mr Marchese: Thank you, Doctor. Mr Clark raised a question earlier on; you weren't here at the time. His question is that the College of Physicians and Surgeons says that already in regulations we have that which permits people to practise complementary medicine. I don't remember the language, but it's in regulations now, so they're saying this is redundant.

Dr McAlister: Although the time doesn't allow me to pursue the details of that regulation, I was one of the people who wrote many of the recommendations—

Mr Marchese: Sorry, Doctor. Could we have Mr Clark read that same clause again?

Mr Clark: The question I asked was that under section 26 of the CPSO's quality assurance regulation, "The fact that a member uses or recommends a non-traditional treatment is not, by itself, determinative of deficient clinical ability." If you look at that and you compare it to the amendment to the Medicine Act that is proposed—a little bit different wording—it means exactly the same thing.

So the question I had was, if we're not doing it now, how are we going to do it with the act?

Mr Marchese: So Mr Clark, the surgeons presumably made the case that—

Mr Clark: That it's redundant.

Mr Marchese: —it's redundant. Is this redundant on the basis of what you heard?

Dr McAlister: I don't think so. First of all, I think we were very active in getting the college to move to the position it's in now. I don't think they would have gone as far as they have without our organization and without our lobbying and without the support of the people of Ontario.

If you read the whole document, you'll find that there are other areas that are open to interpretation, depending on who wishes to enforce that particular regulation. They have really failed to grapple with the central concept of plurality in science. From that point of view, depending on who interprets the regulation—it's not an act, but a guideline—I think physicians such as myself would possibly be put in jeopardy.

Many physicians are supportive of this kind of medicine. There are still a core group of physicians who are very opposed to anything different than what they've been taught. My concern, as a practitioner, is that these people could possibly interpret that act in a way that would be repressive. From that point of view, I think it's very important in the political arena, in the arena of our rights, that this body make a statement supporting this kind of medicine.

I also want to point out that the word "solely" in this act came from our organization.

Mr Marchese: We don't have much time. That's why I wanted to ask this other question. The point that others have made is that doctors who practise in this field continue to be prosecuted and/or persecuted. That's part of the point. So I'm not quite sure that—in spite of the fact that someone said to Mr Clark that this is redundant, persecution seems to continue. In your mind will the wording of this legislation diminish the persecution or prosecution of doctors, do you think, or do something that will be good for you folks?

Dr McAlister: Yes, I think it will be very good for us, because it will send a message to the medical community that the people of Ontario want to have this medicine developed and believe in a so-called integrated medical approach.

The Chair: Time for one more question, or if you don't have one, Mr Marchese, if anyone else in the committee has a question.

Mrs Bountrogianni: I basically just want to get on the record to support this bill, as a psychologist and a member of another health profession, and also as a patient of Chinese medicine.

I would like to also go on record as saying that the physicians should really be cringing at their college's lawyer's comments that patient outcome is of no relevance. Both in my field and in every other health field that I know of, patient outcome is the only thing that's relevant.

So Chair, I just wanted to get on the record to say those things. Thank you.

Mr Marchese: I've got a last question. Mr Clark again raises the question that we're only changing the Medicine Act, as opposed to the other regulated profes-

sions that might be affected by such an act that we're proposing today. He was arguing that perhaps we should make this broader and make it affect and/or relate to other regulated professions. What do you think of that?

Dr McAlister: I can't comment on that in any official way, but as a citizen of Ontario and as someone who knows people in other therapies, I think broadening this would be a tremendous asset. For example, the physiotherapists and the massage therapists are struggling under similar constraints by their colleges. There is some progress there in opening up the fields, but nonetheless I think such an act would also send a message to these other professions and it would be definitely progressive.

The Chair: Thank you for taking the time to make the struggle to get down to us from Richmond Hill, given the weather outside. We appreciate it.

JARMILA ONLEY

The Chair: I'm told that Jarmila Onley has joined us now, if she could come forward, please.

The clerk informs me that your handout isn't quite ready, but if you want to talk, as soon as it comes in—

Ms Jarmila Onley: Good afternoon. Actually, I need them. I put everything on paper.

The Chair: OK, if you could just have a seat there, as soon as the clerk gets those back we can recommence.

Mr Clark: For the record, because Mr Marchese was asking the question also in terms of review by HPRAC, in 1994 HPRAC was requested by the then Minister of Health to review naturopathy and acupuncture. The review was done and submitted back to the ministry in 1996, and then the ministry, in 1999, asked them for additional advice on it. So that review is also—the report is pending in terms of naturopathy and acupuncture.

1700

The Chair: Thank you. Mr Kwinter.

Mr Kwinter: I want to address both Mr Marchese's comments and Mr Clark's comments.

When I started getting interested in this particular bill, having in mind that it was a private member's bill, I was besieged by people who said, "What about me? Why don't you include this? Why don't you include that?" I said that is beyond the scope of what I as a private member could get involved in.

What I did feel was within the scope and would really serve the people of Ontario was to come up with a very simple statement. This bill has got 67 words in it and it's really a statement of principle: freedom of choice for the patient, freedom of choice for the doctor, do no harm and don't be afraid to use your best judgment within the confines of the Medicine Act to do it.

I think that's an important statement, and we've heard from many deputants talking about the problems they have actually endured. I agree, this is a first step. This is a platform on which to build all of these other things, but I think that's a role for the Ministry of Health to deal with, not for me as a private member.

But I do think that we as legislators could send a signal to the profession and to the public that we are receptive. From a statistical point of view, and I don't know exactly how it is right now in Canada, in the United States for sure more people seek out alternative care or complementary care than seek out conventional care.

Professor Merrijoy Kelner did a study and she suspects that same thing is happening here, because a lot of patients go to their doctors and won't tell them they're doing these other things for fear that they will be criticized. But that is a fact of life and I think it's important that we do this.

Mr Clark: When I spoke of the 21 professional colleges and the 23 health professionals, don't take that as offensive to you in terms of your bill. I just raised it from the simple standpoint of being a parliamentary assistant to the Minister of Health, when I'm looking at this particular bill. I recognize that the other act that deals with health professionals has all of these colleges and professions and it's not being addressed there.

You've raised some valid concerns, so the question in my mind immediately became, what about the other professions? It's a question that we must deal with within the Ministry of Health. I'm not sure whether we deal with them one off as acts or whether we deal with them all at once. That's something for the minister to decide.

The Chair: Thank you. Ms Onley has her presentation back, so welcome to the committee.

Ms Onley: Good afternoon, ladies and gentlemen. Let me introduce myself. My name is Jarmila Onley. I was born in the former Czechoslovakia. I came to Canada about 10 years ago and I have two little children.

I'm here today to support Bill 2. If this bill becomes law, all of us will benefit. It has been a deeply rooted tradition for centuries in civilized countries around the globe to cure people with what nature had to offer. For example, homeopathy is over 150 years old.

When we deal strictly with only the physical and omit the mental and emotional complexities and completely ignore the spirit, or the soul, if you will, we get a one-legged health care system in Ontario. We are missing true care. That's the other leg.

My recommendations are as follows: please notice on page 2 my graph, which I am sure you will like. On the left we see traditional medicine and on the right we see alternative medicine and they are working in balance together.

If we are to catch up with the rest of the world, I encourage this government to amend the Medicine Act, 1991, and make the bill into law in Ontario so we can become a healthy part of this country.

Extend this bill by adding to it as follows: part of the medical curriculum should be a wide range in alternative medicine, such as aromatherapy, reflexology, shiatsu, craniosacrum therapy, to name just a few.

Educate ordinary people and children in alternative healings. Let people be in charge of their own health and promote that. Fulfill the Helsinki accord, which Canada signed in 1989 and which states, as we all know, "In the

treatment of the sick person, the physician shall be free to use a new diagnostic and therapeutic measure, if in his or her judgment it offers hope of saving a life, re-establishing health or alleviating suffering."

I want fairness and justice in the health care system. It is my responsibility to be in charge of my well-being. Therefore, it is inconceivable that my very right of free choice in health care would be ignored. This is Canada, a free country. I want a physician who is capable of offering natural remedies besides a pill. For example, the mind, body and soul have to be recognized and treated as a whole, not as apart. That is a mistake.

Today there are 15,000 people, and I'm one of them, demanding Bill 2 become law. Tomorrow there will be hundreds of thousands of us. You can't defeat what has been proven healthy, safe and natural. As an example, take a look at the enormously expanding health food stores, organic nutrients stores, holistic stores, and of course the sale of self-help books exceeds high above the average parameters. This government can only succeed by accepting Bill 2, and by doing so making balance in the health system.

I also would like to point out, just from my perspective, economics, if you could consider them, please. Put together the alternative medicine with the traditional and you'll get the much-needed wholesome health care system that people have been calling for now for years. Now is the time for us to work together for betterment. The alternative with the traditional has enormous potential, an incredible future. As an example, if people are properly educated and have, therefore, health tools to work as a team in their own community with their doctors, the savings to society will be enormous.

Within each neighborhood are people who practise alternative health strategies. Instead of having the doctor as my only choice, imagine that in my community I can go to see a polarity healer or nutritionist. Therefore, the huge stress on the exhausted medical system would be greatly reduced. If basic alternative health skills were taught at the community level, then society's health would truly become a community-based process.

The Chair: Thank you very much. That leaves us a couple of minutes for questions if any member of the committee has any.

Mr Kwinter: I have noticed that in many of the presentations there's been an interchange of words to the same thing, and I found, after having worked on this thing for nearly four years, that what we should be doing is talking about "complementary" medicine as opposed to alternative because "alternative" implies that it's either/or, complementary, and the other one is traditional and conventional. Many of the complementary treatments are traditional as opposed to conventional, and the conventional is what is taught at medical schools in Ontario or in Western society. Traditional could be quite complementary but not conventional.

Ms Onley: I'm sorry if I misguided you or confused you. It's my second language and I'm just trying to support—

Mr Kwinter: No, I wasn't being critical; I was just suggesting, because there is a—

Ms Onley: Thanks. OK.

The Chair: Thank you very much for taking the time to come before us here this afternoon. I appreciate it.

1710

RESEARCH, ADVOCACY AND
INFORMATION NETWORK
ON ENVIRONMENTAL TOXINS

The Chair: Ms Hilary Balmer has joined us. Come forward, please. Good afternoon. Welcome to the committee.

Ms Hilary Balmer: Good afternoon. I thought I wasn't going to get here. It's really fun out there. You don't know what you're in for.

I'm Hilary Balmer and I'm executive director of RAINET, which stands for the Research, Advocacy and Information Network on Environmental Toxins. That's why we call it RAINET. I wish to thank the committee for giving me the opportunity to make our submission in support of Bill 2. RAINET is a non-governmental, not-for-profit organization that provides advocacy on behalf of persons who have become injured or ill and to whom help and/or disability benefits have been denied.

Bill 2 would amend the Medicine Act, 1991, in order to ensure that physicians who provide non-traditional therapies or alternative forms of medicine are not found guilty of professional misconduct or incompetence unless there is evidence that proves the therapy poses a greater risk to the patient's health than the traditional or prevailing practice. This bill will help to bring the Medicine Act, 1991 into the 21st century.

The work of RAINET highlights the fact that many individuals suffer from very complex medical conditions, often chronic in nature, that not only do not respond well to current standard treatments but in many cases are made much worse by standard and accepted treatments. However, these same individuals very often derive a tremendous benefit from complementary modalities of treatment.

Unfortunately, physicians who use complementary methods are constantly at risk of being found guilty of professional misconduct or incompetence by the CPSO, the College of Physicians and Surgeons of Ontario, for "failing to maintain the standard of practice of the profession," despite good patient outcomes. Consequently, physicians may not be able to place the well-being of the patient as the highest priority.

Positive patient outcome does not appear to be of any interest or particular concern to the CPSO. In fact a former registrar of the college has stated previously, "while we're talking about standards of practice and potential harm to patients, the fact that patients are benefited is not necessary information that is terribly helpful." This statement was made despite the mandate of the CPSO to ensure that the public is protected and that licensed physicians practise within the law.

Historically, over the past two decades, the College of Physicians and Surgeons of Ontario has not only failed under its own mandate to "protect the public" and "guide the profession," but this self-regulating body has conducted itself in a shameful and dishonourable manner. Physicians who have caused great harm are ignored, while those who have brought about a "positive patient result" have been harassed, persecuted and punished for providing help.

Without Bill 2, consumer access to complementary tests and treatments from physicians is constantly under threat. Perhaps the most glaring example of this is highlighted by the recent case of Dr Frank Adams. The risk to his patients who suffer from chronic, debilitating and unrelenting pain is extremely high. Many cannot find a physician who will provide essential treatment. As a result, many have been sentenced to once again endure excruciating and unrelenting pain. Some are extremely fragile and at high risk of suicide.

In assisting clients with claims for disability benefits from various agencies, including the Workplace Safety and Insurance Board, which was formerly the WCB, Canada pension, Ministry of Community and Social Services and private insurance carriers, it has been our experience and observation that the negligent and improper conduct by some physicians is the most glaring reason for refusal to provide and withhold benefits.

Despite receiving a significant number of complaints, the College of Physicians and Surgeons of Ontario has refused to take appropriate action. This failure on the part of the CPSO continues to cause tremendous social fallout. When appropriate disability benefits are withheld, many persons who are already injured or ill are forced into impoverishment and into the ranks of social welfare. Thus the burden on the social welfare system continues to remain very significant.

The College of Physicians and Surgeons of Ontario is governed under the law, and by failing to uphold this legislation and to ensure that the protection of the law is provided, they have become party to violations under the Canadian Human Rights Act, the Canadian Charter of Rights and Freedoms, the World Medical Association Declaration of Helsinki and the United Nations International Covenant on Economic, Social and Cultural Rights. The College of Physicians and Surgeons of Ontario continues to interfere with the rights of the people of Ontario and to violate the basic mandate of all physicians, which is to do no harm.

We hope that it is absolutely clear why the Medicine Act, 1991, urgently needs to be amended.

The Chair: Thank you very much. There is time for questions. Does any member of the committee have any questions?

Mrs Julia Munro (York North): I just wanted to welcome you. We certainly appreciated that you took the time to come here today. It's nice to see you again.

Mr Marchese: I just want to compliment people like Hilary Balmer, and others who have spoken earlier, because I think there has been a movement of people

saying, "This has to become part of what we accept as normal practice." It has taken a long for the college of physicians to adapt to it. I think if it wasn't for the fact that people were pressing the college to begin to accept complementary medicine as an accepted practice, they would not have yielded. So they're relenting, it seems to me, because of the pressure you're putting on them and because of the research one of the previous speakers has talked about. There has been an explosion of new research, she commented, which I think forces the college of physicians to look at that a little more favourably. I think because of those various reasons we're getting progress on this issue, and it's because of the work that people like you have done that they're forced to relent a little.

Ms Balmer: If I could just comment further, I'm a member of the College of Nurses of Ontario, and we of course are also governed under the Regulated Health Professions Act. As a health care professional, I am shocked and dismayed at the way that the college has been acting. Doing the work that I do, as I said in my submission, the single reason that disability benefits are denied, and certainly not just locally but federally, is because there are physicians who are medical prostitutes who will write anything for which they get paid.

When Bill 2 is enacted, this will mean that it will put physicians who practise a holistic type of medicine, which can incorporate traditional and less familiar modalities—it will make it much better and their reports will be given the same weight by authorities.

The Chair: Thank you very much, Ms Balmer. We appreciate you coming before us here today.

I am told that Dr Rothbart has indicated he won't be able to make it this afternoon, and so we have a handout from the Ontario Medical Association that the clerk will be distributing to the members of committee.

Do we have a representative from the Environmental Illness Society of Canada? While I am sensitive to the fact they may be struggling to get here, I also have to respect the time of the committee members. So I am in your hands.

RICHARD PATTEN

The Chair: Mr Patten?

Interjection.

The Chair: Well, you can do it from right where you're sitting, actually, since you're not a member of the committee. Strictly speaking, members should be making their—

Interjection.

Mr Richard Patten (Ottawa Centre): No, I asked to be a presenter here.

The Chair: The clerk asked, and my ruling is that you can do it from there, Mr Patten. I'm happy with you doing it there.

Mr Clark: We like you. You can stay there.

The Chair: We've had too many issues in the past making a distinction between presenters and members.

Mr Patten: First of all, my name is Richard Patten. I am a member of the Legislature and I am the member for Ottawa Centre. But I speak to you today not as a member but as a patient. I discovered a little over a month ago, on November 9th, that I have lymphoma B cancer. I want to share my experience with you.

I have supported this bill ever since its first introduction in the House and I have spoken to it I believe each time, perhaps short one, because I believe in the concept of holistically examining and responding to people in need, regardless of what level that may be. But I must tell you when this came forward today at the committee, I asked if I might share for a few moments my perspective, because of course as a patient now my perspective changes quite dramatically.

I must say to you that our so-called Western conventional medical model is a very narrow model. It was suggested to me by my particular doctor, "Stay with the Canadian food plan, get rest when you need it and good luck. We'll see you at chemotherapy time which will be in two days." I asked to speak to a dietician, I asked to speak to other nurses. Because of my background in the YMCA and knowing a little bit about nutrition and diet and physical fitness and things of that nature, and looking at people in terms of body, mind and spirit, this was my inclination to begin with. I did not find that to be there. I did not find resistance to it, I must say, and I must say that my doctor is a highly respected doctor and oncologist and I have great respect for him and this is in no way putting him down. But I suggest that it has something to do with the background and the training of our medical professional specialists. My understanding is that there is very little time in medical school spent dealing with people and other aspects, especially in diet, especially in nutrition and especially in psychological or mental health areas. We spent some time in the mental health area exploring this too.

Therefore, I very much want to support this bill. Does it go far enough? Of course it does not, but it is a step forward. It is a symbol and I believe a very important one.

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I personally took advantage of initiating a meeting with some naturopaths, whom I found extremely supportive, especially in the area of looking at diet, nutrition, vitamin supplements and cleansing one's body in preparation. I said to my doctor, "I see preparing for chemotherapy as if one might be a football player, a hockey player, an athlete. I have to do whatever I can, not simply as a receptor of what the medical officer suggests, but as a participant in assuming that I have some responsibility in this process, that I want to share in it and that there are things I can do. Certainly I can do some things on the spiritual, mental, emotional and physical side, in terms of preparing for all this."

That was not present. It was only when I began to look outside the model that I got the encouragement. I got some support and extreme knowledge. I've discovered

things about my condition that I did not discover in terms of the medical model.

I refer you to two things. The thing that becomes quite obvious to me now is that as I try to maximize, during this period of time, finding organic food and look at minimizing the effects of those things that have preservatives and all kinds of additives and chemical enhancements, it disturbs me to no end how little information is out there.

I see advertisements such as Uncle Dave for Wendy's, proudly talking about this double hamburger with processed cheese. They use the term "processed cheese," which has vacuous calories in it and is no damned good for anybody, as if this is something great. This is pure junk that people are eating. It seems to me there is such an incredible industry weighted in favour of processing things that taste good, rather than what is truly good for you, let alone the air and the water we drink and all that is in there.

I see the need obviously for a more holistic approach. I believe only BC has adopted a model where naturopaths and homeopaths become part of a system of medical practitioners. I don't know why it's always California and BC. There must be something in the mountains or the air or the water or something that leads them to be a little more open around various—

Mr Marchese: Or the NDP.

Mr Patten: Yes, even that. I brought a bottle of Pepsi with me. I will not drink it because you wouldn't believe some of the chemicals in it. I won't go through what they are. It is quite incredible.

Interruption.

The Chair: Order, please.

Mr Patten: When I see the advertisement of the mother bear encouraging the baby bear to swim over to the other side of the iceberg and Coke is the attraction, I find that a very sad message. So I think we have a lot to do as a society.

I support this bill. In terms of the idea Monte mentioned of what is traditional and what isn't, traditional is not conventional. There are lots of traditional things. There is the arrogance our society has in rejecting two thirds of the world's approach to attempting to heal people, without having some support to provide some of the clinical studies. Of course, not too many of the drug

companies will provide some of that support, and therefore governments follow suit with tripartite funding. Unless they have private funding, along with government funding, we participate in not supporting some excellent and very important things to discover.

In the short term, in the very near future, I think this will be a major breakthrough for us, as we begin to look at ways of treating people, because when we look at the cancer rates that are incrementally increasing in North America, it is quite something.

I will stop there. I don't know if I have any time left, but if anybody has any questions, I would be happy to respond.

The Chair: Do any of the committee members have questions?

Mrs Bountrogianni: I am sure I speak for all of us in the Legislative Assembly in wishing you well in your treatment, and welcome back when you come back nice and healthy.

The Chair: Seeing the last group has not made it—I'm sure it may not be through any fault of their own—our next order of business is to move to clause-by-clause consideration of the bill, unless any member objects. Seeing none, it is one of the shorter bills, Mr Kwinter. It should not take long to go through this.

Section 1 of the act: any comments, questions or amendments? Seeing none, I'll put the question. All those in favour of section 1? Contrary? Section 1 is carried.

Section 2: any comments, questions or amendments? Shall section 2 carry? Carried.

Section 3: any comments or amendments? Shall section 3 carry? Carried.

Shall the title of the bill carry? Carried.

Shall Bill 2 carry? Bill 2 is carried.

Shall I report the bill to the House? Agreed. I shall do that tomorrow.

Thank you all. Congratulations, Mr Kwinter. We thank those who took the time to make presentations and to send in their written comments over these past few months.

With that, the committee stands adjourned until 3:30 on Wednesday.

The committee adjourned at 1726.

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Standing committee on general government

Employment Standards Act, 2000

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LEGISLATIVE ASSEMBLY OF ONTARIO

ASSEMBLÉE LÉGISLATIVE DE L'ONTARIO

STANDING COMMITTEE ON
GENERAL GOVERNMENTCOMITÉ PERMANENT DES
AFFAIRES GOUVERNEMENTALES

Wednesday 13 December 2000

Mercredi 13 décembre 2000

*The committee met at 1535 in committee room 1.*EMPLOYMENT STANDARDS ACT, 2000
LOI DE 2000 SUR LES NORMES D'EMPLOI

Consideration of Bill 147, An Act to revise the law related to employment standards / Projet de loi 147, Loi portant révision du droit relatif aux normes d'emploi.

The Chair (Mr Steve Gilchrist): Good afternoon, ladies and gentlemen. I'd like to call the standing committee on general government to order to deal with clause-by-clause on Bill 147, An Act to revise the law related to employment standards.

Minister Stockwell has asked me whether the committee members would be amenable, given that we have relatively limited time, to dispense with the normal procedure of starting with the clauses that have no amendments and instead going right to the amendments.

Mr David Christopherson (Hamilton West): With flexibility. During comments, if someone chooses to make reference back to the main bill, they won't be ruled out of order.

The Chair: Absolutely, Mr Christopherson. Your observations at any time can be relevant to any section. But if the committee would prefer, we could start right with section 17, which is the first section with an amendment. Obviously at some point we would revert to section 1.

Is there unanimous agreement to do that?

Mr Christopherson: Again, Chair, I realize this was in the interests of saving time so we don't get lost in procedure, but on the other hand, just starting at amendment 1 and working our way through may or may not get us to some amendments that need to be talked about. I'm just wondering if we can't have some discretion on the part of each of the caucuses to put before the committee a particular amendment they wish to speak to.

The Chair: If you'd like, if the committee sees fit, we certainly can do that, Mr Christopherson, in which case are you suggesting we go into rotation and pick amendments?

Mr Christopherson: I'm flexible as to how you'd like to go, but that sounds good.

The Chair: Just so we have some order. All right, let's do that.

Mr Christopherson: And then limit it, if you will, so that at the end of the day each of us has had 20 minutes.

The Chair: I will certainly endeavour—if members respect the time, the Chair will certainly undertake to provide that.

We'll start first with the Liberals, if there's a particular amendment.

Mr Dave Levac (Brant): I'll defer to Dominic Agostino for the first comment.

Mr Dominic Agostino (Hamilton East): It would be government motion number 4, the amendment on the two-year period. As we said in the House today, we have a concern and maybe a question for the minister on this, as well. As I said in the House, the concern is now that when someone walks in the first day on the job, they're basically going to be forced to sign a two-year agreement for the averaging of overtime. Then they can only get out of it if both parties agree. That's a long period of time. We understand the explanation about the flexibility and the options and yes, it's only a maximum, but the reality is that we're talking about in this case the potential for five million mostly non-unionized, low-paid workers who don't have the clout and the ability of a union to represent them.

Frankly, we're talking about a lot of single moms, we're talking about a lot of new Canadians and new immigrants who will walk into a job situation and basically be forced to sign this two-year agreement. Let's face it: it is clearly to the employer's advantage and not to the worker's advantage to sign this two-year agreement. But often it will become, through the back door, a condition of employment and if they don't sign this they're not going to get the job or they'll be fired the next day. That's the concern we have when you look at this.

As you talk about the averaging out, maybe the minister can explain to me what would happen in a situation where, say, you took the four-week formula that is there, and someone—as of now it's 44 hours per week, and after 44 hours you get overtime. If someone in a four-week period worked 52 hours the first week, 40 the second, 40 the third and 40 the fourth week, that would average out to 43 hours per week over the period. Would they get any overtime under that provision?

Hon Chris Stockwell (Minister of Labour): Only if they agreed not to get overtime.

Mr Agostino: If they signed to average it out over four weeks—

Hon Mr Stockwell: If they signed an agreement that said, "I want you to average my weekly pay, my weekly

hours, over a four-week period, and I worked 52 hours one week and I want you explicitly to average those out over the next three weeks," so they cap out at 43 a week, sure, that could happen, but only on consent of the employee. If you're working 40, 40, 40 and 56, the employee would say, "No, I want the 44 to 56 as overtime."

Mr Agostino: But under the old rules, within that four-week period, you would automatically get overtime after 44 hours. If there's no agreement signed, if you work 52 hours the first week, after your 44-hour time, you would get your eight hours of overtime.

1540

Hon Mr Stockwell: Under the old system, if you applied for a permit, you could do exactly the same thing. By permit, you can average overtime by agreement with the employee. The employer could apply for the permit from the Ministry of Labour. The permit would then allow the employer to average overtime. That's no different. By simply getting a permit, you could do exactly that under the old system.

Mr Agostino: You don't see the potential here again. As much as you claim there's protection in here and provisions for complaining, can you understand though the potential that is there for the abuse, particularly of newer workers and younger workers?

The balance of power with an 18-year-old or 20-year-old kid working and an owner or employer in a small firm, a small company, non-unionized, as much as we want to talk in an ideal world, it would be the reality in the real world that it is not there. The power is with the employer. The employee is basically at the mercy of the owner of that company and his goodwill and his fairness. If that doesn't exist, then this new legislation forces him into a very difficult situation that they can't get out of for two years unless they both agree. Of course, if it is to the advantage of the employer, they're not going to agree.

The unfortunate part is we have such little time to debate and discuss all of these amendments. That's only one of the many concerns we have. Certainly I wish we actually had more time because I think this bill is significant. The concern generally with all of this is the fact that this bill has not had one minute, one second of public hearings.

There was consultation over the summer, in general; there was a white paper put out by the government. In many cases, members of the opposition were not invited to attend the hearings or the briefings that occurred. In some cases, members went. We think in a bill that impacts five million Ontarians, which is a significant amount of our population who could be faced with the repercussions of this bill, the government at least owed the opportunity to some of those people to come forward and tell us if they agreed or disagreed.

I have not heard from one working person in the province of Ontario who has called my office and said, "This is good. I want this bill." Certainly we know from the comments that have been made that business, the chamber of commerce, those folks are going to be very happy with this bill and are in support of this bill. I think

it is extremely unfair that we have not had one second of public hearings on this bill. It is nothing short of a disgrace.

Interjection.

Mr Agostino: You don't have to tell me that you had the consultation over the summer; we know that. But the bill, as it is now in front of us, has not had one second of public hearings.

Hon Mr Stockwell: To go through the history of the thing, you understand that two or three years ago this process began under Elizabeth Witmer, who was Minister of Labour at the time. She issued a white paper seeking input from all the affected parties: unions, business, non-union sectors and so on. She received hundreds and hundreds of submissions. Upon receiving those submissions, we read them and we dealt with them. From those submissions we created the white paper in the summer. That white paper then was created through submissions given to us by the community out there; as I said, hundreds of them.

That white paper then was issued to everybody it affected. If you wrote in to us, you were given the white paper. If you were a union or anyone else we sent it out to your business organization, as well as the members of House and the opposition. Then, yes, we did tour that white paper. I invited both yourself and Mr Christopherson to appear to make a deputation. I understand Christopherson had some difficulty in Toronto and he went to Ottawa to make a deputation. I appreciate the fact that he made that effort. Furthermore, I actually invited the members in the communities I went to.

We took ads in all the local papers to inform the community and hopefully the member that we were coming in to that community to hold this public hearing—I misspoke myself. Lyn McLeod actually showed up in Thunder Bay and Mr Crozier showed up in Windsor.

Then we went around the province to five or six cities and held public hearings. I think we actually accommodated every single person who made a request to make a deputation, every one of them. It meant we had to add days at certain sites to make sure we gave everybody time to make their deputation. That was the genesis of the bill.

The bill fundamentally is factual and very, very close to what the white paper was. There were amendments made. Those amendments were put forward by the unions and the executive and those people who made those requests. We accommodated those, particularly in a section with respect to inspectors and their request that they need more power. They need a ton more power and we've increased their power significantly. A lot of those came from the legal clinics and the unions that we spoke to. So, yes, it hasn't received what you classify as a committee process of public hearings, but in a three-year period it got a lot of publication, a lot of debate, a lot of discussion and a lot of input from people in the province.

Mr Agostino: One more quick question. Where did the request for this bill come from? Was it labour unions? Was it working people who felt they wanted the 60-hour

workweek and the overtime provision or did the initiative to change this legislation come from the business community?

Hon Mr Stockwell: There were two places, basically. One, it was in the Blueprint that we campaigned on in 1999. We spoke in the Blueprint to a flexible workweek and the kinds of amendments to the Employment Standards Act that would allow that. That's the first place. The second place was the number of permits we received, that the NDP government issued, that the Liberal government issued and that we issued; they were significant, thousands and thousands and thousands of permits to exempt them from the Employment Standards Act. It was getting to the point that with the exclusions we had in mining, hospitals, tourism, all these sectors, and the exemptions that we were allowing under the permit system, that we all allowed under the permit system, we were in the situation of getting close to having more people working outside of the Employment Standards Act than working inside the Employment Standards Act. So it became a process that we had a bill that was so arcane, archaic and outdated that there were more people working outside that bill than inside. That was the genesis of why we wanted to address the situation.

I'm not suggesting the unions support the bill. I understand their position. But I think they agreed at the outset that the bill needed to be addressed; it was arcane, archaic and it was contradictory in a number of places. I'm not going to tell you that they liked the outcome, that's not my position, but I think that everyone agreed, in the beginning at least, that the bill was seriously flawed and was not doing what it was supposed to do when it was adopted in 1968.

Mr Levac: I guess I would echo the concerns of my colleague Dominic and basically ask this question. Since October 1999, this particular government has used time allocation 20 times, and three or four of those particular bills used with time allocation—and I want to make it very clear that the entry into the discussion is one thing but after the fact is another. So what we're talking about is somebody who wants to say that the briefings and all of the ideas and your input was taken, but I want to make it very clear that was before the bill was drafted and completed and presented to the House. After the House presents that bill, time allocation gets presented in three, four now, very significant changes. Quotes from some of the ministers who are producing some of these bills are saying, "This is a fundamental change in the way we're going to operate with this bill." Time allocation was applied, particularly into a lot of the labour issues that we're seeing in our government today.

My concern is the balance between whether or not consultation is taking place before the bill's drafted and after the fact. We now have this bill before us, which has not had the consultation process after the fact to provide amendments. As a matter of fact, we have an entire binder filled with amendments from the government side, one from the NDP side, and from our side we've basically said it's going to take us the entire committee

work because of time allocation to get through the bill itself. So inside of that, I'm going to ask this question. Is it the government's intention to continue to pass legislation with time allocation, with, after the fact, discussion and input by the province's citizens negated because of the way the rules work?

Hon Mr Stockwell: Let me say first off, I think there are 24 amendments in total—I could be off, I'm not sure—one from the NDP, 23 from us. It's a big bill. That's why we spent three years working on the bill. I'm not going to go into the history too much, but I sat in your place on a number of occasions and 23 amendments was not a significant number of amendments. In the NDP's term, I actually saw them produce more amendments than clauses in a bill, in some instances; literally hundreds of amendments to a bill that only had 99 clauses. So I wouldn't suggest that this is some kind of onerous, outstanding, unusual number of amendments when you get to 23, when you're dealing with a bill of this size.

1550

With respect to your argument about after the fact, before the fact, I guess we have a systemic disagreement. I feel that we've canvassed the communities and have done our best. I've heard the opposition and I've heard their complaints about the bill. I'm not trying to dismiss their complaints. I'm just suggesting that we have a fundamental disagreement. Those are the complaints that you've registered. I've tried to respond to them in the House as directly as I can. I believe, with the implementation of the new fines, the incarceration, the powers of inspection, the spot audits, the anonymous tips, the posting of your employees' rights—all these kinds of things work toward protecting that vulnerable worker that weren't in the bill before. Also, the fact that they can take any reprisal and reinsert somebody back into a job, they couldn't do before.

So if your question is, have I heard the issues, I think I've heard them clearly and I've tried to respond clearly. I guess you're saying my response isn't acceptable. I'm not surprised, but I believe the kinds of things we've implemented in this bill go a long way to protect employees that weren't there under the old Employment Standards Act.

Mr Levac: Just to comment on that, just a quick rebuttal. I would suggest to you respectfully that a lot of those things that you had to write into the bill weren't necessary because the previous legislation didn't require it.

Hon Mr Stockwell: You mean—

Mr Levac: A lot of the protections that you're saying are implemented in the bill that didn't exist before, maybe it was because a lot of the things that could be contemplated now because of the legislation weren't there in the first place. Therefore you didn't need to have the protections in place in order to do some of the things that you're saying you need to do.

Hon Mr Stockwell: With respect, you're the only person saying that, then. Basically everybody, from the

NDP to the unions to the Liberals to ourselves, was saying you've got to give more powers to the inspectors because there are shortcomings here. The shortcomings are they don't have the power to reinstate, so if somebody actually wanted to complain about their employer and then their employer appealed it, they'd be out of work for six months—no paycheque, no food to put on the table, nothing. They couldn't pay their bills while this appeal was made to the Ontario Labour Relations Board. So this employee would be out of luck. Under our new provision they can make the appeal, but if the inspector says, "You're going back to work," you go back to work. You get paid while that appeal is being registered and you won't miss a day's pay. So with great respect, I'm not sure that's true.

Secondly, there's this misconception under the old permit system that somehow these are kind of new initiatives. The vast majority of the thousands and thousands and thousands of permits we issued, you issued and the NDP issued talked about extending work hours beyond 48, sometimes beyond 60, averaging overtime, one day off at a time rather than a weekly process.

The thing with the permit that was unacceptable to me was it ran forever. Once you got a permit, you never had to reapply. What we're saying in our amendments is that's not good. You can only make the agreement to work these conditions for a maximum of two years and the employee can invoke anything less than two years—two months, three months.

This misconception on the permit system was some kind of fantasy that somehow the permit system gave you protection. Once you got the permit, you were completely unprotected. So I don't agree with you.

Mr Levac: That's fair. Just one last quick question, and it will require a two-second answer.

Hon Mr Stockwell: I'll be the judge of that.

Mr Levac: Believe me, Chris, you'll hear it. How many inspectors do you plan to hire?

Hon Mr Stockwell: We're going to increase inspection staff by 20%. In whole numbers, we basically have around 100. We're going to hire 20 more inspectors.

Mr Christopherson: Just to respond to the minister, first of all, on your comment about the permit system, I don't think anyone would disagree that the permit system needed to be looked at, but the idea that the best thing for the permit system was to throw it out entirely and keep the ministry out of workplaces in terms of the amount of hours that people have to work is the wrong way to go. Just to say that there were problems, as your government has done on many occasions—identify a problem and then say, "We've identified it, we're going to do something, and therefore you should believe it's better." No, in most of those cases you've identified a problem, stepped in and done something and made it even worse. Eliminating the permit system is going to make it worse.

Hon Mr Stockwell: Well—

Mr Christopherson: Let me mention all my issues and then you can respond. First of all, there's our position and comment with regard to the permit system. Of

course, that's impossible to do with the obscene shortness of the time that's available.

Also, you spoke with great pride just a few minutes ago, Minister, about how your law makes sure that inspectors have the power to reinstate a worker who has been wrongly dismissed for whatever reason. You thought that was an important measure because people have bills to pay and food to put on the table. I just wish that you, as the Minister of Labour, would also apply that to someone who's been fired because of an organizing drive. We used to have legislation in this province that said that the board—

Interruption.

The Chair: Order. To the people in the gallery, I'm awfully indulgent as the Chair, but we're going to get through this without any demonstrations, please. I want to make sure that the opposition members have as many minutes as possible to make their point here, so please, no demonstrations.

Mr Christopherson: Prior to your Bill 7, the board had the ability and used it very effectively so that people weren't intimidated in the workplace. If you feel so strongly about people who are wronged, then you ought to take a look at the situation at Drycore, where we have a number of workers who have been off the job. It will be a year, I think, by the time they get in front of a board and have their hearing. Where, then, is your argument about their having to pay bills and put food on the table? Why does your government feel that it's OK in the one instance to deny people the ability to pay their bills and put food on the table, but in this instance you want to brag about it?

I mentioned this in the House, and I want to say it again for purposes of today: there is a world of difference between a public meeting that you may choose to call a hearing, a public meeting, a gathering or Chris's gaggle of friends, versus a committee like this, where we have a bill in front of us, we have a procedure, we have a Chair, we have staff and we have opportunities, as the opposition, to ask questions, to engage in debate. That's a whole lot different than you sitting in a rented room in a hotel having people come in where you control entirely what happens inside that room.

Further to that, you mentioned Elizabeth Witmer's bill when she was minister, in terms of changing the Employment Standards Act. That was Bill 49. That was a bill that your government said was just housekeeping; nothing major in there. We went on the road for four weeks. At the end of it, there were significant changes: both withdrawals in terms of initiatives the government had undertaken because of public pressure and improvements in areas where it was just a bad bill—because of the construction parts of the bill that could have been improved, and were, as a result.

To suggest that somehow Bill 49 takes you off the hook or that your little gatherings, before the bill was tabled, are supposed to compensate for a lack of decent time here and now doesn't hold, not by a long shot. Further to that, if you need further evidence, the bill is different than what you talked about. The discussion

paper, the white paper you circulated, didn't have legal language, didn't have the actual clauses for us to look at in terms of understanding the legal implications.

It is absolutely insulting to suggest that today a whole new bill that replaces five other bills and 24 pages of amendments can be dealt with basically in an hour—because after 4:30 today we can't talk any more; it's all straight voting. You're going to win every vote, 10 times out of 10, because you've got a majority. That somehow that constitutes any kind of review that has meaning under any definition is absurd.

I know what you have to say as a minister, but you know in your heart that this is a sham. The only reason you're ramming this through is because you want to head off the kind of public outrage that is beginning to grow now. It is really just starting to take effect now. The room is full. We've had protests in downtown Toronto. We've had occupations of offices. If there were enough time to look at this, I believe you'd be forced to back down in some areas. You don't want that. That's why you've made sure this thing is going to be quick and dirty, in and out today. By the time people realize what has hit them in the new year, it's already going to be law. That's your game plan. We know it and in your heart of hearts you know that's what's going on too. This process is a joke and an insult to the people of Ontario.

1600

If I can, I'd like to talk about three specific amendments, in no particular order. I would draw to the attention of the minister our amendment, the only one we brought in. You have said on many occasions that nobody needs to worry about the horrible aspects of this bill because they all have the right to voluntarily say no. You're prepared to say it, but you're not prepared to put it in the law.

Our amendment covers off a number of the major areas of concern that people have, that we have and that we've been hearing about. I heard what you said in the House. I heard what you said to me in our short discussion before question period. I've taken a look at this law. For the life of me, I can't understand where you feel you have the right to say no to codifying in law the very things you're prepared to verbally say people have rights to.

I'm asking you, Minister, why will you not accept an amendment that says people have the right—and it just spells them out specifically, so that employers and employees know their rights and obligations. It merely states it, because the reprisal section, section 18, does not cover this. We've mentioned the after 48 hours, splitting the 30-minute meal break into two sections, the averaging of overtime and the vacation in terms of shorter periods taken in small clumps of time.

We said, "At the very least, put that in there as a new sub (9) to ensure that everybody understands what you have said they have rights to verbally." Why won't you put that in the bill?

Hon Mr Stockwell: OK. I'll respond in order. The permit system: the rationale for the permit system is

simply this. We would have a series of civil servants working on a permit system who were spending time rubber-stamping permits. Basically, that's what it came down to. They weren't going out and actively inspecting or seeking whether or not the employees agreed or didn't agree with the employer's request. It was simply too onerous because we were issuing so many permits. It was becoming too big a job.

Rather than use those people to rubber-stamp permits, it seemed to me it would be more intelligent to hire inspectors who could actively get out into the workplace and get to those places where people needed inspections and needed protection. That was my take on it. I didn't really think it was sensible for government to pay people to rubber-stamp permits. Why not take that money and use it for inspection, to put teeth in the bill to protect the vulnerable worker? That would have been far wiser money spent by any government. I think if any of you were in power, you would have agreed to that. It's a better way to spend money.

With respect to the intimidation possibilities, this is the clause in the Employment Standards Act that we brought forward. There are many areas on which you and I disagree.

Mr Christopherson: We're not going to get to debate those because there's not enough time.

Hon Mr Stockwell: No, but we've had a very vigorous debate about these over the years, for sure, and certainly in the last few months. That's just our approach to this with the Employment Standards Act. That's why we wanted to hire these, to protect those vulnerable workers out there. They are there; I don't deny it. There are bad employers out there. I've said it on a number of occasions. The bad employers need to be vigorously prosecuted. But if you're using people to stamp permits, you're not spending the money to get inspectors out there to vigorously prosecute them.

As far as the public hearings are concerned, Chris's gaggle of friends, that includes Sid Ryan, Anne Dubas and all those folks from all the unions from across this province. This was no Chris's gaggle of friends. This was virtually dominated by the unions, union executive, legal aid clinics and workers' associations. There were two or three deputations in the whole time—maybe more than two or three, but a few—from chambers of commerce or business associations. The vast majority came from the union side.

We accommodated every single person who requested to make a deputation. They had half an hour for their deputations. Every single person who asked to make a deputation, we accommodated. We heard from them all. There were demonstrations. Mr Ryan organized a demonstration during his period. It wasn't like I was hiding in the weeds. We were out front meeting with the people, giving them the opportunity, making the demonstration—there was certainly some media attention as well.

Legal language: the reason we didn't use the legal language—and as far as you're concerned I can't help but

come back to the social contract when you talk about public hearings. That debate has been had and I've used it before, but, my goodness, when you changed labour legislation it gutted collective agreements for public servants all across the province, hundreds of thousands of them. You didn't have five seconds of public hearings. You didn't have a white paper. You didn't have five seconds, so I'm not sure you have a really good leg to stand on, on that one.

With respect to legal language, you're right. I asked them not to produce the white paper in legal language. That was my request. I take that. I didn't produce it in legal language because I thought it would be counter-productive to send this out to a bunch of people around the province who are not lawyers, and then put it in legal language they couldn't understand. It didn't make sense to me to get a bunch of lawyers to draft up a white paper for people to scratch their heads over.

We did it in non-technical language. We did it in layman's language that we use when we debate the bill in the House, quite often on a number of occasions. Some of us aren't lawyers. We often review this stuff with lawyers; we have that capacity. But many people in the province who read the white paper don't have access to a lawyer to have it explained it to them. Yes, that's what I did. We converted their recommendations into language for the bill. So, yes, I did that.

There are two very important points about your amendments. Your amendments deal with three or four very specific parts of the legislation.

Mr Christopherson: Exactly.

Hon Mr Stockwell: The bill gives the employees the right to refuse across the entire bill. There are dozens and dozens of sections within the bill that they have the right to refuse. If we inserted your amendments—that is all covered in the bill, that is all covered in different sections of the bill—then we would be inserting in the bill a tremendous ambiguity, because the body of the bill would say, "The employee has the right to refuse in all these cases." But then we'd throw this in that says, "And the employee has the right to refuse in these three or four specific cases." That then means, if it gets challenged, that a judge or a court is going to have to say, "Which part of the bill is right here? Do you only have the right to refuse on these three or four, or is the body of the bill right, where you can refuse on dozens and dozens of sections of the bill?"

It's restrictive. This would take rights away from employees. It would remove their rights. It would take a right that we've built into this, that they could refuse certain parts of the job, and it would say that they could no longer refuse it because we've got an ambiguous section in the bill that says they only have the right to refuse on three or four issues.

I tried to explain it to you. I appreciate the fact that you don't agree, but my legal counsel whom I have consulted at the Ministry of Labour, at the Attorney General's office, and legislative counsel who drafted the bill said, "This is not going to do anything but hinder employees' rights."

Mr Christopherson: OK. Quickly, then, to respond, because I don't want to keep debating on the non-amendment issues, I still would say to you that if you'd said that as part of the process you wanted to sit down and look at how we might improve the permit system and invited submissions on how that might happen, then we probably would have a very different bill right now. I can tell you, the labour movement believes that there ought to be some permit system in place. They recognize its imperfections. Former Labour Minister Bob Mackenzie was very clear that he didn't agree with it either, but just throwing the whole thing out doesn't necessarily, and certainly doesn't in this case, make it better, Minister. The problem is, you didn't invite anybody. There's nobody here who's been given a chance to come to the end of the table and tell us what they think about the permit system, or anything else for that matter.

Next, you commented about the fact that most of your public hearings were dominated by unions who made presentations. Well, let me tell you, we all know your business friends have got all the access they need to you and every other minister, so of course they don't have to utilize any kind of public process. It's everybody else who's left trying to beg and scrape an opportunity to have a minute of the minister's ear.

With regard to your comments about this bill, you know I'm not a lawyer and you're not a lawyer. In fact, our backgrounds and our level of formal education are very similar. I might be right and you might be right, but you know what? We're not going to get any opportunity to bring in a different legal point of view because there are different legal opinions. That's why we have courts. So you may decide that there's a great comfort level for you to stand behind your ministry lawyers. That by no means suggests it's the end of the debate. In fact, it's just the beginning of the debate, except we're not going to get a chance to have that debate.

So your argument doesn't hold. If there's a legal problem with the way this is worded, I would still leave it with you, Minister. There is nothing under the reprisal section that gives legal force to the voluntary aspect that you've given verbal attention to but no legal attention. To say to me that somehow it detracts under the reprisal section of section 18 may or may not be true, but to dismiss the whole thing out of hand, to emphasize under every section where you can that an employer is not to intimidate and an employee doesn't have to accept intimidation, I would suggest to you is inviting employers to intimidate and that's exactly what's going to happen, and I think you know that.

1610

I want to move on, if I can, to two other amendments. One is the amendment that I raised with you in the House with regard to the two years. I believe Dominic raised it also. Under this amendment, as we understand it—I want you to tell me where you think this is a misinterpretation—here's a scenario: somebody gets hired for a job. They don't have a legal background. The limited formal education you and I have looks like tons of formal education compared to where this individual is at. They may or

may not have English as their first language, but they go in and they're thankful beyond belief that they've got an opportunity for a job because they haven't been able to find one for months and months. Those of us who have been in that position can understand the mindset when you walk in and they say to you, "You've got the job. You can start on Monday. The only thing we need to do is sign a few papers here."

How many of us remember those papers or give any thought to whether you're going to sit back and say, "Well, hang on a second now. Let me just check this out to see if I agree"? That is not how you're going to start your new workplace employment. The fact of the matter is, you're going to sign the income tax forms that it takes, any WCB or WSIB forms it takes, and if they put one in front of you and they say to you, "This is the policy. It's the new government law. This merely gives legal effect to the law," and you sign your name on the dotted line, at that moment, unless your employer agrees to release you from that agreement, you are now bound for those two years to live with overtime averaging, which means you're going to get screwed out of overtime. I'd like you to tell me, Minister, where legally I've got this wrong.

Hon Mr Stockwell: If you're saying to me that you walk in there and you sign things that you haven't read or that you're not understanding etc, it's very difficult for me to make an argument with you, because the simple fact is the system today is built on agreements, many agreements. The system we got for permits is based on agreement. It's no different. If you have an employer who applies for a permit, it's based on the fact that the employees agree to these terms and conditions.

At some point in time, in order to have a permit system or any other system, there's got to be a process put in place that asks for agreement between the employee and the employer. So I say to the member, it's not different from the old system. Under the old system, the employer would file for a permit based on the fact he had agreement from an employee or if the employee wanted to work there with this permit, he would hire them based on those conditions of the permit.

Mr Christopherson: But my point—

Hon Mr Stockwell: But the point that I think you should make, too, is this: what was the difference when you did the Sunday shopping law? It's the same thing. When you apply for a job where you've got to work on Sundays, the employer says, "Well, you're working on Sundays." It's the same law that you put in. So the person has to work on Sundays; it happens all the time.

Mr Christopherson: There's a world of difference between understanding that you're going to work on Sunday versus giving away money that you're otherwise entitled—

Hon Mr Stockwell: Well—

Mr Christopherson: Wait a minute now. I'm talking about a scenario. You know what? Even if they do understand what the law is, I'm suggesting that people are going to feel pressured. I'm giving you the good case scenario; I'm not giving you the one where they're

quietly taken aside and there are absolutely no witnesses and they're told very clearly, "You better sign this thing, because you haven't been performing up to snuff lately and I've got a whole lot of people who are anxious to come in here and they'll work for less money. So you'd better sign this thing and agree to it or you're out the door." If you think that's not going to happen, you live in a different Ontario than I do.

The fact of the matter is, that's the bad case scenario. I'm pointing out to you one that is very likely to happen, where people are told, "Look, here's the new law the government just brought in. It is the policy of this company that we ask our employees to sign the form." When you're hired as a new employee, you are so anxious you'll say yes to just about anything. What I'm saying to you, Minister, is that under your law, when you sign on the bottom line, you now agree to give away overtime pay for up to two years unless your employer agrees to take you off the hook. Why are you doing that to people? Why would you subject them to that kind of situation?

Hon Mr Stockwell: Because it's the same as you were doing. It's the same situation, by permit.

Interruption.

The Chair: Order.

Hon Mr Stockwell: By permit, you allowed exactly the same situation. You issued a permit to the employer. The employer now has a right to average overtime. If you wanted to work with that employer, the difference was, it wasn't two years, it was forever. You subjected them to that forever. This is time-limiting that. They're saying that after the two years you need to go back and get approval. Under the old system, the permit system, you got a permit to average the overtime. You wanted to work in a place that had a permit that could average overtime? You had to work under those terms and conditions for the rest of your life. How's that better?

Mr Christopherson: You know what, Minister? If we had the time in committee—now listen, hear me out—we could ask you and say, "Deliver us the number of permits here of people who have wilfully given away their overtime." I'd like to know. I think the people here would like to know. How many people? Don't just give us your word; make the case. Put the material in front of us. Make the case. Because you know what? I don't think there are that many people who, with ministry approval, have given away their right to overtime pay for their entire work life. I just don't happen to believe that's the case. I'd like to see you come in here and make that argument. I don't think there's anybody in their right mind that would agree to averaging, first of all. The only way they would do it is if they were coerced or hoodwinked, and either way, you've made that legal and it's wrong.

Hon Mr Stockwell: You're suggesting to me that under the permit system the only people that agreed to averaging overtime were coerced or hoodwinked. You, your government and the Liberal government, were a party—

Mr Christopherson: Show me how many there are, Chris.

Hon Mr Stockwell: —duplicious—

Mr Christopherson: Show me how many, Minister. Don't talk hypotheticals.

The Chair: Mr Christopherson, you'd asked for at least a third and I've actually gone longer than that. I don't know if there are any government members. If there aren't—

Mr Christopherson: Out of all 24 amendments, we've dealt with two. I asked to deal with three. I haven't even had a chance to deal with that number. It's frustrating because I want to speak and you won't let me speak, and if you won't let me speak—

Interruption.

The Chair: Come to order or I'll clear the room. And while we do that, the clock is still ticking and Mr Christopherson will get no further chance to say anything.

The committee recessed from 1619 to 1622.

The Chair: I call the committee back to order and invite any further comments. We've got a few minutes. You mentioned you had a third amendment?

Mr Christopherson: I did, Mr Chair, if you'll give me just one second. I guess there are ministry staff who can answer a question.

The Chair: Yes, or the parliamentary assistant is here.

Mr Christopherson: I believe your amendment 20 makes reference to subsection 140(1), and you're adding paragraph 8.1, where it now only goes to 8. It deals with this whole issue of the voluntary nature of getting into agreements in 17(1). Under "hours of work," some of the very issues we've been dealing with this afternoon, you've now added—I wanted to know what the implication of 8.1 is in plain language, please.

The Chair: Could I invite ministry staff to come forward to the witness table.

Mr John Hill: Perhaps it would help if I began by explaining the cross-references.

Subsection 17(2) is the provision that allows the agreements to work in excess of the presumptive limits, which are eight hours a day, or a regular workday, if that's longer than eight hours, and the weekly limit of 48 hours.

Clause 17(1)(a) is the daily hour limit which, as I said, is eight hours per day, or if a regular workday has been established of longer than eight hours, whatever that regular workday is.

Subsection 17(3) is the provision that allows an agreement to work hours in excess of those limits to be revoked by the employee upon two weeks' notice. What this provision says is that if you make an agreement to work hours in excess of the daily limits—not the weekly limits but the daily limits—and you make that agreement at the point of hiring and it's approved by the director of employment standards, then that agreement is irrevocable unless both parties—the employee and the employer—agree that it may be resolved.

Mr Christopherson: And that is related to agreements for working 60 hours? Help me out a bit.

Mr Hill: That's the agreement to work hours in excess of the daily limit, which is eight hours or the regular workday, whichever, and not the weekly limit.

Mr Christopherson: So if you agree to work beyond eight hours a day on a regular basis, then there is a permit that the ministry issues—is that what you're saying to me?—and it can't be revoked unless both the employer and employee agree.

Mr Hill: Yes. For example, if I agree to work four 12-hour shifts a week, and I make that agreement at the point at which I'm hired, and that agreement is approved by the director of employment standards, that agreement is irrevocable unless both parties say it can be revoked.

Mr Christopherson: Is that normal? Is that a change?

Mr Hill: Under the existing legislation, the question of whether agreements are revocable is simply not addressed. I don't think there's any clear legal answer to the question of what happens if I make an agreement to work a certain number of hours at the point at which I'm hired and then later purport to say, "I'm going to take that back. I don't want to work those hours any more."

I don't think there's a clear answer under the existing legislation as to what happens. It says that you cannot work an employee more than eight per day or 48 per week without the consent of the employee, but it doesn't say what happens if consent has been given and the employee later tries to take it back. Subsection 17(3) of the act was an attempt to address the question of whether these agreements can be revoked or not. It said, yes, you can make these agreements but they are revocable upon two weeks' notice. This new provision, paragraph 8.1, would allow the Lieutenant Governor in Council, ie, the cabinet, the power to make a regulation to create an exception to that in the case of agreements to work hours in excess of the daily limits, where it's done at the time of hire and the director of employment standards has approved.

Mr Christopherson: Only under those two circumstances?

Mr Hill: That's right.

Mr Christopherson: Not a subsequent agreement? If there were a subsequent agreement, how would that differ?

Mr Hill: If it's not an agreement that's made at the time of hire—if originally the company had five eight-hour shifts per week and they said, "We want to go to a four-day week with 12-hour shifts," at some point after the time I'm hired, this regulation wouldn't have any impact on that. If at some point after the point of hiring the employer wants to change the configuration of the workweek, and the employee agreed, the employee can withdraw that agreement upon two weeks' notice. It won't affect that.

Mr Christopherson: All right. The four 12s is something I know they have at Dofasco and other major places. Firefighters have things like that. So that's probably the nice, pristine example of where you would use this.

What would happen to somebody who hired someone and said, "I expect you to be available to work. Your regular workday is eight hours a day, and once you sign this and start the job, then we'll get a permit that allows that," assuming an employer would even say that much. Is there not the potential here for someone to inadvertently bind themselves to a longer workday that they can't get out of unless the employer agrees, or have I got it wrong?

Mr Hill: Inadvertently? I think the agreement is going to have to say what the upper limit on the daily hours would be.

Mr Christopherson: Yes, but say it's seven or whatever or—

Mr Hill: There's still a 48-hour weekly limit that this doesn't impact upon. So, could somebody do it inadvertently? I suppose if the agreement that was put in front of the employee said, "OK, you may be required to work up to 11 hours a day," or whatever, and at that point the employee doesn't have a regular workday of 11 hours—it's eight hours—but the employer is putting this agreement in front of the employee to work up to 11 hours a day, and the employee agrees and signs it, yes, that would be irrevocable. Would they be doing it inadvertently? I guess that is a possibility, if they don't realize the significance of the fact that the agreement is saying 11 hours, even though the established workweek at that place is eight hours. It's possible.

Mr Christopherson: So we have created a potential for new problems here that wouldn't have been there under existing legislation.

Mr Hill: What I said is premised on the fact that they did not realize the significance of the agreement saying, "I may be required to work up to 11 hours a day."

1630

Mr Christopherson: One more quick question. I know I'm probably on borrowed time, believe it or not.

Are you a lawyer?

Mr Hill: Yes, I am.

Mr Christopherson: In your professional opinion, are there any changes in here that are more than just what one might classify as housekeeping?

Mr Hill: If you'll give me a moment, I'll review them very quickly and let you know.

Mr Christopherson: You're getting more time to review than we did.

While that's going on, just to take advantage of the time if I can, the cameras are gone. I was going to read the Hansard at this stage. I've got to tell you, though, somewhere down the line, this has got to stop. You can't do this. You can't keep ramming through legislation and having no review, no clause-by-clause at all. There's no review here. I don't expect anybody to respond to this, but you know there's no way to respond to the question of fairness or adequacy of having all of us at least take a look at these things. There just no justification on earth for doing this.

Mr Raminder Gill (Bramalea-Gore-Malton-Springdale): Mr Chair, if I may? I think we've given the court-

easy to the member. He doesn't have to keep knocking us at every turn. It is unfair. He should be appreciative of the opportunity each time that has been given to him.

Mr Christopherson: Should be appreciative?

The Chair: We have something here we are awaiting. Have you got your answer?

Mr Hill: If no one minds, I will rely on a list prepared by our policy branch which divides amendments between substantive and other types of amendments rather than review each one myself. I can explain from that list which are the ones they've identified as substantive.

The motion for section 17 is different than what you see in the bill because it allows the employer to establish a regular workday of more than eight hours.

Mr Christopherson: I guess I really can't ask questions. He can give his answer and then we are on—

The Chair: Might I ask how long you think your answer is going to be here?

Mr Hill: There are six amendments that have been classified as substantive on this sheet.

Mr Christopherson: I'll shut up if you'll let him answer that.

The Chair: I'll tell you what. Why don't you just cite which six they are.

Mr Hill: The motion for section 19: if an unforeseen situation occurs, this is where public services have to be maintained. It allows, in effect, an emergency exception to maintain public services, and in that case exceed the hours-of-work limit. We've added at the beginning that it is if something unforeseen occurs, to make it clear that this is to deal with an emergent situation.

Subsection 22(2): this is to provide for the grandparenting of existing averaging agreements. It also deals with some administrative aspects such as whether agreements can be renewed, whether they can be revoked.

Sections 46 and 48: these are virtually identical amendments. It requires an employee who does not intend to return to work upon the conclusion of her leave to give the employer four weeks' notice of that fact. There's a parallel amendment for the parental leave provision.

Section 18: there are two aspects to this motion. The bill language talks about performing "active duties." The motion would change that to performing "work." We found there is a lot of confusion, more than we anticipated, about what active duties are, as opposed to inactive duties for a worker, so we've just talked about work. If there are problems of what "work" means, that can be taken care of in regulations because there is a power to define terms.

At the end of subsection (3), this is the provision that requires that there be at least eight hours between shifts. There are certain situations where it might be advantageous to both parties for the employee to agree to work a successive shift even though fewer than eight hours have passed. In that case, the change in subsection (3) would allow that to be waived in effect if the employee agrees.

The last one identified as substantive—paragraph 8.1 I believe we've spoken about already. The other motion

which is really coupled with that is section 140. It is adding three new subsections, (8), (9) and (10). Let me just refresh my memory here. This was the approval that the director of employment standards could give where the employee at the point of hire agrees to work more than eight hours per day.

Subsection (8) would allow the director to impose conditions in granting an approval and also to rescind the approval if the director wishes at a later date.

Subsection (9) is a clarification provision which says that even though this agreement has been made, you cannot work more than 10 hours per day except in the emergency conditions which are identified in section 19 of the bill.

Subsection (10), another precaution: if under the agreement that the employee has signed they are working both more than eight hours per day and 48 hours per week, as we've indicated with paragraph 8.1, in certain circumstances that agreement could be irrevocable insofar as the daily hours are concerned. Subsection (10), though, makes it clear that the part of the agreement that pertains to the weekly hour limit is revocable in accordance with subsection 17(3).

The Chair: Thank you very much. We appreciate that detailed answer.

With that, we've certainly made allowance for any time lost for the demonstration.

Pursuant to an order of the House, seeing that it is 4:30 of the clock, the committee must move promptly into clause-by-clause, the actual votes. Every question is deemed to be put. That means we don't even read the motion. We will simply proceed on the basis of the numbers on the upper right-hand corner of each page. I will put the questions in order, first by section and then as we get to the various amendments.

Shall section 1 carry?

Mr Christopherson: Recorded vote.

The Chair: A recorded vote has been requested.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Section 1 is carried.

Shall section 2 carry? All those in favour? Opposed? Section 2 is carried.

Shall section 3 carry?

Mr Christopherson: Recorded vote.

The Chair: All those in favour?

Interjection.

The Chair: We seem to have a difference of opinion, but I will defer to the expertise of the clerks. In the case of a recorded vote, all sections or amendments that have that request are moved to the bottom. Then you can have a 20-minute recess to vote on that. If it is your wish to do that—or are you indicating you're going to be asking for a recorded vote to all sections and amendments?

Mr Christopherson: Yes, they're all going to be recorded vote requests.

1640

The Chair: Then the committee will—I'd hate to say, "I told you so," to a clerk. May I suggest to the committee members that we not take a 20-minute recess? Agreed? Thank you.

A recorded vote was requested for section 3.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Section 3 is carried.
Shall section 4 carry?

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Section 4 is carried.
All those in favour of section 5?

Interjections.

The Chair: I'm skipping one step of the process, anticipating what's the likely answer.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Section 5 is carried.
All those in favour of section 6?

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Section 6 is carried.
All those who believe section 7 should carry?

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Section 7 is carried.
All those in favour of section 8 carrying?

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Section 8 is carried.

All those in favour of section 9 carrying?

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Section 9 is carried.

All those in favour of section 10 carrying?

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Section 10 is carried.

All those in favour of section 11 carrying?

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Section 11 is carried.

All those in favour of section 12?

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Section 12 is carried.

All those in favour of section 13 carrying?

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Section 13 is carried.

Section 14.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Section 14 is carried.
Section 15.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Section 15 is carried.
Section 16.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Section 16 is carried.
Amendment 1, the government motion.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: That amendment is carried.
Shall section 17, as amended, carry?

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Section 17, as amended, is carried.
Amendment 2, government motion.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: That amendment is carried.
Shall section 18, as amended, carry?

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Section 18, as amended, is carried.

In section 19, we have amendment 3, a government motion.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: That amendment is carried.

Shall section 19, as amended, carry?

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: I didn't know whether to take from that silence an acquiescence, but I take it not.

Section 19, as amended, is carried.

All those in favour of section 20 carrying?

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Actually, in deference to the clerk's voice, section 20 is carried.

Section 21.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Section 21 is carried.

The fourth amendment, in section 22, a government motion.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: That amendment is carried.

Shall section 22, as amended, carry?

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Section 22, as amended, is carried.

The fifth amendment is in section 23, a government motion.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: That amendment is carried.

Shall section 23, as amended, carry?

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Section 23, as amended, is carried.

I will, in the interests of greater clarity, for government motion number 6, break it down and ask the question on each section, up to and including the new section 29.1. So you will be voting, in effect, for subsections of the motion you see on page 6.

All those in favour of the amendment to section 24?

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: The amendment to section 24 is carried.

The amendment to section 25: all those in favour? Oh, I beg your pardon. We will simply consider that the only amendment within section 24.

Shall section 24, as amended, carry? I didn't hear a no, so it carries.

Interjection.

The Chair: No, I'm asking whether that was acquiescence.

Mr Christopherson: No.

The Chair: OK, that's fine. A recorded vote on each section.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: That section is carried, as amended.

The amendment to section 25, a government motion.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: That amendment is carried.
Section 25, as amended.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Section 25, as amended, is carried.
The amendment from page 6, a government motion
amending section 26.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: That amendment carries.
Section 26, as amended.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Section 26, as amended, is carried.
The amendment to section 27, government motion.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: That amendment is carried.
Section 27, as amended.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Section 27, as amended, is carried.
The amendment to section 28, government motion.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: That amendment is carried.
Section 28, as amended.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: That section is carried.
The amendment to section 29, government motion.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: That amendment is carried.
Section 29, as amended.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: That section is carried, as amended.
The new section 29.1, government motion.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: That amendment is carried.
Section 29.1, as amended.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: That section is carried.
Section 30.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: That section is carried.
Section 31.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: That section is carried.
Section 32.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Section 32 is carried.
Section 33.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Levac.

The Chair: That section is carried.
Section 34.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Section 34 is carried.
Section 35.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Section 35 is carried.
Section 36.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Section 36 is carried.
The next amendment is to section 37; it's government
motion number 7.

1650

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: That amendment is carried.
Section 37, as amended.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Section 37, as amended, is carried.
Section 38.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Section 38 is carried.
Section 39.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Section 39 is carried.
Section 40.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Section 40 is carried.
Section 41.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Section 41 is carried.

Section 42: All those in favour?

Clerk of the Committee (Ms Anne Stokes): Mrs Munro, Mr Barrett, Mr Chudleigh, Mr Gill.

The Chair: Opposed?

Interjection.

The Chair: I beg your pardon. So you're in favour?

Interjection.

The Chair: OK. My apologies. We're still on "all those in favour."

Clerk of the Committee: Mr Agostino, Mr Levac, Mr Christopherson.

The Chair: Section 42 is carried.

Section 43.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Section 43 is carried.

Section 44.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Section 44 is carried.

Section 45.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Section 45 is carried.

The next motion is found at page 8, a government motion.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: That amendment carries.

Section 46, as amended: all those in favour?

Clerk of the Committee: Mrs Munro, Mr Barrett, Mr Chudleigh, Mr Gill.

The Chair: Opposed?

Interjection.

The Chair: Let me do that again. There seems to be some doubt around the table. All those in favour of section 46, as amended?

Ayes

Agostino, Barrett, Christopherson, Chudleigh, Gill, Levac, Munro.

The Chair: Section 46, as amended, is carried.

Section 47.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Section 47 is carried.

The next amendment is found at page 9, a government motion.

Ayes

Agostino, Barrett, Chudleigh, Gill, Levac, Munro.

Nays

Christopherson.

The Chair: The amendment is carried.

Section 48, as amended.

Ayes

Agostino, Barrett, Christopherson, Chudleigh, Gill, Levac, Munro.

The Chair: Section 48, as amended, is carried.

Section 49.

Ayes

Agostino, Barrett, Christopherson, Chudleigh, Gill, Levac, Munro.

The Chair: Section 49 is carried.

Section 50.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Section 50 is carried.

Section 51.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Section 51 is carried.
Section 52.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Section 52 is carried.
Section 53.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Section 53 is carried.
Section 54.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Thank you. The next amendment you'll find at page 10. It's a government motion.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: That amendment carries.
Section 55, as amended.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Section 55, as amended, is carried.
Section 56.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Section 56 is carried.
Section 57.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Section 57 is carried.
The next amendment you'll find on page 11. It's a government motion.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: That amendment carries.
Section 58, as amended.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Section 58, as amended, is carried.
Section 59.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Section 59 is carried.
Section 60.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Section 60 is carried.
Section 61.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Section 61 is carried.
Section 62.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Section 62 is carried.
Section 63.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Section 63 is carried.
Section 64.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Section 64 is carried.
Section 65.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Section 65 is carried.
Section 66.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Section 66 is carried.
Section 67.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Section 67 is carried.
Section 68.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Section 68 is carried.
Section 69.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Section 69 is carried.
Section 70.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Section 70 is carried.
Section 71.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Section 71 is carried.
Section 72.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Section 72 is carried.
The next amendment you'll find on page 12. It's the
NDP motion.

Ayes

Agostino, Christopherson, Levac.

Nays

Barrett, Chudleigh, Gill, Munro.

The Chair: That amendment fails.
Section 73.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Section 73 is carried.
Section 74.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Section 74 is carried.
Section 75.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Section 75 is carried.
Section 76.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Section 76 is carried.
Section 77.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Section 77 is carried.
Section 78.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Section 78 is carried.
Section 79.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Section 79 is carried.

In deference to the clerk's voice, it would be acceptable to have a recorded vote for a number of sections together, if that meets with your approval. Would that be fine?

Looking forward to where the next amendment is—section 107—the question would be on sections 80 through 106.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Sections 80 through 106 are carried.
Section 107 includes an amendment. You'll find it on page 13. It's a government motion.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: That amendment carries.
Section 107, as amended.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Section 107, as amended, is carried.
Section 108.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Section 108 is carried.
Section 109.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

1700

The Chair: Section 109 is carried.
Section 110.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Section 110 is carried.

The next amendment you'll find at page 14. It's a government motion.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: That amendment carries.
Section 111, as amended.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Section 111, as amended, is carried.
Section 112.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Section 112 is carried.
Section 113.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Section 113 is carried.
Section 114.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Section 114 is carried.

The next amendment is on page 15, a government motion.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: That amendment is carried.
Section 115, as amended.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Section 115, as amended, is carried.

The next amendment you'll find on page 16, a government motion.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: That amendment is carried.
Section 116, as amended.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Section 116, as amended, is carried.
Section 117.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Section 117 is carried.
Section 118.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Section 118 is carried.
The next amendment is found on page 17. It's a government motion.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: That amendment carries.
Section 119, as amended.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Section 119, as amended, is carried.
Sections 120 through 139.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Sections 120 through 139 are carried.
The next amendment you'll find on page 18. It's a government motion.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: That amendment carries.

The next amendment is on page 19, another government motion.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: That amendment carries.
Amendment 20, a government motion.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: That amendment carries.
Amendment 21, a government motion.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: That amendment carries.
Amendment 22, a government motion.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: That amendment carries.
Section 140, as amended.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Section 140, as amended, is carried.
The next amendment is on page 23, a government motion.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: That amendment carries.
Section 141, as amended.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Section 141, as amended, is carried.
Section 142.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Section 142 is carried.
The final amendment you'll find on page 24. It's a government motion.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: That amendment carries.
Section 143, as amended.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Section 143, as amended, is carried.
Section 144.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Section 144 is carried.
Section 145.

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Section 145 is carried.
Shall the title of the bill carry?

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: The title of the bill is carried.
Shall Bill 147, as amended, carry?

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: Bill 147, as amended, is carried.
Shall I report the bill, as amended, to the House?

Ayes

Barrett, Chudleigh, Gill, Munro.

Nays

Agostino, Christopherson, Levac.

The Chair: I will report the bill, as amended, to the House.

Thank you to the committee members. I appreciate your co-operation through this process and look forward to third reading debate.

The committee stands adjourned until the call of the Chair.

The committee adjourned at 1706.

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First Session, 37th Parliament

Assemblée législative de l'Ontario

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Official Report of Debates (Hansard)

Monday 18 December 2000

Journal des débats (Hansard)

Lundi 18 décembre 2000

Standing committee on general government

Subcommittee report

Personal Health Information
Privacy Act, 2000

Comité permanent des affaires gouvernementales

Rapport du sous-comité

Loi de 2000 sur la confidentialité
des renseignements personnels
sur la santé

Chair: Steve Gilchrist
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LEGISLATIVE ASSEMBLY OF ONTARIO

STANDING COMMITTEE ON
GENERAL GOVERNMENT

Monday 18 December 2000

ASSEMBLÉE LÉGISLATIVE DE L'ONTARIO

COMITÉ PERMANENT DES
AFFAIRES GOUVERNEMENTALES

Lundi 18 décembre 2000

The committee met at 1537 in committee room 1.

SUBCOMMITTEE REPORT

The Chair (Mr Steve Gilchrist): I call the committee to order for the purpose of accepting the report of the subcommittee for Bill 159, An Act respecting Personal Health Information and related matters. To get it on the record, Mr Wood.

Mr Bob Wood (London West): I move adoption of the subcommittee's report.

The Chair: It has to be read into the record, if you would be so kind.

Mr Wood: Can we waive the reading of it? Do I have to read it?

The Chair: It depends on how nasty the looks are I get from the various clerks assembled in the room here.

Mr Wood: Everybody has a copy of it, I take it? All right.

I move adoption of the report of the subcommittee. Call the vote.

The Chair: Any discussion?

Mrs Lyn McLeod (Thunder Bay-Atikokan): Just a couple of things. First of all, I have as of today, Mr Chair—you may not have received it yet—provided you with a written request to have the committee consider a couple of related issues that are beyond the immediate scope of the bill, as you had suggested at the subcommittee hearing. So you will have that in writing, and I have provided a copy to the clerk, if you wish to have that distributed to all committee members.

Second, I understand the clerk is going to be distributing a list of the people who were to be invited to make presentations. I understood you to say at the subcommittee meeting that if we had other groups that weren't on the list that we wanted to propose, we could make that recommendation to the clerk. Is that an accurate statement?

The Chair: That is completely accurate, Ms McLeod, and I look forward to getting a copy. I have not seen that.

Mrs McLeod: It was just done today, so you wouldn't have received it yet.

The Chair: Mr Marchese?

Mr Rosario Marchese (Trinity-Spadina): I'm just an innocent bystander.

Mrs Julia Munro (York North): I just wanted to ask about point 8, "a minimum of 20 minutes." It seems to

me that normally we make a distinction where people are representing organizations or are private individuals. Is the intent here that only those representing organizations would be making submissions or are we suggesting that everyone has 20 minutes regardless of the breadth of their representation?

The Chair: An excellent point. I believe there was some discussion around the subcommittee of making a distinction between groups and individuals. I recall we had agreed to go from 15 up to 20 for groups, but I think perhaps in the course of that discussion we lost sight of the fact that we had said 10 minutes for individuals. I don't know if anyone would wish to make that a formal amendment to the subcommittee report.

Mr Marchese: I don't know whether Lyn has any point to make with respect to that. Because obviously I was not there in subcommittee—Frances Lankin was—I'm not sure what the agreement was, but normally we suggest 10 minutes for individuals and 15 for organizations. Unless the subcommittee decided that perhaps this issue is a little more complicated and requires a little more in-depth deputation, that I would suggest would be the norm. But I'd like to hear from Lyn.

Mrs McLeod: My understanding of the discussion at the subcommittee was that because this is an extremely technical bill we're doing it somewhat differently.

Mr Marchese: So 15-20 then.

Mrs McLeod: That's right, because it would be virtually impossible for anybody to address the detail of the bill in a very short presentation. So it's not as though we're looking for opinions; we're looking for really technical analysis of the legal implications.

Mr Marchese: So is it 15 minutes for individuals and 20 for organizations that you might have agreed to?

The Chair: Again, Ms McLeod, correct me if I'm wrong, but I think our discussions then segued almost exclusively into groups, and you did raise the very valid point that the groups would be coming in, in most cases, with fairly specific and technical questions that they would like to have answered. I don't think we really spent a lot of time on individuals. I guess I would just draw it to the attention of the members of the committee that when we're looking at scheduling, particularly here in Toronto, if our goal is to do a balancing act between making sure all questions are answered but also making sure we hear from as many people as possible, that is why we historically have adopted a different standard for individuals.

Mr Marchese: I'm not sure whether Lyn has an opinion on that. Are we agreeing to 15 for individuals, or 10; and 20 for organizations?

The Chair: I would invite comment from all the members around the table.

Mr Wood: I would endorse Mr Marchese's suggestion of 10 and 20, but I'm not particularly strong. I might point out that I do think the Chair has been given the authority to increase, so what we're talking about here are minimums. So it's not that someone, if it was felt more time was needed, might not get more than 20 if they were an organization. What you're talking about, as I understand it, are minimums, which I'm quite happy to support. I am open to suggestion on it, but I think your suggestion is a reasonable one, provided the Chair does have the authority, as he does, to extend it.

Mr Dave Levac (Brant): The Chair has always exercised some discretion in terms of allowing people to go over if it looked like it was getting us somewhere; and a compliment to him, because there were times when we were in the middle of a deputation that it was obvious more needed to be said by this particular witness. I would bow to the Chair's judgment on that because it makes sense to me that we not shortcut anybody, unless they decide not to speak for 10 minutes or 20 minutes, individuals or groups.

I needed a clarification on a comment you made about distinguishing groups. Was there a request to make sure that we had a distinction between a group, per se, and an individual, or different types of groups that we were looking for?

The Chair: We have historically tended not to be judgmental about what constitutes a group, as long as it's clearly not just a name somebody has manufactured for the purpose of artificing a longer period of time. But an individual hospital and the OHA, I would suggest, would be considered equally valid group presentations.

Mrs McLeod: I guess the reason why I'm hesitant to see the flexibility of either the Chair or the committee restricted is because we may, for example, on a bill of this nature, if we're in Kingston, find value in having a law professor from Queen's University who has some expertise in this who is not an organization but to whom we would like to give an extensive period of time because we would all benefit from that kind of an analysis.

The Chair: Perhaps if I might offer a compromise then, that once the final list of presenters is before you, if there are some you would like to bump up from the category of individual to group because of their expertise, I would be more than happy to take those representations. My only concern again is that if here in Toronto we were to get such a lot more applications from individuals that it compromised our ability to hear from the groups, then I think we would not be serving this bill to the extent we possibly could.

If we could make it 10 and 20 on the understanding that once the deadline for the application to be a witness before the committee has passed, that list would be

circulated and if you see someone whose expertise you'd like to see rewarded, we would take that direction.

Mr Wood: Further to the discussion, could I put a motion on the floor that I think will encapsulate what we've just said?

"Witnesses be allotted a minimum of 10 minutes per individual and 20 minutes per group per presentation, and that the Chair be authorized to expand the length of time" etc, "depending on the individual or group being represented" etc.

Mr Marchese: We could do that. Steve was recommending that once we see the list we can all agree on the length of time rather than—

Mr Wood: I think he's inviting submissions, actually. He's saying if you think more time is needed, you tell him. Certainly if the committee gives instructions—in the past I think there's been reasonable discretion used, but others don't feel that, obviously.

Mr Marchese: I could live with the discretion of the Chair, obviously.

The Chair: We have in fact covered off in section 10 "That the Chair, in consultation with the clerk, be authorized to make decisions" including scheduling. I would be happy to see two amendments: first off, the one in 8 that would say 20 minutes for presentations for groups and 10 minutes for individuals, but then that in number 5 we insert a sentence after the first sentence that says, "As soon as possible after the deadline, the clerk shall circulate the list of prospective witnesses to all caucuses for their input."

Mr Wood: I'll add that to my motion. That will be put as another amendment in my motion.

The Chair: So are we clear about those two sentences? All in favour of that? Thank you.

The amendment having been dealt with, all those in favour of the adoption of the subcommittee report, as amended? It is adopted.

I believe, Mr Wood, you had another matter to bring before us.

PERSONAL HEALTH INFORMATION PRIVACY ACT, 2000

LOI DE 2000 SUR LA CONFIDENTIALITÉ DES RENSEIGNEMENTS PERSONNELS SUR LA SANTÉ

Consideration of Bill 159, An Act respecting Personal Health Information and related matters / Projet de loi 159, Loi concernant les renseignements personnels sur la santé et traitant de questions connexes.

Mr Wood: Yes. As members are aware, the government's not going to proceed with subsections (2) and (3) of section 36 of the bill, and I think we have unanimous consent to remove those. There are some technical things I have to do to do that, so maybe I can plunge into that if that appears to be in order.

I seek unanimous consent for the committee to proceed with clause-by-clause consideration of Bill 159, to

stand down sections 1 to 35 to deal with subsections (2) and (3) of section 36, but stand down the remainder of section 36 and stand down sections 37 to 95.

I have to seek that first and then I move my amendment to get them out.

Mrs McLeod: Just before giving consent, Mr Chair, we had agreed at subcommittee to have these sections struck out before the bill proceeds to committee, but I had understood it was to be done in the House. I would appreciate an explanation of why it can't be done in the House.

Mr Wood: Apparently it's far more complicated to do that. It has to be pulled out of the committee to go back to the House. After they explained the procedure, I didn't understand it but I took their word for it that it was more complicated. The simplest way to do what the subcommittee wanted to do, apparently, is what I have just done. If unanimous consent is given to that—I can even read the motion I'm going to move, if you'd like to hear it. I can give it to you right now.

The Chair: In fact, I can add further to Mr Wood's comments. It not only has to be pulled out of committee, it then must go into committee of the whole House. We have to go through a whole procedure there, at which point another motion would have to be passed to send it back to committee. So having had those who deal with these sorts of issues review the matter, it wasn't as simple as we thought it would be in subcommittee. It has exactly the same effect, is my understanding of what we're trying to do.

Mr Wood: This is the easy way to do what we wanted to do, is the short answer.

The Chair: Might I just say, just for the purpose of procedural issues here, we're not voting on that motion. Mr Wood is simply seeking unanimous consent to, in effect, open up the floor for debate on this.

Mrs McLeod: I understand that and that's why I'm making my comments prior to giving my unanimous consent.

Mr Wood: We will read you the actual motion if you want to hear it.

Mrs McLeod: I suspect I'm comfortable with the motion, which I expect would say to strike down the two sections, and that's a motion which I would support.

Mr Wood: That is it.

Mrs McLeod: My only reason for raising the concern, and one of the reasons why both Ms Lankin and I agreed in the subcommittee that we would be prepared to entertain this motion in the House, was so that when the bill proceeds to committee for public hearings it goes forward in a way which eliminates a clause that the government clearly intends to strike from the bill. My concern then is whether or not there is less public awareness prior to the public hearings if this is done in committee, and in what manner something which is done in committee is reported back to the House. At what point is it reported back to the House? How does it get out of committee? I think in some way there needs to be perhaps even a letter that would go to stakeholders, some kind of

information that that portion of the bill has already been dealt with in committee.

1550

The Chair: As a supplementary motion, that would certainly be in order, that the clerk could be directed to communicate whatever change is made, if any, to all the groups which indicated an interest in speaking to the committee, or even in the general mailout to solicit feedback, written or oral.

Mrs McLeod: So in granting consent I can have it on faith that that motion would be entertained?

The Chair: Just looking around the room, I guess I should nod my head.

Mrs McLeod: I'm not trying to be tricky here, but the government wants, and we agree, that this bill should go forward as cleanly as possible, so we just want it to be communicated that way.

Mr Wood: I think that point is well taken. I'd like to suggest that perhaps when we invite people to make submissions we send a letter saying, "Please note that subsections (2) and (3) of section 36 in the original bill have been removed."

Mrs McLeod: I agree, because otherwise I think it will be a focus of some—

Mr Wood: That's an excellent suggestion. Could we invite you to instruct that as part of—

The Chair: Might I just ask that we deal with that as a separate motion. But clearly we have an indication that it seems to have unanimous consent.

Mr Wood: I will move that first, if need be, after Mrs Elliott speaks.

Mrs Brenda Elliott (Guelph-Wellington): There was just some concern about whether or not people who had expressed interest in the bill and making presentations on the bill would be alerted to this so it's a technical brief.

The Chair: If I may be so bold, I think Ms McLeod is suggesting that even before we get to that stage, the people that the clerk will be sending out notices of the hearings to will also know. So it covers all the bases.

Mr Wood: We don't have to formally instruct you to do that, do we? Do you wish a motion?

The Chair: It certainly makes it easier for the clerk to have that on the record formally.

Mr Wood: I move that in the notices sent out—

The Chair: Are we not getting a little ahead of ourselves? We haven't made any change yet.

Mr Wood: You're right. I will move it when I'm in order.

The Chair: Mr Wood has sought unanimous consent to open up for clause-by-clause for the purpose of dealing with one motion. Agreed? Agreed.

Mr Wood: I move that subsections 36(2) and (3) of the bill be struck out.

The Chair: Any debate? Seeing none, I'll put the question. All those in favour? Opposed? It's passed unanimously.

Mr Wood: I move that in the requests or invitations for submissions that it be noted to those being com-

municated with that subsections 36(2) and (3) of the original bill have been struck out.

The Chair: Any debate? All those in favour? It is passed unanimously.

Mrs McLeod: Procedurally, then, where does that stand legally now? Because the bill is not being reported. We're not reporting this amendment. It's basically an amendment. We're not reporting this amendment back to the House for the House's approval at this point, so it stands as part of clause-by-clause. It stands as intent of the committee amendment process. It's not legally struck yet?

The Chair: You can imagine that it is comparable to a typical clause-by-clause at the end of a bill that might go more than one day. So in the absence of a time allocation motion, in theory, when you make each change to a bill, that change is now done and, save only the final vote at the end of the bill to refer it back to the House, I think to the extent that everything we do is intent until that final vote is taken, it has exactly the same weight today as it would have had on the last day of clause-by-clause.

Mrs McLeod: Theoretically, though, according to our rules of order, it would be possible for that part of the recommendation of the committee to be struck by the Legislature.

The Chair: After second reading the House could change anything we do in first reading, yes.

Mrs McLeod: I just think the way in which we communicate it should make it clear that this has been done by committee, it has not been done in the Legislature. It's been done by committee, that the sections have been struck in the initial review of the bill.

Mr Wood: The Legislature, once a report comes back, either endorses it or they don't.

Mrs McLeod: In its entirety?

Mr Wood: Exactly. So as long as this stays out, they've either got to reject it or accept it. They can't make amendments, I don't think.

The Chair: Forgive me. On the assumption that everything else proceeds as one would expect it to, at the end of public hearings and clause-by-clause, the moment the committee agrees to send the bill back to the House, these clauses are gone. They would have to be reintroduced. There would be nothing for them to debate because they aren't there. So it would have, again, the

same weight as if we had done this at the end of the hearings.

Mr Marchese: I wondered about that, Steve.

Mrs McLeod: I'm not sure that there isn't some way. I don't think there's precedent for it, technically.

Mr Wood: I think the answer is that the House, in and of itself, can't amend this bill. It either accepts it or it doesn't. If it wants to amend it, it has to come back to a committee.

The Chair: Aside from committee—

Mr Wood: In other words, you can't go back in unless it comes back to a committee.

The Chair: As we launch into a procedural debate here, the clerks are by far the most expert to handle this. Aside from committee of the whole House, strictly speaking, the Legislature never amends bills; committees are the ones that amend bills. So it is in all respects typical. The clerk very correctly suggested my wording was slightly off. When we refer a bill, even then it has no force until, of course, we consent to its introduction again in the House.

Mr Marchese: Except that it's probably been very rare, if ever done, where we've sent a recommendation from this committee and the Legislature, the assembly, has either changed an aspect or a section of a bill, for that matter.

Mr Wood: But they can't—

Mrs McLeod: It's technically possible.

Mr Marchese: It's technically possible but I don't think it's ever happened.

Mr Wood: I don't think it is, no.

Mrs McLeod: This has become more a curiosity than anything else.

Mr Marchese: We're just debating it.

Mr Wood: They can't amend it in the House. Folks, it is gone for sure, I promise you.

Mr Marchese: I think we can move on.

Mr Wood: I think we have too many lawyers in this committee, even though I only have one.

Interjections.

The Chair: Are there any other issues before the committee this afternoon?

Mr Wood: I move the adjournment of the committee.

Mr Marchese: I'm in favour of that.

The Chair: The committee stands adjourned.

The committee adjourned at 1557.

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LEGISLATIVE ASSEMBLY OF ONTARIO

ASSEMBLÉE LÉGISLATIVE DE L'ONTARIO

STANDING COMMITTEE ON
GENERAL GOVERNMENTCOMITÉ PERMANENT DES
AFFAIRES GOUVERNEMENTALES

Wednesday 7 February 2001

Mercredi 7 février 2001

*The committee met at 1007 in committee room 1.*PERSONAL HEALTH INFORMATION
PRIVACY ACT, 2000LOI DE 2000 SUR LA CONFIDENTIALITÉ
DES RENSEIGNEMENTS PERSONNELS
SUR LA SANTÉ

Bill 159, An Act respecting Personal Health Information and related matters / Projet de loi 159, Loi concernant les renseignements personnels sur la santé et traitant de questions connexes.

The Chair (Mr Steve Gilchrist): Good morning. Welcome to the standing committee on general government on our first day of hearings on Bill 159, An Act respecting Personal Health Information and related matters. Today we're going to start off with two detailed briefings.

MINISTRY OF HEALTH
AND LONG-TERM CARE

The Chair: First off this morning is the Ministry of Health. I see a number of different players before us. I wonder if for the benefit of Hansard you could introduce yourselves. We have two hours for your presentation this morning.

Mr Phil Jackson: Phil Jackson, director of strategic health policy, Ministry of Health.

Ms Jutta Auksi: Jutta Auksi, senior policy analyst, strategic health policy branch, Ministry of Health.

Mr Gilbert Sharpe: Gilbert Sharpe, counsel to the Ministry of Health.

Mr Liam Scott: Liam Scott, counsel with the legal branch of the Ministry of Health.

The Chair: Thank you. Please proceed.

Mr Jackson: Committee members, thank you for the opportunity to present a technical briefing on Bill 159. We'll attempt to provide you with an overview of the context of Bill 159 and technical explanations section by section of the bill.

To give you an outline of the presentation, we will provide you with some context and general history. I'll be asking Gilbert Sharpe, who has had extensive experience in this area, to provide a general legislative background, including developments related to federal Bill C-6. I will then provide you with a high-level overview

of Bill 159, going through some of the key areas and addressing how that would change the existing scenario. We would then proceed with a section-by-section walk-through where we can explain the intent, and explain in technical detail the bill as drafted.

Mrs Lyn McLeod (Thunder Bay-Atikokan): Just to get a sense of what our involvement is as the technical briefing goes along, do we ask questions throughout or do we ask questions when we get to the section-by-section explanation you mentioned?

Mr Jackson: We would appreciate it if we could hold questions until the end of the presentation.

Mrs McLeod: The end of the entire presentation?

Mr Jackson: Until the end of the presentation, because some of the answers to potential questions are contained in the section-by-section review.

Mrs McLeod: I appreciate that. I guess my supplementary question then would be, what time frame is there for us to come back and ask some of the questions we have of the ministry staff?

The Chair: Mr Jackson, what would be your expectation in terms of the time to make your first presentation?

Mr Jackson: I think we will be left with probably 25 minutes for questions, based on the timed presentation that we've done.

The Chair: From past experience, I think that's likely not going to be sufficient to deal with the questions.

Mrs McLeod: I could start in 25.

The Chair: Perhaps it might make sense to allow you to do your overview first, but when we get to the section by section, I would be inclined to allow questions from the floor on each section. If that takes us over time, assuming everyone's schedule is somewhat flexible this afternoon—we don't exactly have an onerous schedule—we might be able to accommodate going a little later into the lunch hour.

Mrs McLeod: I appreciate that. I would also be very happy if when we ask a question on a section and you know that it relates to other sections that help to clarify the question, we have those other sections referenced. That would be fine with me. We're just really looking to understand the issues, and our issues are probably broadly based, so any sections you have to refer to to clarify it for us would be helpful.

The Chair: Clearly, Mr Jackson, given that the point of having the ministry here is to give the members as sound a foundation on which to proceed in the rest of

these hearings as possible, it makes sense that we perhaps indulge even greater allowance for questioning in this session than perhaps is normally the case.

Mr Jackson: We appreciate and recognize the decision of the Chair.

To begin the presentation, it's true that federal and provincial governments have long identified the need to address the issues of privacy and confidentiality regarding personal information. In Ontario, from 1978 to 1980 there was extensive work done in what was to be the three-volume report released by the Krever commission, headed by Justice Horace Krever, outlining an extensive series of recommendations concerning the need for specific solutions regarding protection for personal health information.

The Ministry of Health and Long-Term Care has examined this issue over many years. It's true that the most recent consultations on personal health information privacy legislation were held in 1996 and 1997, with follow-up consultations on a discussion document that took place in September 2000. Work had proceeded prior to that in a range of areas.

The need to develop rules specific to the health sector for the collection, use and disclosure of personal health information has been outlined by organizations such as the Ontario Hospital Association and the Health Services Restructuring Commission as vital to ensuring a more integrated and effective health care system. At the same time, we know from the input we've received from the privacy commissioner and the privacy community that maintaining the balance between the protection of privacy of the individual and effectively meeting the needs of a modern health care system is a challenge for any policy area and a challenge legally.

Manitoba, Saskatchewan and Alberta have all enacted personal health information privacy legislation, and it's fair to say that the complexity and challenges faced by Ontario in establishing approaches in this regard have been paralleled by the debates that have taken place in other jurisdictions. Privacy is one of the most complex and challenging areas of public policy. There are multiple perspectives, as the committee will hear from the stakeholders who are presenting in front of the committee. Perspectives exist on a range of key issues. Often consensus has been hard to find on key areas. There are areas where, we believe, it may be impossible to achieve consensus. However, we have strived in the work that has been undertaken internally to maintain an appropriate balance and we look to the work of this committee and to the input of the stakeholders who will come into this process to maintain and judge whether the balance that's been crafted in Bill 159 is appropriate.

I am now going to ask Gilbert Sharpe, counsel to the ministry, to provide a general historical context with regard to the legal background regarding personal health information as the area has evolved. I'll then provide an overview of the current situation with regard to the legislated rules that are currently in place, outline how Bill 159 would strengthen those rules, and provide a section-by-section overview of the bill.

Mr Sharpe: Mr Chair, and members of the committee. As you have heard from Mr Jackson, my role is now one of historian. I hope that beyond that I can provide a bit of expertise.

Ms Frances Lankin (Beaches-East York): Historians get paid a lot more than lawyers, is that what you're saying? Ministry lawyers.

Mr Sharpe: No, they got a big increase.

Mr Jackson: For the record, Gilbert is our counsel.

Mr Sharpe: I have been involved with issues of confidentiality and privacy since beginning my government career in 1975. At that time the approach to disclosure of patient information could best be described as paternalistic. For example, the old Mental Hospitals Act, which regulated committal and admission and treatment of patients in psychiatric facilities for many years, contained a provision that said the administrator can disclose information about patients so long as it is clearly not against the best interests of those patients. So that was the history.

In the days when I was a law professor teaching torts and looking at issues of confidentiality and privacy, there were very few actions, litigation involving breach of privacy, breach of trust in the health information context. There was a case in England years ago about a physician who had disclosed to one spouse the fact that the other had VD and there was an issue there, but it was very rare, because the damages were difficult to establish. Even when legislation existed, it was often difficult to prosecute an offence. Historical regulation was done primarily through the Health Disciplines Act and provisions of those sorts that looked at what health professionals did as ethical practice. One of those rules was the Hippocratic oath: you don't disclose secrets about patients; that would be actionable through the colleges.

The first time we really looked at legislation involving health information that I was involved in was the work in 1977 around the amendments to the Mental Health Act, and although they focused primarily on committal and treatment, we did put forward comprehensive provisions on confidentiality. Some of those provisions are in Bill 159, including our attempts in the 1970s to protect psychiatric information from disclosure even in court, where it was considered inappropriate. In some jurisdictions—Europe, for example—physicians and others are prohibited from disclosing even in court a patient's secrets. It is accorded protection almost like the priest-penitent privilege.

The idea in the 1970s was that patients would consent to the disclosure, unless in a voir dire or private hearing the court determined that it was essential in the interests of justice to make the disclosure. We had a parallel provision dealing with records that looked at whether or not there was likely going to be harm to the patient or some third party.

These provisions have been carried over in Bill 159, but they were first crafted for the purpose of the Mental Health Act enacted in 1978. At that time, these provisions that I referred to under the Mental Hospitals Act were repealed.

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We then lead into 1979 and 1980, where there were concerns about improper disclosure to the police and hospitals and what information was being given out, and a royal commission was established at the time. Phil mentioned that some of you may recall the work of Mr Justice Horace Krever in a three-volume report. One of the principal recommendations in that report served, I believe, as one of the main reasons it never got implemented for some years: he recommended patients should have a legislated right of access to their records. At the time—remember, this is over 20 years ago—many in the health professions and health facilities were concerned about the consequences of opening up the records. Examples were given, for example, of psychiatric records, what families might have said that would be recorded and what impact that might have on the treating team and on the patients themselves in terms of safety and so on. There was also concern that information would be misunderstood, that it would lead to malpractice actions. For a host of reasons the government of the day did not move and implement the recommendations. As I say, this was one of the principal concerns; it was around access rights by patients.

The next major round of amendments to the Mental Health Act came in 1986-87, and at that time the decision was made by the government of the day to provide access rights in the context of that legislation. So again we're moving in a fragmented way. There were regulations under the Public Hospitals Act that dealt under hospital management rules with disclosure of the medical record. Consent would be the rule, and then there would be a number of exceptions. Then there were these provisions in the Mental Health Act. But in most health care settings, apart from professional regulation through the Health Disciplines Act, which is now the Regulated Health Professions Act, there was nothing. So people working out in community health clinics, mental health and so on, had no legislative guidance and it was unclear under what circumstances disclosures could be made.

In 1986-87 there were a number of amendments made to the Mental Health Act, and one involved providing a legislated right of access and the notion of being able to if not correct your record, at least raise concerns about it and have statements of disagreement put on the record—very important issues which were embraced in, at about that time, the 1980s, the development of the Freedom of Information and Protection of Privacy Act.

There was debate at the time that latter statute was introduced about the breadth of its application. There was a lot of concern that perhaps it should reach into the community, at least so far as publicly funded health institutions were concerned, such as public hospitals. The decision at the time was to leave health care aside from the application of that legislation, except where health information would be in the possession of government, to exempt psychiatric facilities under the Mental Health Act, and not include, for the time being, public hospitals. The minister of the day said he would be looking at

comprehensive laws to regulate confidentiality in health care. The needs of the system, arguably, require special rules. That was the thrust the government wanted to take on at that time. We're talking mid- to late 1980s.

In the early 1990s a principles paper on confidentiality was developed and released for discussion around whether rules should be developed and what those rules might say. Work had gone on, frankly, on a version of this kind of legislation since, from my perspective, the mid-1970s, and drafts were evolving. I think sometimes as we get into the specific legislation—we're going to look at clause-by-clause as Phil gets into describing that—some may say, in sitting back and looking at it now, that it seems as if there may be some internal inconsistencies: "Could you explain why this doesn't seem to quite jibe with that?" Part of the reason is many drafting people over many years and many evolutions and many consultations, with input from all kinds of people.

The evolution continued into 1994, with amendments in the long-term-care area, where provisions on access and record-keeping generally and information were added to that legislation, with an attempt to maintain some consistency with the Mental Health Act and the regulations under the Public Hospitals Act. Provisions from time to time were added in this area that is known as directed disclosures. Groups like CIHI, for example, have access to information from hospitals, which are required to provide the information without consent so that CIHI is able to provide hospital report cards and specific information on patient treatment patterns and care.

There is obviously a thread that's going to run through these hearings. It seems that whenever we're looking at health legislation, there are these competing interests of rights of individuals and greater concerns about what's good for society and for the system and for allocation of resources. This is best exemplified, I think, in legislation around health information and privacy. You'll hear criticisms, certainly, about whether there are provisions in the legislation that err too much on the side of sharing information in the interests of planning and managing the system and allocating resources, and you may hear others saying there isn't enough discretion available in the ability to share information.

It may be useful, and I know I've found this instructive from my perspective, to determine what current practices are as much as possible, to try to sort through what happens now, to learn how information gets shared within the health system. As I said, there is very little legal guidance. Although there was a Supreme Court of Canada case a few years ago that said patients do have a right to their records and to their information, it's very difficult for patients to access that.

You'll hear some discussion around the fact that most North American jurisdictions, most provinces, have provisions in their evidence laws to protect quality assurance information, the peer assessment reviews that often happen in hospitals and other institutions to enable

the improvement of quality and prevention of errors in those institutions. Ontario historically has never gone down that road. Groups like OMA and OHA have consistently come forward to various governments making a claim that these are critical provisions that will not and should not interfere with the care and treatment of patients and the ability of patients to have full accountability through every mechanism, including malpractice actions, of their medical records and information, but that these types of other records are also important for other purposes involving peer and quality reviews.

There are provisions in Bill 159 to address error management and quality assurance. Have we caught the right balance? We've tried to look at other jurisdictions and take what we thought were the best approaches. Again, we've talked to many people over the consultation period, but obviously this committee will be taking a very close look at the language to determine whether or not the right balance has been caught.

There have also been amendments through the years in statutes like consent to treatment. The three major initiatives I've been most concerned about over 25 years have been mental health, and with this committee looking at Brian's Law last spring we brought some closure to that on the community treatment order side; consent to treatment, which for many years was also in need of comprehensive approaches and laws, has been through a number of iterations, but there is now a Health Care Consent Act that takes an approach that has some consistency for health care; and—this is really the final piece—health information and privacy.

Health information has been a thread, as I've said, that has rolled through mental health and certainly health care consent, because those acting on a substitute basis will have to make decisions on behalf of their loved ones who may be incompetent, or young children, and they will need information in order to make those decisions. But there will be, as we examine issues of age of consent and roles of parents of those under 16, which is touched on in this legislation, very tricky issues in some areas of health care about just who can have access to information and in what circumstances; again, a very delicate balance of individual rights. When you are a young person, when do you achieve that autonomy? We have erred on the side of saying that if the Health Care Consent Act has recognized an autonomous ability of an individual to consent to treatment, then the information surrounding that treatment should also be controlled by that young person who is competent to give their consent.

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You'll see threads in this legislation, again gleaned from other statutes, like mental health, where an individual who is considered to be mentally incapable of making decisions on disclosure should have a right to challenge the finding that they are incapable. This is a principle that was brought in some years ago on the consent-to-treatment area.

You'll also hear some discussion from a legal perspective around issues like implied consent. I think this

process is going to be very constructive if we're able to have some legal debate around what existing laws are, these principles and how they would apply.

Implied consent is the notion, going back to the days of every first-year law student, that if you go into a doctor's office and you put up your arm to get a needle, you've implied that you've given permission to have the needle given to you. It's difficult to imply consent in confidentiality. Some may suggest that when you go into a hospital and you sign a form that anything that happens to you there can be disclosed in certain settings and to certain individuals and for certain purposes—as a lawyer, it's difficult to understand how that would apply practically to serve as any kind of protection or defence for the health care team because it's one thing to give an implied consent to treatment that's in front of you. When information has not yet been compiled in your file and you don't know what it's going to say, how can you give either an actual or an implied consent? How can it be informed? The information isn't there? If you ask questions, you don't know what it is that's going to be disclosed. So that is a principle that applies well in the consent-to-treatment area that I don't think translates very well into health information.

This leads into issues around debate around C-6, the federal bill which is now law and awaiting application to the health systems within provinces over the next few years. You're going to have much discussion and debate around what "substantially similar" means and what the problems really are with that bill and why its principles can't apply to the health system.

The Ontario Ministry of Health put two briefs in to Ottawa, to the House of Commons and the Senate. If you're interested, when we do get into the technical discussions, I could provide you with three or four practical, clinical examples. Essentially, I don't believe that Industry Canada, in developing what really is very good law for the e-commerce and commercial sectors, had in mind the health care sector. This is obvious in a number of areas; there are no provisions for substitute consent. There are all kinds of reasons why that won't work in health care.

Health Canada would normally, as you know, be the ones to lead discussions with the provinces on health legislation generally that has a national and a provincial perspective, which this legislation certainly does. If the committee is interested, when we do get into discussion on specific issues, and perhaps later on, after you've had the opportunity to hear from people like the federal privacy commissioner, there would be an opportunity to discuss with you in detail what the concerns are. I think, being a public record, the Ministry of Health's briefs would be available to the members of the committee.

I should stop now and let Phil pick up with his formal presentation. I simply want to conclude by saying that there have been allegations that this legislation in many respects does not protect privacy. Others have said it doesn't facilitate information sufficiently and that there are too many exceptions to the principle of consent. The

exceptions could have been grouped. Instead of having two dozen, I suppose we could have brought them into five or six, from an optics perspective. But I can tell you that each one has been very carefully debated and frankly emanates from the very many consultations, cutting across four governments and 25 years in my experience. Can this be improved? Of course. That's what we're hoping to help you do. I look forward to your questions and to participating in the process.

Mr Jackson: Part of the importance of Gilbert providing some of the legal history around the evolution of personal health information legislation but also in terms of the conceptual debates and discussions that have gone on over multiple years is to bring us to a point where we can attempt to outline some of the key areas in the current situation. What are the current provisions that are in place? What are some of the current gaps that are in place regarding protections of personal health information? It's fair to say that the current legislated rules regarding the collection, use and disclosure of personal health information in the health sector have grown up in multiple statutes. It's fair also to say that they're inconsistent, many areas are narrow and in some cases are non-existent.

While the Freedom of Information and Protection of Privacy Act, which came into force in January 1988, and the Municipal Freedom of Information and Protection of Privacy Act, which came into force in 1991, apply to government institutions and would include in the health sector such things as municipal homes for the aged and public health, FIPPA and MFIPPA, as the acts are referred to, do not apply to the vast majority of the health sector. Where legislative rules do exist currently, for example under various acts that govern the health professionals, they're not comprehensive. They typically deal only with the disclosure of information, often not with the collection or use of personal health information. Taken together, the current legislated protections as they exist are incomplete at best.

There are large areas of health care where there are no legislated rules in place at all specifically protecting personal health information privacy. This includes things such as unregulated health professionals, community mental health clinics, a health care aide, a community health promotion worker or health adviser. While there are ethical standards and professional conduct demonstrated by these workers in their day-to-day activity of providing health care, there are no specific legislated rules and there is little recourse for an individual when information is inappropriately shared.

The limited legislative protections that currently exist and the inconsistent nature of some of the current rules have been identified by many as a major privacy concern. With no clearly articulated set of rules that cover all health care providers, there's a significant barrier to the implementation of more effective and more integrated patient care. If providers don't know the rules or are working from different rules with regard to the sharing of information, it becomes a major challenge to establishing a more integrated health system. The Health Services

Restructuring Commission commented in their paper on health information management that this was a major barrier. They also referred to it, in their work on integration, as a challenge the health system needed to address in order to be able to move forward with more integrated care.

It's also true to say that the existing rules have not sufficiently kept pace with the changes to the way health information is shared. For example, in many areas rules typically would not cover unrecorded information. Potentially this could include information gained through a telephone consultation or information shared between health care providers in conversation. In the area of electronic transfer such as e-mail, there are no specific legislated requirements currently in place creating obligations on the health care provider when transferring information.

No independent oversight powers outside of those provided by FIPPA and MFIPPA exist for the health sector regarding the collection, use and disclosure of personal health information. FIPPA and MFIPPA would catch municipal homes for the aged and not much more. This was a major area of recommendation by the Krever commission of the need for independent oversight for the uses of personal health information in the health sector. I understand that the provincial privacy commissioner will no doubt speak in detail to this issue when she's here later in the day.

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Currently, in a rapidly evolving world of increased computerization, increased electronic transfer, the rules that are in place now regarding computer matching specifically in terms of the Ministry of Health are in the form of a directive; they're not in legislation. This is an area where there has been considerable scrutiny and certainly is an area where we have tried to come up with approaches that would modernize the way in which health information protection could be enacted.

Again under the current situation, there is a major challenge when transferring information out of the province, when personal health information is to be transferred out of province or out of country, a typical scenario being that if you imagine a senior spending part of the year in the south, currently there are no specific legislated requirements on the health information custodian or on a health information holder regarding the precautions that need to be in place when transferring information out of jurisdiction. With the move to increased use of technology and increased use of computers, with a highly mobile population and an increased technical capacity, this is obviously an area of concern to those in the privacy community, balanced with the fact that the move to greater electronic transfer is a reality in the day-to-day evolution of health care. So we would anticipate that this is no doubt an area where there will be discussion from stakeholders with different perspectives.

In the area of marketing, there are currently no legislated rules specific to the use of personal health infor-

mation for marketing purposes. In the area of fundraising by, for example, hospital foundations, there are no legislated rules in place now on how information that a hospital holds might be used by its foundation to fundraise, for example. While foundations strive to be ethical and strive to be professional in the way in which they manage the health information that they hold, the fact that there are no legislated rules specifically in this area is of concern to the members of the public and it also does not provide the foundations themselves a framework within which to operate.

With regard to research, while the provincial freedom of information act and the municipal freedom of information act contain provisions for research and approaches required when undertaking research using personal information, it's true to say that FIPPA and MFIPPA don't apply to large areas of the health sector and hence there is no provincial legislation, other than FIPPA and MFIPPA, prescribing how and when consent should be obtained for the use of personal health information in research. This is an area that other jurisdictions have grappled with but Ontario as yet hasn't got a legislated solution to this problem. Where the health care provider may also be a researcher, this presents significant challenges practically and ethically.

Regarding the power of the minister to direct disclosures of information that may include personal health information, this has been the subject of scrutiny. It's also fair to say that the powers to direct disclosures have evolved over many years and exist in many statutes. They exist in the Public Hospitals Act now. Basically the way in which a directed disclosure works practically is that there's a requirement established for the collection and transfer of a prescribed set of data.

The example that Gilbert alluded to was CIHI, the Canadian Institute for Health Information. It collects information now under directed disclosure from individual hospitals in order to track and report on utilization and on the effectiveness of programs, and enables the production of such things as hospital report cards and various other assessments of the capacity of hospitals to deliver the care they're funded for.

Mrs McLeod: Excuse me, Mr Chair. Could I ask just one question? Is it allowed and does it happen that there is identifiable information transferred to CIHI under the current act?

Mr Jackson: Currently, yes.

Mrs McLeod: Personally identifiable information?

Mr Jackson: Yes, and I will give you more detail as we go through section by section.

So currently in the Public Hospitals Act there is the power to direct disclosures. In the Health Insurance Act there is the power to direct disclosures. In the Independent Health Facilities Act there is the power to direct disclosures. In the Drug and Pharmacies Regulation Act there is also the power to direct disclosures of information. So in the current situation, which has evolved over many years and as a recognition in part of the need for adequate information for the planning and management

of health care, various provisions have been put into legislation which allow the minister/ministry to direct disclosures.

These provisions exist now, and they exist currently in the absence of the protections set out in Bill 159. I'm sure the area of directed disclosures is going to be an area of scrutiny and certainly is an area where there is need for discussion. It's also, from the ministry's perspective in terms of the ability to plan and manage the system, fair to say that there are enormous information gaps that currently exist around how you would go about planning and managing such sectors as long-term care, community programs and rehabilitation, with the sort of quality information that organizations such as CIHI and ICES, the Institute for Clinical Evaluative Sciences, have for the hospital sector. For other sectors, because we have not required the collection of that information, the information often is not collected in a usable format to sufficiently inform policy, to sufficiently inform decision-making.

The current situation with regard to access to your own medical records, and Gilbert touched on this in his initial overview: a very basic principle. A Supreme Court decision has already happened regarding access to your own medical records. It exists in common law. Legislatively, the right exists in the Mental Health Act, and, for those small parts of the system where that applies, the legislative right to access your own record is set out. For most of the health system, this basic provision is not covered by any legislative rules, and denial of access to records by a health information custodian—by a physician, by a hospital—would typically have to go through a time-consuming and expensive court process.

The right to make a correction to your medical record: currently there are no legislative rules in place, except for institutions covered by either the Mental Health Act or FIPPA/MFIPPA, to request a correction. So currently—take that to its logical extreme—FIPPA and MFIPPA, which would include a municipal home for the aged but wouldn't include a hospital, would provide a right to correction in one area. The majority of the health system doesn't fall under these acts, so the right to request a correction in your own record is effectively not backed up by legislation.

Disclosure of personal health information in court: Gilbert had touched on some of the provisions in the Mental Health Act. The Mental Health Act currently provides, subject to certain provisions, that unless a patient consents, patient information cannot be used in court unless essential to the interests of justice.

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Now, there are other areas of information where the information is equally sensitive to that which will be covered under the Mental Health Act. The test for those other areas is now simple relevance; it's not whether it's deemed essential to the interests of justice.

Disclosure without consent for the purposes of conducting an investigation, some of the current legislation in this area: I wish to read from FIPPA. The Freedom of

Information and Protection of Privacy Act defines law enforcement as meaning:

- “(a) policing,
- “(b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and
- “(c) the conduct of proceedings referred to in clause (b).”

It then goes on to define “personal information.”

The language used in FIPPA regarding law enforcement is where disclosure is by a law enforcement institution to a law enforcement agency in a foreign country under a written agreement or where disclosure is to an institution or a law enforcement agency in Canada to aid an investigation undertaken with a view to a law enforcement proceeding if a law enforcement proceeding is likely to result.

Currently that's the language in FIPPA. As we go in further, we'll give examples from Bill C-6.

It's fair to say that this is an extremely complex area. It's one of the most charged areas. Certainly with regard to the work and what we've heard from various stakeholders, there are competing interests at play; there are competing perspectives regarding this issue. Currently, that provision is in place for FIPPA. I will read later from C-6 around the provisions that would apply in Ontario if C-6 were brought in in the absence of a substantially similar piece of legislation.

Also with regard to disclosures, there is mandatory disclosure of information now that health care providers are required to make, for example, to children's aid societies for the purposes of monitoring and preventing child abuse. Those have long been in place and recognized as an important component where essentially the right of the individual to privacy is overridden by a broader social responsibility. I think the committee is going to be spending significant time engaged with that debate around the appropriate balance between social good and individual rights protection.

With regard to the current situation, it's fair to describe a patchwork history of attempts to grapple with the issues of personal health information privacy in a range of statutes, some with limited coverage and statutes with inconsistent coverage. We also have areas where the legislative guidance required for unregulated health care workers is absent regarding what their obligations are when they obtain personal health information.

Because it is so important to the overall discussions of the committee and because it's been important to a number of jurisdictions that engaged in work in trying to develop personal health information protection legislation, I want to provide some context in terms of the federal legislation, Bill C-6.

Federal Bill C-6, previously C-54, the Personal Information Protection and Electronic Documents Act, was originally introduced October 1, 1998. It was reintroduced in 1999 as C-6, receiving royal assent on April 13, 2000. Part I of the bill, pertaining to privacy, came into force on January 1, 2001.

As of January 1, 2001, the C-6 legislation will apply to organizations that collect, use or disclose personal information in the course of interprovincial commercial transactions. As of January 1, 2002, the legislation will apply to all interprovincial transfers of personal health information in the course of commercial transactions.

If by January 1, 2004, Ontario does not pass legislation that is substantially similar to C-6, the legislation will apply to all organizations that collect, use or disclose all personal information, including personal health information, in the course of commercial transactions.

For the health sector this would include a range of areas that could be considered commercial; for example, private laboratories, pharmacies and some nursing homes. The challenge for Ontario and for the health sector is that C-6, which has been largely designed with commercial transactions in mind, with an emphasis on privacy in the commercial sector, would apply to one piece of the health sector. It would establish one set of rules for one piece of the health sector while, in the absence of substantially similar legislation, the existing patchwork would continue to apply in the other sectors. This would create significant issues with regard to the continuity of care: which set of rules are you following?

It's also true that C-6—in part I would suggest because it's designed primarily for the commercial sector—doesn't contain some key concepts that are essential for health care and the way health care is delivered.

One example is that while C-6 is heavily consent-based for information described as sensitive, there are no provisions regarding substitute decision-making. The challenge of obtaining consent when incapacity is an issue is not addressed in C-6; in part, because it was not crafted for the health sector per se.

Gilbert had referred earlier to some examples that informed the submission the Ontario Ministry of Health made regarding C-6. I'd like Gilbert to give a couple of examples to sort of illustrate in a practical sense the potential implications that the ministry had previously flagged regarding C-6.

Mr Sharpe: I will quote a few examples from the brief.

An elderly man living in the community has several health conditions for which he sees different doctors. He takes a variety of drugs and has the prescriptions filled at whatever pharmacy is convenient to his home or the office of the doctor he's just seen. In this type of situation, without an ability to quickly link information among the various doctors and pharmacists, the risk of over-prescription and adverse drug reactions is significant. C-6 would be a barrier to the sharing of information in this circumstance.

Another example: a woman goes to her doctor about some symptoms she's been experiencing. Her physician sends a requisition and the patient's blood and urine samples to a private medical lab for analysis. C-6 requires the lab to obtain consent from the woman even though no direct contact is made between her and the lab.

The lab might then need to send her information to another lab for further analysis or verification of results. C-6 requires the lab to explain to her the likely uses and disclosures of the information and obtain her consent to these uses and disclosures. The explanation must occur at the time of collection, so even before the health care is provided or, if after collection, before use.

There are a number of other examples in the material. CIHI has been mentioned by both Phil and myself. Under C-6, CIHI would be required to obtain consent before it can collect personal information from hospitals even though, as we've indicated, the Public Hospitals Act does currently permit such disclosure, and subsection 7(3) of C-6 would be of little use, because CIHI will no longer be able to collect comprehensive data.

1100

A number of health statutes in Ontario, such as the Independent Health Facilities Act and Health Protection and Promotion Act, currently permit disclosure of confidential information by government employees in connection with the administration, or for the purposes related to administration, of acts. C-6 would require recipients, for example, labs, to obtain consent before they could collect that information. Some private labs currently work inside hospitals; the Toronto Hospital and Sunnybrook and Women's College are examples. The lab information that is obtained inside the hospital would become part of the patient's record and, again, it wouldn't be clear to what part of the record C-6 would apply. You would have different rules applying to different parts of a medical record.

Another example, the final one: a plastic surgeon removes a basal carcinoma from a patient's cheek—this is a procedure currently covered by OHIP—and at the same time removes a mole, which is a cosmetic procedure not covered by OHIP. The doctor sends the specimens for analysis to a community-based lab which, although it's a private corporation, is paid by OHIP. Services provided above the max funding level are not reimbursed. C-6 would apply to one part of the lab operation and not to others. You would have to have two sets of records and so on.

There are a number of other examples in both of the briefs the Ministry of Health submitted that would demonstrate the inflexibility and inappropriateness of the C-6 rules to the health system.

As I've indicated, we have spent a great deal of time trying to wrestle with these competing issues of provisions in the act under tight security measures that would permit a free flow of information within the health system to enable patients to be treated appropriately and quickly. Draft legislation was circulated in 1997. In the last few years there were three rounds of consultations led by three different parliamentary assistants. These provisions strike a balance that would address the examples I've just given. C-6 was not developed with that in mind.

I hope that helps clarify what you're looking for.

Mr Jackson: Yes. In part it is only to serve as an example of potential practical issues that arise with C-6's

implementation in the health sector. Ontario is not the only jurisdiction that has grappled with the issue of carving out its own set of specific rules for the sharing and use and the protection of personal health information in the health sector. In the context of concerns around privacy and of the discussions that were going on at the time around C-6, a number of jurisdictions moved to introduce legislation specific to the health sector and specific to personal health information. Manitoba, Saskatchewan and Alberta have proceeded with legislation specifically in this area.

I would now like to move on into what Bill 159 as it is currently drafted would change, some of the key areas. Here I am speaking largely from the technical perspective, from the perspective of the technical work that bureaucrats have done. I'm not addressing the broader policy context in which this exists.

Mrs McLeod: May I ask a question? With the discussion of the federal legislation—and I know we have the federal privacy commissioner coming to the committee tomorrow, so I assume the appropriate time to get into a further analysis about C-6 and its compatibility with this bill would be tomorrow morning. I am sure there will be some—

Mr Jackson: If you wish to ask a question regarding that today, we will be in a position to give some responses, but the role the federal privacy commissioner plays would perhaps give them expertise, so the committee should also raise the question then.

Mrs McLeod: My question is, will there be an opportunity for the ministry in turn to respond after we hear from the federal commissioner tomorrow?

The Chair: We might invite Mr Jackson to actually have someone in attendance tomorrow morning, if that's possible, and we could have a timely response.

Mrs McLeod: I think that might be appropriate. I mean, we're not simply looking to set up a confrontational atmosphere but actually to find out how the two bills interrelate. So it would be helpful to hear from the provincial ministry as well.

The Chair: I'm sure it would. If that could be arranged, we'd be grateful if you could have a staff member able to comment on the testimony of the federal privacy commissioner.

Mr Jackson: Just for the record, we don't have an interest in an adversarial relationship with the federal privacy commissioner. We would be interested in terms of the comments specific to the CSA code and the areas around "substantially similar," which have not been fully articulated and which have created some difficulties in terms of anticipating how you craft a piece of legislation without knowing the rules regarding "substantially similar." So it would be useful for us to be present.

Ms Lankin: You may want to share some questions with us that you would like us to put on the record, in fact.

Mrs McLeod: I'm happy to ask some questions now about the presentation the ministry has just made, but it just seems that it would be more constructive if we heard

from the federal commissioner and then had a sense of how the two presentations relate and where our questions come in.

Mr Jackson: That would be very useful for us, because we've certainly asked some questions in the past and it would be helpful, with a new commissioner, to get a sense of his understanding of what substantially similar constitutes.

Mrs McLeod: And I had some questions arising from the presentation that Ontario made to the federal government when the federal government was developing its bill. I'd be happy to ask those now, but if we have an opportunity to come back to this whole issue tomorrow, or even tomorrow afternoon, Mr Chair, I'd be happy to just hold that whole discussion until tomorrow.

Mr Jackson: Yes. We'd be happy to at least know what those questions might be so that we can give some time this evening to thinking through if we need additional material prepared to be able to engage, just for the purposes of having as informed a discussion as we can on this.

The Chair: Mrs McLeod, did you wish to put them in writing or express them orally now?

Mrs McLeod: I can certainly indicate a couple of areas. I don't want our analysis of the clause-by-clause bill to be diverted by going too extensively into this. I have some questions around whether or not the Ontario bill answers a concern in the federal bill which would restrict the transfer of identifiable information for private health care custodians. Then I have some questions about whether or not that same limitation would apply to transactions with publicly funded institutions or whether or not this is an attempt to make it easier for privately run health care facilities. So that's one area.

Mr Jackson: I understand the question, yes.

Mrs McLeod: The other is this huge area of difference in terms of disclosure and requirement for consent. I just have a lot of questions around how—but those would be questions I have all the way through the Ontario bill. So those are the kinds of areas. I don't think there would be anything that was a particular surprise, based on what you've already acknowledged as the areas of controversy in the bill.

Mr Jackson: Yes.

The Chair: Ms Lankin, did you have a question?

Ms Lankin: No, I just wanted to suggest that at the end tomorrow there may be a number of questions on which we will want further response from the ministry. Presumably committee, as we look to the beginning of the actually hearings, will have another opportunity to put informed questions directly to the ministry then that arise from this kind of briefing. So I'd prefer that we wait until the end to put a number of those things on the record.

The Chair: That's certainly why we allowed a couple of weeks' time separation between these technical briefings and the public hearings. Hopefully you'll have all those questions answered to your satisfaction.

Mr Jackson: What Bill 159 would change, some of the key areas, before we go into the substantive section-

by-section: probably the most significant contribution that Bill 159 would bring is it would put in place consistent rules across the health sector. It would cover areas currently where no legislative protections exist for personal health information. So it would draw in those unregulated health providers and unregulated facilities and place rules around the uses and disclosures of personal health information by areas currently not legislated.

The IPC would provide independent oversight for all health information custodians and it would include the Ministry of Health and Long-Term Care as a designated health information custodian. It would introduce consistent protections. Section 12 of Bill 159 as currently drafted will place general limitations on all collections, uses and disclosures of personal health information across the entire health sector. Those general limitations would be that no personal health information shall be collected, used or disclosed if other information would serve the same purpose; no more than registration information could be collected, used or disclosed if registration information would serve the purpose; no more personal health information than is reasonably necessary to achieve the purpose should be shared, collected or disclosed; and, to the extent that it's reasonably possible, the identity of an individual is to be concealed. Section 12 would apply across the board. It's an important provision to refer to as we're going through committee when reading the other sections. It's one that reads into other sections of the bill.

1110

With regard to the protection of information flow out of Ontario, which is section 37, Bill 159 will provide additional protections regarding the sending of personal health information outside of Ontario or the use of personal health information outside of Ontario by a custodian where the custodian collected that information in Ontario. That's section 37. A health information custodian would not be allowed to disclose information outside of Ontario unless the act would permit the same use in Ontario and the custodian believes on reasonable grounds that the person receiving the information would take appropriate steps to preserve the confidentiality of the information.

On section 37, I would say this is a very challenging area to deal with because you're trying to address the rules that you can put in place in Ontario, within the jurisdictional power of Ontario, specific to transfers outside of the jurisdiction. So we've attempted in looking at this to craft something that places a responsibility on a custodian who's in Ontario to consider these factors and, in doing so, try and maintain within the power that Ontario would have to legislate in this area.

With regard to security measures and accountability at sections 18, 19 and 20, there is currently no existing statute for the health sector as a whole that sets out the obligations on all health information custodians regarding the administrative, technical and physical safeguards that are to be in place. Bill 159 sets these out in sections 18, 19 and 20, and these would apply, if Bill 159 were

passed, to the entire health sector. It would basically put in a requirement for the administrative, technical and physical safeguards.

With regard to security measures and accountability, Bill 159 as drafted would require written policies regarding the retention and disposal of medical records and ensure that privacy is protected when the medical records are disposed of. As I'm sure you're aware, this has been an issue in the past over a number of years regarding records that have been destroyed.

With regard to openness, health information custodians will be required to establish written policies regarding their information management practices, and these policies would need to be made available to the public upon request. In relation to this section, there is also a clause pertaining to unanticipated disclosures, section 25. Health information custodians will be required for the first time to inform the public and patients of the anticipated uses to which their personal health information may be put. That's basically a transparency provision that would allow individuals to know up front how their personal health information may be used in the day-to-day provision of care, and legitimate uses that a custodian may make of that information. If a subsequent unanticipated use is made of the information, the custodian will be required to note this matter on the individual's record. So it's both the notification of what information may be used for and, where it falls outside of that spectrum, the unanticipated disclosures clause.

A key provision in Bill 159 builds on the work that was done in the Mental Health Act that Gilbert alluded to. Bill 159 will provide an expanded legislative right for individuals to access their own medical records for health information custodians across the health system. Where a custodian refused access to the medical record, the bill would provide a right of appeal to the privacy commissioner. The commissioner could mediate and, if mediation did not work, the commissioner could conduct an inquiry and audit disclosure under section 69. Failure to comply could result in fines of up to \$500,000 for an institution.

The right to request corrections to a medical record: Bill 159 would expand the legislative right to request a correction on a medical record, section 50. The health information custodian will be required to amend the record or, where there is a disagreement between the patient and the health information custodian, to attach a statement of disagreement to the record. Section 69 would also provide the commissioner with the power to launch an inquiry in response to a complaint regarding the failure to comply.

The right to request corrections and the right of access to records would be significantly expanded from the current provisions that exist now and would apply across the Ontario health system.

Also with regard to some of the key provisions, section 26 would introduce a limit on marketing. Currently no legislated rules apply specifically to the use of personal health information in marketing or market

research. Bill 159 would prohibit the use of personal health information without consent for the marketing of services or for market research.

Limits on fundraising, section 26: currently there are no legislative rules that apply to fundraising, for example, by a foundation. Bill 159 would introduce protections for the first time. Hospitals and other health care facilities would only be able to use or disclose information without consent for fundraising purposes where individuals are provided with a written notice to opt out. Special rules will be in place regarding sensitive information, where the facility itself, if the facility's name were disclosed in the fundraising effort, may inadvertently trigger an individual's awareness or family members' awareness of the condition which the individual may have been admitted for. So there will need to be discussion at committee around what specific additional provisions might be needed with regard to sensitive information. It's an area we've certainly attempted to grapple with, balancing the need for hospital foundations—many members of the community contribute and donate to their local foundation and play a valuable role. At the same time, they have access to information. We have attempted to craft section 26 and limits on fundraising that wouldn't end fundraising by foundations but would put in place requirements they would have to meet and limitations on their access.

In court settings, Bill 159 would take some of the conceptual work that was done in the mental health legislation and would introduce protections against personal health information being disclosed in court without consent unless essential to the interests of justice. This is obviously subject to certain criteria where a diagnosis is part of the case. There are obviously exceptions stipulated in the legislation. This would expand significantly from what currently exists, where the benchmark is relevance and not whether it's essential to the interests of justice.

With regard to research, section 32, this is research using recorded personal health information. Bill 159, as currently drafted, would require all research projects proposing to use recorded personal health information for a research study to obtain ethics approval from a recognized ethics review body. Here is extensive work that will be required as a follow-on, should the legislation pass, to define by regulation who a recognized ethics review body would be. There are many of them. Currently many academic institutions have, as a matter of course, ethics review bodies. Currently on our projects there is no requirement for somebody wishing to proceed to go through a mandatory ethics review process. If the ethics review committee determined that consent was required, the study could not proceed without individual consents being received for the purposes of the study.

1120

With regard to computer matching, Bill 159 would elevate to the level of legislation the core components that are in place in the form of policy directives, so it would establish a legislative framework to have rules in

place regarding computer matching. When we go section by section, we can speak specifically to that.

Finally, the fines that would be in place under the legislation: currently the fines are \$5,000 and \$25,000 under the Mental Health Act and FIPPA respectively. The fines, and we can go into detail in the section as we go there, would be \$50,000 for violation of the act for individuals and \$500,000 for organizations.

With your permission, we would like to now walk through some of the key sections.

Ms Lankin: I have two quick questions, and first of all a request. Perhaps the notes that you presented from and that Mr Sharpe presented from could be circulated to committee members. I'm not sure, for the clause-by-clause part, if there are good notes, but it would be very helpful. We will eventually have it in Hansard, but for committee it takes a bit. As we meet with the privacy commissioners this afternoon and tomorrow, if we could have that, that would be great.

Mr Jackson: Mine has scribble all over it, but I can get you a clean one.

Ms Lankin: I just ask that now because perhaps someone could be making copies available to the clerk so we can get that for this afternoon.

Secondly, in the preliminary briefing opportunity that we had with the ministry, there are a number of areas where I asked for further in-depth clarification. Most of them I suspect will come in the clause-by-clause. One—you alluded to this—was for a briefing note with respect to how information is currently shared. You've given us some examples, but I think it would be helpful for committee to as much as possible have that spelled out: how information is shared, by whom, for what purpose and in what form—identifiable form or not. Some of the concerns that are raised about what this bill will allow actually in some cases are completely warranted concerns. In other cases I think people would be surprised to know that the bill is actually a restriction on what goes on now. That doesn't mean the bill in its form is correct, but it means the debate needs to be more informed. I think committee members would find it really helpful if that could be done by the time we get to submissions and we're debating and hearing from the public on these various points.

Mr Jackson: In terms of the legislation regarding the sharing of information, if I could just understand specifically what you're requesting.

Ms Lankin: For the briefing note?

Mr Jackson: Yes. Just a review of the legislation regarding it?

Ms Lankin: For example, you made reference to CIHI. I think a lot of people, as evidenced by Ms McLeod's question, wouldn't know that CIHI information actually can be disclosed, direct disclosure, in identifiable form. ICES is another example. We came across in Brian's Law a requirement in the legislation to share information around community treatment orders and after the fact tried to plug a little hole there. There are lots of places where currently health information is

either directed to be shared or required to be shared for either research or treatment purposes in varying forms. While some of that is understandable, as you go through the clause-by-clause and explain, I think there are some things that won't be captured that would be useful as background information in a bit more detail than the high-level briefing you gave for us today.

Mr Jackson: If we now turn to the section by section. So it's page 4, which is section 1. Section 1 sets out the key purposes of the act: to protect the privacy, confidentiality and security of personal health information while facilitating the use and disclosure of personal health information for the improvement of health care. Purposes of the act set out the duties and mechanisms to protect the confidentiality and security of personal health information, establish rules for the collection, use and disclosure—

The Chair: Excuse me, Mr Jackson. I just want to direct the members of committee. At tab 11 you'll find the bill recopied in a way that I think might make it easier for you to follow Mr Jackson section by section.

Interjection.

The Chair: Is mine tabbed separately or differently?

Ms Lankin: Do you have it open at tab 11?

Mr Rob Sampson (Mississauga Centre): I have the bill in front of me, which is even better.

Ms Lankin: No, but do you have a tab 11?

Mr Sampson: No. I have the bill in front of me, which is even better.

Ms Lankin: Is there a difference between the information that has been provided to caucuses?

The Chair: No. As Chair I've had this photocopied in a way that it's the bill translated in a different way. I was just suggesting it was easier to read. This was simply expanded.

Ms Lankin: But the format—

The Chair: My apologies. I just thought that format was easier.

Mrs McLeod: I agree.

Ms Lankin: Mr Chair, I agree. The format in which the bill is set out and the explanation of the clauses beside it is in fact what ministry staff may be working from, and it would be very useful for all committee members. I assume if you as Chair have it that other members of the committee have it. I don't have it. I object to that. I think it should be shared with all members of the committee before we proceed.

Mr Sampson: Mr Chair, if I could just comment. I don't know what's been shared with the other members of the committee. Perhaps our friends legislative counsel can tell us what has been shared. I don't know, but I'm assuming that what you're doing is going through the bill clause-by-clause.

Mr Jackson: I'm going through clause-by-clause, yes.

Mr Sampson: So references to the bill would be just as appropriate as references to any of the other tabs that we may or may not have. I have not read tab 11 in detail, so I don't know what's here that's different from what's

not in the bill. But if you want to have tab 11, I don't know if there's a problem, Chair.

Mrs McLeod: Is it possible that the bill has been set out—

Mr Sampson: I think it's been broken down into sections, literally.

Mrs McLeod: —with explanatory notes?

The Chair: We took the French out.

Mrs McLeod: Are there any explanatory notes in tab 11, itemization of sections of the bill?

The Chair: No formatting, just as—

Mrs McLeod: Can I see the second page there, Steve, to get a sense of it? There's a page behind that that has side rules? I think that adds to our understanding of the bill. I don't know how necessary it is, but it just would be helpful if that's what the ministry staff is reading from.

The Chair: That would appear to just be a definition on the side. You can correct me if I'm wrong. Yes, it's the definition of "personal health information."

I'll tell you what. As we go through here, I'm sure if there's any information that isn't already obvious, we can get the ministry to make copies of any other definitions that might be included in here. It was my understanding—

Ms Lankin: Chair, it's easier to go through your format—

The Chair: Well, again, in the interests of the time before us here now, why don't we go through the clause-by-clause and we certainly can have copies made of anything that comes up in the course of the morning's discussions.

Ms Lankin: I understand that tab 11 in the government members' books has come up in the course of discussion, and I would ask that copies be made available. I don't think it is private information. I don't think it is ideologically confidential information. I think it may be some work that has been provided by your caucus—I understand that—but if it's in an easy format and has references and definitions, given that our intent here is to understand the detail of the bill, it would facilitate it, I would request that it be shared.

1130

The Chair: I thought I just said that, Ms Lankin, but if you want it on the record in your words as well, that's fine.

Ms Lankin: I didn't—

The Chair: I thought I just said, as we go through right now, if there's any information, that's the whole point of the technical briefing. So if there's a single definition or anything else that isn't clearly laid out in whatever you have before you, I would certainly expect the ministry to copy that and give you that detail when we're done.

Ms Lankin: Does that include the document that you have at tab 11? I really think that ought to be copied—

The Chair: It's not under my control to speak for the ministry, obviously, but the fact of the matter is—

Ms Lankin: No, Mr Chair, I'm sorry. The ministry is actually not allowed to prepare information for one

caucus that is different from the others, so I'm assuming that this is caucus information that's been provided. If it's confidential in some way, fine, but if it's not and if it's helpful to the committee, I'm just saying share it.

Mr Sampson: Maybe if I can clarify, I think the document being referred to is something that has been prepared by the caucus staff for the support of the caucus members here. To the extent that there's something here that is of general interest I don't see any problems with that, but to the extent it's a document prepared, and I think that's what it is, by caucus staff, then I'm sure you could understand it would stay with the caucus members it was prepared for, unless you're prepared to share your stuff with us, which would be highly unusual, I would have thought.

Ms Lankin: You can have everything I have.

Mrs Sandra Papatello (Windsor West): I guess my question then is that as Chair of the committee you wouldn't be operating from the viewpoint of a caucus or other, so if you've referred to section 11, could we then have a copy of your section 11? You wouldn't be operating from the Conservative caucus package; you're the Chair of the committee.

The Chair: Ms Papatello, I have a binder put in front of me and if that includes documents from more than one source, then I obviously didn't control that. So if Mr Sampson is suggesting that is in fact something that has been prepared by other than the ministry—

Mrs Papatello: But, Chair, apparently you have—

The Chair: Yes, Ms Papatello, and you know, when the Liberal Chair sits here, he would have access to the things that the Liberal caucus has prepared.

Mrs Papatello: So were you suggesting just a moment ago that what you were going to offer us is a Conservative Party document?

The Chair: No, Ms Papatello. If I erred in suggesting that the way it's been reformatted there in this binder is not specifically what you have there, I would invite—obviously, as we go through the detailed clause-by-clause, if there are any definitions that you need, they will be provided.

Mr Sampson: I'll try one more time.

The Chair: Sure. I'm sorry I mentioned this.

Mr Sampson: To the extent the document in front of us, or portions of it, is a document that's helpful to better understand the bill, I don't see any problems to the extent that we could provide that. To the extent that there are comments or notes prepared for the purposes of the government caucus members, clearly I don't think you're expecting us to share that, unless of course you're prepared to reciprocate. We'd be happy to see it. But to the extent it's an easier document and components of it are an easier document to understand the bill, I don't see any problems with us doing that.

I can't commit to delivering that document to you right today, but if it's a better explanation of the bill that could be shared with other caucuses, I don't see any problem with that. To the extent it's information prepared by the PC caucus for the PC caucus review, I think it

would be highly unusual for us to be sharing that with your caucus. I don't know that I recall it ever being done, but if you want to set that precedent, we'd be prepared to take a look at your briefing material as well.

Mr Bob Wood (London West): Mr Chair, maybe we can offer some closure to this. This was a document prepared in part by the PC caucus. We're not going to share it with the other caucuses.

Interjections.

The Chair: Thank you. I have apologized for raising it. In the future, I'll make sure there are better annotations on the tabs, but obviously as we go through this I expect all members to have their questions answered. I would hope that the ministry, if there are any definitions or any other work that your caucuses have not been able to do so far, gets the information here. My apologies for taking us off on that tangent.

Mrs McLeod: Mr Chair, maybe this is a time when we haven't had any preliminary discussion and we haven't had any second reading debate so we haven't established in any kind of public format our procedure for this committee and our intentions in sitting down in what is still a somewhat unusual procedure.

My understanding of the government's interest in going to the committee hearings without having had second reading debate was that we would attempt to really come to some understanding as to how to make this a bill which is the best possible bill that potentially has the support of all parties.

As was addressed by ministry staff at the outset, this is a very complex piece of legislation. Governments are more inclined not to deal with it than to deal with it because of the complexity. I'm not going to speak for Ms Lankin, although we've had personal discussions, but I believe our caucus would share the belief that it is important to have health privacy legislation.

We have some real concerns with this bill and we've been very public about our concerns. We'll be very public about raising our concerns. Our hope would be that there can be a real dialogue about what the intent is in putting forward some of those areas where we have a concern, and if we're not satisfied with the answers we may not be supportive of the bill. But at least at the outset it was to be an attempt on the part of all three parties to share.

I think this gives us an unfortunate start. I have only one—

The Chair: Mrs McLeod, I've got to cut you off. I've made the undertaking. I expect you to have your questions answered. The fact that the government caucus would have prepared the bill in another format—I have no doubts your caucus goes through it and the NDP does as well.

In terms of getting us through this morning, Mr Jackson and his associates are here to give the kind of definition. From that I think will flow any number of things. Certainly, as I've said twice now, I will expect you to have full access to all the information. I would hope something as simple as reformatting a page is not

seen as an impediment to allowing us to get through clause-by-clause here. As I looked around the room, there seemed to be a lot of people on both sides trying to figure out what Mr Jackson was referring to when he said page 4 and then went on through his notes. I simply leafed through this binder and saw a different format that seemed to be a clearer way of looking at it. Having said all of that, it has exactly the same sections as are found in the annotated version of the bill that is in your binder.

I'd like to see Mr Jackson be allowed to proceed. When we're done all of that, I will certainly put whatever pressure we have to put on to make sure you have absolutely all the information you need to move through this bill, because we all agree it is a very important initiative.

Mrs McLeod: It would have been so simple just to have provided an easier format.

The Chair: I showed up here and saw a binder, just as you did, and I don't know what all is contained in there.

Ms Lankin: I'm about to ask if we could take a quick five-minute break. I'm tempted to ask what's at tab 12, but I won't do that. Mr O'Toole has assured me he'll share tab 11 with my anyway, so we can do that if we take a five-minute break. Is that possible?

The Chair: Again, the first few sections of the bill are definitions and things like that. I will be astounded if you find any surprises in that. I would suggest that goes on coincidentally, if in fact that's the only reason for suggesting a delay.

Ms Lankin: No. I would like to take a five-minute break. I was joking about everything else.

The Chair: I beg your pardon. OK. The committee stands recessed for five minutes.

The committee recessed from 1138 to 1152.

The Chair: I call the committee back to order. I think we've lost our presenters.

Mr Sampson: Chair, are you going to take questions now? For the next half-hour, what's the game plan?

The Chair: I am certainly in the hands of the committee members. If you already have questions based on the presentation so far, I think they would be in order.

Mrs McLeod: I'd be comfortable with the ministry taking us through clause-by-clause. The questions at this point really are questions for clarification and understanding. We're not looking to debate stuff, so I think we could work through clause-by-clause and ask the questions, if anybody has questions, along the way.

Mr Sampson: So as we go, we'll do the questions. Is that the idea?

Mrs McLeod: I think that's the easiest way to do it.

Mr Sampson: I just wanted clarification.

The Chair: Mr Jackson, if you'd like to continue taking us through section by section.

Mr Jackson: Beginning with the purposes, section 1, page 4 of the act, part I sets out the purposes and definitions. The key purposes are to protect privacy, confidentiality and security of personal health information; to establish rules for the collection, use, disclosure, retention and disposal of personal health information; to

protect individuals, whether living or deceased, from unauthorized collection, use and disclosure; to facilitate the exchange of personal health information for authorized purposes; to control the collection, use and disclosure of an individual's health number; to establish restrictions on disclosure in proceedings with regard to quality-of-care information.

Mrs McLeod: I'm not sure whether you feel you need to give us time to read it with you or whether you just want to highlight, and then I'm assuming we may be able to pick up on questions that we have without needing the kind of time—

Mr Jackson: If you're comfortable with me highlighting for you, we can highlight.

The Chair: In the interests of time, Mr Jackson, I think if you would just give the highlights. I expect the members have already digested the bill once or twice.

Mr Jackson: In the interests of time, then, I would skip through some of the definitions. I would point you to the definition of "registration information," because that shows up later in the legislation.

Ms Lankin: Which section?

Mr Jackson: Registration information is defined in section 2.

Mrs Papatello: What page?

Ms Lankin: Page 9.

Mrs McLeod: This is just a curiosity question. One of the things we've tried to do is cross-reference the bill to the ministry's original consultation paper and to the response Ann Cavoukian made to the ministry's consultation paper. I just simply don't understand. In the list of definitions of who is a "health information custodian," apparently originally the Ministry of Consumer and Commercial Relations was listed as a health information custodian and other ministries were not. The privacy commissioner has said there needs to be a rationale for who was included and who wasn't. As I look at the bill, none of those are included and therefore there is no rationale. I'm curious to know what happened between the—

Mr Jackson: As you may be aware, this summer the Ministry of Consumer and Commercial Relations was out consulting at the same time as the Ministry of Health on a discussion document around potential general privacy legislation. In part, it's a reflection of those discussions, the specific work that's been ongoing on personal health information. It's fair to say that the work that went on in 1996 and 1997 included a broader range, in part because there was not the anticipation of other legislation in this area. Hence MCCR, in terms of the registration information they would hold, was not envisaged to be captured in this bill, because they also hold a range of other information, but under the broader general bill.

As I say, I can't comment on when or whether the other bill will proceed. That's a decision that still requires to be made. However, that's the background.

Mrs McLeod: Can you give us an idea of in what context MCCR would be a health information custodian, where they would be holding health information?

Mr Jackson: In that registration information is there. They are also covered under other legislation for that registration information.

Mrs McLeod: That takes me to one other question on this section on the registration information. It seems like very broad registration information, because it includes electronic and photographic images and any identification number for the individual, other than the health number, which I assume included driver's licence numbers and any information about the individual's employment status. Is that consistent with definitions of registration information under other acts, including health acts, in the other provinces?

Mr Jackson: We can confirm that for you. We'll confirm that in terms of the definitions used in other jurisdictions.

Ms Lankin: Just back to the health information custodian definition for a moment, I'm assuming, perhaps incorrectly, that clause 14, which is essentially the regulation-making power setting out others who can be designated, is where a number of these other groups like the ministries would end up being referred to, and/or are they caught by a general provision of anyone who has health information and we have to go back to what the definition of health information is?

Mr Jackson: No, we don't basically cover anyone who holds health information. It's been crafted to respond to the health sector, so it's personal health information in the health sector and would include the Ministry of Health. The reg-making authority in the act would provide the ability to add additional custodians. In part, if an institution or a newly class of institutions is introduced or if a new health profession is established, that's the sort of provision that would allow us to recognize an additional health information custodian.

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Ms Lankin: Then at this point in time, and from your previous answer, we don't know what the government's intention is with respect to other ministries that may have some of the information that could be determined to fit under personal health information.

Mr Jackson: Insofar as the Ministry of Health is captured under this legislation with regard to the ministry's role in planning and management of health care, it has been structured in a way that we are attempting to capture the health sector. As you know, FIPPA and MFIPPA apply to government institutions. These are specific rules for the health sector.

Ms Lankin: Understood. My next question is also with respect to registration information and the breadth of what is contained within that. I appreciate that you are going to do a comparison of other jurisdictions, but my question is a little more basic. Why have you included, for example, information about an individual's employment status? Why is that part of what the Ministry of Health sees as relevant to registration information?

Mr Jackson: In terms of registration information including employment status, we will need to clarify and we can provide you an answer in writing on that.

Mr Sampson: I want you to help me out if you can with how broadly you see the definition of “health information custodian.” How broadly do you see that definition? I’ll give you a couple of examples and maybe you could comment on those particular examples.

If you go to a fitness club, public or private, it generally asks for a lot of health information to determine whether or not you should be using certain pieces of machinery etc. When your son or daughter participates in hockey or any sort of athletic group, OHIP numbers are provided to the coaches so they can deal with emergencies should they arise, and sometimes health information is provided. Are these individuals captured under the definition of health information custodian?

Mr Jackson: No, they wouldn’t be covered. For example, if a fitness centre employed a nurse—I can’t think of many examples of where this would apply—or employed a registered health professional or an unregistered health professional, as an individual, they would be captured as custodians.

In terms of the general questions that a fitness trainer would ask, no, they would not be covered as health information custodians, because they typically don’t extensively collect, use and disclose personal health information, and they are not in the health sector.

Mr Sampson: Is that the exclusion, then? Where is that exclusion seen in the bill? Can you refer me to the section that would exclude them?

Mr Jackson: It’s done by virtue of they are not included in the definition of health information custodian. If they are not included in the definition of health information custodian—and a large number of agencies are not included in that definition—then they are excluded from the application of the bill.

Ms Lankin: I’m sorry, one more question with respect to health information custodian. The reference to “community health program or service”—I didn’t look back—is that defined anywhere?

Mr Jackson: It is currently not defined. The purpose of its inclusion is to capture those sorts of unregulated health professionals who are currently in place where there is not a legislated way to refer to them. So it’s a definitional challenge.

Ms Lankin: I agree. The definitional challenge that I have is, is it broad enough to include community services that are currently under the Ministry of Community and Social Services, as opposed to the Ministry of Health?

As you know, depending on the age of the individual receiving services and/or treatment, these services are funded and exist in different places within our community. Actually, in my mind I’m coming back to our discussion under Brian’s Law before, where there was a requirement to share information around a community order. A number of the community players in that sector will be health, but some of them in fact will be Comsoc.

There are specific references here to employment support situations under ODSP, which is different, but there are also employment supports under Comsoc that might be part of a CTO, for example. I just want to make

sure we actually are capturing those groups and that by using community health service we’re not limiting ourselves to only Ministry of Health-funded community services.

The Chair: Thank you. Mrs Papatello.

Mrs Papatello: Could you clarify that question we asked with regard to comparing registration information, not necessarily across other jurisdictions but across ministries within the Ontario government? How does this list of what can be included in registration information compare with, say, the Ministry of Transportation?

Mr Jackson: Certainly in terms of providing information to the committee, an assessment of what’s currently there in terms of registration information and how it’s defined, we can pull that together.

Mrs Papatello: I just didn’t hear your response to Ms Lankin’s question with regard to the purpose for including employment status on that list.

Mr Jackson: What I’d said is that we committed to get back in writing.

The Chair: Thank you. Mr Barrett.

Mr Toby Barrett (Haldimand-Norfolk-Brant): Further to the definition of a health information custodian, if an organization is conducting research or data analysis—for example, surveying mental health clients—the agents or perhaps students doing this research would be classified as health information custodians? They would have access to the information?

Mr Jackson: Somebody who is basically contracted with a health information custodian or is acting under the direction of a health information custodian—for example, if that research were being undertaken by a hospital that included students to do survey work—would not be able to undertake any of the duties or any of the functions of a regulated health information custodian other than those that would be allowed for the custodian. So the rule is on the custodian. If they are bringing on a student to assist, they are still governed by the rules that would apply to the custodian.

Mr Barrett: So a student would have access to the information under the part of their responsibilities to do surveys.

Mr Jackson: Insofar as it complied with the legislation as stipulated and it complied with the appropriate uses and appropriate protections and measures that would be required to be in place.

Mr Barrett: I also understand there is research with respect to mental health clients where they are using consumers, mental health consumer survivors themselves, to conduct these instruments, to conduct these questions, so they are also entrusted with this mental health information of their fellow consumers of the service. They would be classified the same as the students?

Mr Jackson: Where, for example, you may have a psychiatric survivors’ group who are, for the benefit of their own ongoing treatment or as part of their ongoing lives, engaged in that discussion—they are individuals; they are not regulated health professionals—they are not

covered under this legislation. They would be basically conducting their discussions as one individual to another. Should they engage in research, they would not be covered by the research rules that apply here unless somebody in the health sector defined as a custodian had contracted them to do so. It's not attempting to capture all discussions of personal health information between free individuals. It's aimed largely at the formal health sector per se.

Mr Sampson: I think there has been reference already to the fact that you've tried to design this bill as something that's caught the correct balance—I think you said the “right” balance, and I'm going to use the word “correct” balance—between the need for information to be shared for social purposes and the need for information to remain confidential.

Perhaps as you go through the clause-by-clause you could let us know where you believe the bill has been structured to help readjust that balance should that balance need to be readjusted, because as I reflect upon Gilbert's dissertation of the history here, what comes to my mind is that perhaps legislation has been trying to play catch-up to the realities of the way information is stored and shared and assembled and processed, let alone dealt with in a general sense.

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I think it's appropriate to make sure that we do our best as legislators to draft a bill that can be somewhat flexible to changes in the use of medical information or whatever as medical technology and medical science move ahead. So if you can tell us this is where, for instance, we're able to be flexible to meet whatever future demands should be on either the sharing of information or the plan to keep it confidential, just as a general comment—I don't know if you need to do that right now, but as you go through and say, for instance, “Here's a spot where that balance could be adjusted by future governments as necessary,” or where we might have to look at adjusting it.

Mr Sharpe: I don't know if it's even so much a matter of balance. The history I gave reflected on the fact that we traditionally looked at hard copy. The Public Hospitals Act talked about medical records and the Mental Health Act talked about clinical records. We worried in the 1970s about the situation where a patient consents to disclose a psychiatric record but the law does not reach into that secondary and that tertiary disclosure. How do we protect the integrity of that very sensitive information which is now out of the control and hands of the institution that compiled it and the patient who consented to its release?

In crafting this, we had the difficult task of trying to determine where to cast the net, and do we try to follow it as health information, wherever it might be—in a health club, in an insurance company, wherever—or is this a law primarily aimed at the health care system? They're the principal custodian of the information. They craft it and all the access rights and others would pertain to them. Then you have some provision which we have dealing with recipients of information, and they have

obligations on them about how they have to deal with the information they've obtained properly but they don't become, in fact, custodians of it.

That's where, as we examine the details of the legislation, there will be these ongoing threaded questions of, what about other ministries? There are jails that have physicians and there are records crafted there: Comsoc, of course, many examples—children's mental health centres and so on captured in some cases—other Comsoc information that might be health-related that might be shared in the interests of eligibility and benefits that may not be captured by this law, and the provisions of Comsoc's bills may not properly or consistently apply.

The ultimate thrust, I suppose, is if the net has been cast sufficiently broad, and I include in that that in jails and in Comsoc facilities you have regulated health professionals who have their own legislated RHPA requirements professionally on them; what are the other safeguards necessary to ensure that that legislation, which is still essentially health care information about us, is protected?

Mr Jackson: Part of the reason we took the form of introduction we did to outline some of the other privacy initiatives is that the temptation can be quite easily to make a bill which is basically designed for the health sector respond to any perceived flaws that exist in every other sector. That's a challenge about where you draw the boundary in crafting a piece of legislation with specific goals regarding the health sector.

There are questions that I think committee may want to ask the federal privacy commissioner when the commissioner presents regarding the broader protections. For this, the purpose of the definition of health information custodian was to try and circumscribe what are those facilities, programs, organizations, individuals, the role in health care—managing health care, planning health care—that draw a box around this legislative exercise. So the definition section is a very important section. It spells out the boundaries of this act. Beyond the boundaries of this act there's other legislation that would apply. There's other legislation and there may be holes in other areas, but this is almost a core area of debate.

Mrs McLeod: I agree it is a core area of debate and it's one of the reasons why the answers to the questions “why” are genuinely needed for understanding, as opposed to being a challenging question.

I have a question about what it is and why it is with the exception to the definition of “health information custodian.” In this case I'm particularly looking at subsection (2)—I'm losing track of what section it is, but it's page 10 of the printed bill. It says, “A person described in one of paragraphs 1, 5, 6, 12 and 13 of the definition ... is not a health information custodian with respect to personal health information of which the person has knowledge....” Basically it says somebody who has access to health information as an employee of somebody who is a health information custodian is not under the provisions of this act, as I understand it. My question is,

since employees will have access to highly sensitive information, including somebody who's doing the note-taking, the electronic entries for a physician—they're not bound—what protection is there that those people are not in a position to disclose without any consequence at all?

Ms Auksi: I think this may be dealing with several different aspects of the bill. This particular provision is not, I think, the one that really goes to the question that you've asked. When it's an employee who is working in assisting in providing health care under the direction of the health information custodian, that employee, certainly in regard to those activities, is covered by this bill. There are responsibilities of a custodian and responsibilities of the employee that are set out, I think, in a part Phil will come to.

There's the other issue, though—and I think this has been discussed at times, and I'm guessing this may be what's behind your question—that employee records per se are not covered by this bill. So if, for example, there happens to be in the administrative records, the personnel records of an employee working in a hospital, some information about their sick days, something like that, that would not be covered in this bill any more because this is not intended to address that broader issue, because certainly there are employee records in organizations and companies that have nothing to do with the health system. That kind of record would be left to a more general privacy approach rather than this. Different issues are raised than are raised in the health care delivery context.

Mr Jackson: Also in your answer, if you go to the definition of "custodian," you will see it's, "A service provider within the meaning of the Long-Term Care Act," or it's a facility. Or as long-term care it would basically be the service provider in the meaning of the Long-Term Care Act, the service provider with the Child and Family Services Act or a hospital within the meaning of the Public Hospitals Act. So the institution itself is the custodian; it's an institutional custodian. Insofar as that exists, there are obligations on the institution and there are obligations on the individual providers. Specifically when we go through section by section we talk to the issue of those who are operating under the agency of a custodian.

Mrs McLeod: So employees in those settings are covered by the provisions of the act. I guess part of my question was in the areas in which employees are exempted from the provisions of the act. My example was a bad one, I acknowledge, but if we go back to the sections where it is carried, are you satisfied that there is not an opportunity for the disclosure of highly sensitive personal information by employees who would be operating under one of these exempted classes under paragraphs 1, 5, 6, 12 and 13? If I'm misreading that, please tell me. There are several classes of the gathering of health information where the health information custodian doing the gathering and collecting of that information is under the provisions of the act, but as I read that clause, the employee of that custodian is not. I guess my question is, does that not still open up the possibility of

disclosure of sensitive information? And if it doesn't, why is the exemption there?

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Ms Auksi: I'm not absolutely sure I understand what you're referring to, but if you're referring to the page 11 provision that you were talking about before—

Mrs McLeod: Yes, it's provision 2: a person described in one of those five clauses "is not a health information custodian with respect to personal health information of which the person has knowledge as a result of or in connection with being employed by or in the service of another health information custodian."

Ms Auksi: OK, I understand what you're referring to now, yes. Sorry, could you give me the section number?

Mrs McLeod: Sure. It's page 10, subsection 2. I've lost track of what section it is because this is the unwieldy section that has a thousand subsections and sub-subsections.

Ms Auksi: OK. The intent here is to deal with—for example, let's say someone is a physician, works in a hospital and also has a private practice. The physician in the private practice part of his work would be the custodian of that information; working in the hospital, it's the hospital that's the custodian. That's really the situation now. This just attempts to set it out more explicitly than it is in existing legislation.

Mr Jackson: If you go to subsection 16(1), which is on page 19, it deals specifically with the issue of employees—"For the purposes of this act, a person who is employed by or in the service of a health information custodian"—and goes on to define the—

Mrs McLeod: But the exemption is given under the definition, so that the people who are exempted under those five clauses are not covered by the section that you've just referred me to as 16(1). I'm just trying to get at the potential for the disclosure of sensitive information to employees under those five circumstances.

The Chair: I think, Mr Jackson, if I may, the confusion may be about the difference between being a custodian and someone who just happens to have access to information. Perhaps if you could elaborate on that distinction—

Mrs McLeod: No, it's the employee of somebody who is a health information custodian. In five categories their employees are exempt from the provisions of the act. Every other employee of a health information custodian, whether it's a hospital or a practitioner—well, no, not a practitioner, because of section 1—

The Chair: I took from the answer we were given earlier, though, that because there was a higher authority that was still covered, you were not exempt as an employee—

Mrs McLeod: I understand that the employer is the custodian and the employer is responsible.

Mr Sharpe: Right. My reading of this is that subsection (2) would exempt them from being custodians.

Mrs McLeod: The employees are exempted from being custodians, right.

Mr Sharpe: Yes, the employees would not be themselves custodians.

Mr Jackson: To be a custodian would mean, for example, you have to have a written policy around how you dispose of records, so the organization would be covered under that. The employee would be captured under 16(1) for the purposes that they're employed in a health care setting.

Mrs McLeod: Let me try to make it straightforward so that I can try and understand it. So if an employee of one of the health information custodians under one of these five sections discloses sensitive personal health information, what you're saying to me is that at the end of the day the responsibility lies with the custodian and any penalty is levied against the custodian, as opposed to the employee.

Mr Jackson: Yes.

Mrs McLeod: And you deliberately put in those five sections as exemptions, whereas in the other section you referred me to the employee is also responsible for maintaining the confidentiality of the information. Why did you exempt the employee in those five areas? Is there a reason for that?

Mr Jackson: They're not exempted.

Mrs McLeod: Well, they're treated differently.

Mr Jackson: They're exempted from the definition.

Ms Lankin: Mr Chair, there are a couple of points that I want to raise that are stylistic, but let me begin with this one. The definition of all employees of health care information custodians is set out on page 8 near the top. Section 16 that you allude to refers back to that definition, so those people do have restrictions on them with respect to what they can and can't disclose and all of that.

Subsection 2(2) indicates that those people, where there's a dual role in some cases, are not custodians themselves. I think it would make a lot more sense if 2(2) were actually included as a subpart of the definition of a person who is employed by a health service. It's sitting out on its own; it's very hard to relate back and understand.

Mr Jackson: I think 2(2), taking that approach, would clarify that so there's absolutely no doubt that they're captured, and that's the intent.

Ms Lankin: The other again is stylistic. I'm sorry, but I don't understand why some definitions end up further on in the act and not up front. For example, the definition of "quality of care information," or quality assurance information, is set out in part VII of the act, not in the definitions section. Immediately you get into application, and in application it says it applies to health information and quality assurance. I don't understand that, and maybe you could take a look at some of those things because, one of the problems with understanding complex legislation is the way in which you get the information, you know, the big stuff and then you move down, and when you get the detailed stuff, the big stuff all of a sudden popping up later, it changes your reading of the whole act.

Mr Jackson: In terms of defining quality-of-care information, I think it could be included in the earlier section as part of definitions.

Ms Lankin: Is there a reason?

Mr Sharpe: It's simply a matter that, in working with the various draftspeople on the bill, some sections were more or less self-contained and they thought it was best to say—and I've seen this from time to time—"These definitions really only apply in this part, so it might be best to have it a complete code in this part so people don't have to keep going back to the beginning to see what we're talking about, because the notion of quality-of-care information doesn't apply anywhere else." It is stylistic and it's designed to be more user-friendly, but for others it may be more confusing.

Mr Wood: In the definition of "person who is employed by or in the service of a health information custodian," do you think you include an independent contractor working for a custodian. If that is included, could you share with me how the draft statute does that?

Mr Jackson: Yes. There are specific provisions that address somebody who is contracted to provide services for a custodian. If it's unclear in the language, then certainly it needs to be clarified, but it is captured.

Mr Wood: Could you share with me where it's captured?

Mr Jackson: It's under the direction or supervision, (3).

Mr Wood: That goes with the definition of independent contractor, of course, but certainly not under supervision. An independent contractor is not under the supervision of the person they're contracting.

Mr Jackson: If a facility contracts for the purposes of care, they will be covered under this. If a health information custodian contracts with a third party in relation to the responsibilities of that custodian with regard to health care, they will be captured. Insofar as that is not clear, I take your point and perhaps it is one where we need to look at the linguistic—

Mr Wood: I'm wondering if you should simply include independent contractor, if that's what you're trying to do, because there's clearly a specific legal definition of what an independent contractor is, and some of the things you're talking about there exclude you from the definition of independent contractors.

Mr Sharpe: It's a legal notion of whether it's off-service or for-services, all of the history around that that comes under the contract and commercial law area. I think there was an attempt to capture it by saying "employed by or in the service of," that "service of" would be broad enough. But it certainly would be helpful to clarify that that does include independent contractors as well. They may not be "supervised by."

Mr Wood: I would invite you to consider that.

The Chair: Are there any other questions on the definitions, just while we're on this section?

It's now 12:30. The privacy commissioner has indicated she could move her appearance up to 1:45. So with the indulgence of the committee, I'm going to ask whether the Ministry of Health folks could attend, all of you or some of you, during the privacy commissioner's presentation and make yourselves available for further

questioning at the end of her presentation no later than 3:45 this afternoon. If that would meet your schedule, we would be most grateful, because I'm sure the members have many more questions they'd like to pose to you.

With that, the committee stands recessed until 1:45.

The committee recessed from 1230 to 1349.

INFORMATION AND PRIVACY COMMISSIONER/ONTARIO

The Chair: Good afternoon. I'll call the committee back to order. This afternoon we are pleased to have with us Ms Ann Cavoukian, the Information and Privacy Commissioner. I'm told she's joined by—I think I've seen at least one of her colleagues—Mr Beamish. I wonder if they could come forward to the witness table. We have up to two hours for your presentation and questions and answers, as the committee members see fit. Thank you for joining us.

Dr Ann Cavoukian: Thank you, Mr Chair. Good afternoon, ladies and gentlemen. I'm very pleased to have this opportunity to address the committee today, and if I could kindly ask you to hold your questions until I complete my prepared statement, I hope to get a lot of information out.

Let me start by saying upfront that I strongly support the government's introduction of this much-needed legislation and I'm pleased that my office has been identified as the oversight agency.

My office has been advocating the need for health information privacy legislation for many years, since the inception of our office in 1987, but we're certainly not alone in that regard. Members of the public, health care providers and other stakeholders have been waiting for the introduction of this type of legislation since Justice Krever's report of the royal commission on confidentiality of health information in 1980. That's over 20 years ago. Since that time, there have been repeated attempts to get a bill introduced. We came quite close on several occasions but never as close as we are today.

Ladies and gentlemen, the need for this legislation has never been greater, especially with the increasing electronic exchanges of health information. The old, paper-based world of health records will gradually disappear over time and the new world of electronic records will require new rules specifically crafted for this new medium.

I offer a caution. The committee will no doubt hear from people who will urge you to scrap the bill. I ask that you be skeptical of these calls and ask them the following question: what protections are in place right now without a bill? What privacy protection will there be for personal health information in the interim until the next and possibly again failed attempt to introduce new legislation? In other words, what happens in the meantime? I think this is a critical question.

I'll tell you what will happen: your privacy will get further eroded and your health information will get subjected to further abuse.

None of this takes place in a vacuum, as you know. You have to take a look at the existing state of affairs. What is the status quo? The status quo is that there are no legislated safeguards in place right now. It's wide open and your health information is now being used without your consent in ways that most people are completely unaware of. There are no controls in place now, and we can have no influence in such a world. Electronic health information networks are being built as we speak, without any guidance or control. So I urge you, please, not to scrap this bill but to improve it.

In my 14 years of experience with this agency, I personally witnessed first hand the repeated but failed attempts to introduce this type of legislation. It's a very difficult exercise. Whenever you're trying to balance so many competing interests, you will invariably be confronted with the problems and the issues that arise again and again. But we need this legislation now, more than ever.

I've also had numerous discussions with people in the health field, with the ministry, including Mike Connolly, for example. He's the chief information officer of the government health sector, who also heads the smart systems for health, a project which I strongly support in its dogged determination to try to protect privacy. Mike has repeatedly emphasized the need for increased diligence in the protection of privacy as the health care field moves further and further into the information age. Quite frankly, he's worried about the growing risks for health information, and he witnesses it first hand.

So we need health information privacy legislation. We need it now. Please, let's do whatever we have to do to bring in legislative protections to ensure the privacy and confidentiality of health information. Again, this speaks in favour of fixing this decidedly imperfect bill rather than scrapping it.

Now, to be clear, this bill needs a lot of work, no question. I would not suggest otherwise. To that end, I offer the resources of my office to work with the Ministry of Health until the concerns raised about the bill have been addressed. We are very strongly committed to working with the ministry to make this a truly privacy protective bill.

I urge you to take the necessary steps to ensure that the bill is improved, that its privacy provisions are strengthened and that a superior bill is reported back to the House so that all Ontarians may have the benefits of privacy protection for their health information.

Before I review the three major areas where we have encountered difficulty, let me first touch on another matter involving the federal statute, Bill C-6, which I believe you're all very familiar with. I would ask the committee, in your review of the bill, to be mindful of the new federal privacy legislation, the Personal Information Protection and Electronic Documents Act, commonly referred to as Bill C-6. I understand you will be hearing from the federal privacy commissioner tomorrow, who can certainly speak to this matter much better than I. But I should point out that unless Ontario's health privacy bill

is deemed to be substantially similar to the federal law, that part of the health care sector which is engaged in commercial activity could potentially end up being subject to the federal legislation instead of this bill, which I think would not be a particularly desirable outcome given that it could create a great deal of confusion and uncertainty on the part of both health care providers and the public.

C-6, as you know, is based on a CSA Model Code for the Protection of Personal Information. The CSA code consists of a set of privacy principles, generally referred to as "fair information practices," which form the foundation of all privacy codes and laws throughout the world. The CSA code is attached as a schedule of the federal legislation.

While in some respects Bill 159 is arguably better than the federal legislation, it has a number of very serious weaknesses and it certainly doesn't model the CSA code. Wherever possible, the committee should try to ensure that the bill meets the minimum requirements set out in the federal legislation so that it can be deemed to be substantially similar.

One other issue I'm going to raise briefly is the range of health information custodians who will be covered by this legislation and those who will not. There are a number of organizations that collect, use and disclose health information that are not included in the list of health information custodians, such as insurance companies and employers. However, it is our understanding that the government will be introducing broad private sector privacy legislation that will apply to these other custodians of personal health information. That's how they will be caught. As long as such private sector legislation is put into place in a timely manner, the narrow scope of the existing health bill is not as great a concern to my office. However, if that's not the case, then certainly those organizations should be included in the scope of this legislation.

Let me now turn to my major concerns with this bill. My comments and our written submission were prepared with three primary goals in mind: (1) to enhance the privacy protection provided by this legislation; (2) to promote harmonization of this law with the federal privacy law and other provincial health information privacy laws in Canada, which I will describe briefly; and (3) to facilitate the implementation and enforcement of this legislation.

As the body which will eventually be responsible for oversight and enforcement of this bill, I believe there are a number of key areas where the legislation must absolutely be strengthened.

Mrs McLeod: You mentioned your written submission. Is that available for the committee?

Dr Cavoukian: We will be distributing it right after my statement. Yes, absolutely.

The single greatest area of concern has to do with the broad disclosures of personal health information that are permitted without the consent of the individual, particularly for purposes related to the management of the health care system.

Another concern relates to the broad regulation-making power provided by the legislation which could fundamentally alter the very operation of the legislation, placing serious constraints on the rights of individuals. This to me is totally unacceptable.

The third major area of concern is the lack of explicit powers for my office to conduct investigations into privacy matters and to issue final and binding orders. Without these we can make no assurances as to the protection of privacy. Such powers are critical to the effective and efficient oversight of the legislation and are much needed if we wish to have public confidence in the system.

I will limit my comments to these three areas. However, please note that all of our recommendations are presented in great detail in the written submission which you will be given shortly and they follow the order in which they appear in the legislation.

Turning to perhaps the most glaring area in need of attention, let me review the broad disclosures of personal health information that are permitted without the consent of the individual. Not only is this a major concern for my office but also for privacy advocates and the public at large. As well, the Ministry of Health itself has acknowledged problems in this area and the need for narrowing.

One of the basic premises of this legislation, generally speaking, is that the consent of the individual should be obtained before personal health information is disclosed. However, the bill contains numerous provisions for the use and disclosure of personal information for a wide array of purposes without any consent from the individual. In fact, under this bill, individuals have relatively little control over the collection, use and disclosure of their personal health information.

The notion of having control over the uses of your own information is fundamental to privacy. Privacy revolves around control, personal control, over the use and circulation of your information. This is often referred to as informational self-determination, that the individual is the one to determine the fate of his or her information. Bill 159 is seriously lacking in this vitally important area. One example: individuals have no ability to prohibit their health information from being made available to others over computerized networks. In contrast, under comparable legislation that recently came into force in Alberta, custodians are required to obtain consent before disclosing health information via electronic means.

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Under Saskatchewan's yet-to-be-proclaimed health information privacy law, which has been passed, individuals may prohibit a custodian from making their health information available over government-sponsored health networks, and where it is made available over the network, individuals can then prohibit the disclosure of all or parts of their records. Again, control is maintained.

However, under Ontario's bill individuals have no way in which to prevent their health information from being shared freely among health care providers. In contrast, under comparable legislation in the province of

Manitoba, a trustee may disclose personal health information to a person who is providing health care unless the individual has instructed the trustee not to make the disclosure. They can do that. This is called the lockbox provision, which you may have heard about and which I would be glad to discuss with you later if time permits.

Even the United States, a country which has strongly resisted both national and international pressures to enact privacy laws, has recently passed regulations for health information under the Health Insurance Portability and Accountability Act which require providers to obtain consent for routine uses and disclosures of personal health information such as treatment, payment and health care operations. This was surprising even to me, and very pleasantly so.

While individuals may have some concerns about the free flow of their personal information among the health care community, they are even more concerned about the use and disclosure of their health information for secondary purposes. These are uses of their information, not only for which they haven't given consent but in ways that they have absolutely no knowledge of. It's just out there.

The public is also very concerned about the potential for the government to have control over their health information. For example, under this bill the government could direct health custodians to disclose any personal health information to a third party for a wide range of purposes related to the management of the health system. This could be practically anything. It's wide open and it's far too sweeping a power, in our view.

While we understand that some directed disclosures are currently permitted under different pieces of existing legislation, our review suggests that the disclosures that are contemplated under this bill go well beyond what even currently exists. So it's expanding the existing directed disclosures, extending the government's reach into a patient's file, into his or her very chart with their medical information. Think about it. Think about your own medical records and if you would like that to take place.

What's even worse is that there are virtually no limits on the information a custodian may be directed to disclose and in almost all cases no power for the commissioner to oversee any of these types of directed disclosures that would fall well beyond our oversight capabilities.

We see no convincing evidence from the ministry that it requires these broad powers in order to collect the information needed for planning and administrative purposes. Added to this is the fact that there is no transparency in this process. The public is completely in the dark about existing directed disclosures, let alone the expanded ones. There's nothing in the legislation that I believe will remedy this. I repeat that this is completely unacceptable. If the directed disclosure provisions are not eliminated from the bill, then we recommend that any remaining directed disclosures be subject to the review of my office, not just the directed disclosures related to non-

funded health services and programs. What's not funded? Hardly anything. So basically we would have no oversight over directed disclosures.

In addition, all disclosures, including directed disclosures, should be subject to the general limiting principles in the legislation such as the requirement to preferably disclose anonymized or pseudo-anonymized health information whenever possible. We've also recommended that the legislation include some safeguards for anonymous health information to ensure that through advances in data matching processes, the once anonymous individual could not later be re-identified. We urge the committee to carefully review each listed disclosure and probe thoroughly with ministry officials to ensure that it's necessary and warrants the elimination of a basic privacy right.

Let me now turn to regulation-making power. The extent to which this legislation creates regulation-making power is an area of great concern to my office and one that requires serious amendment. We understand that some matters must be left to regulations, of course. It's neither practical nor desirable to have every minute detail included in the body of the legislation. However, a review indicates that at almost every key decision-making point, the bill includes the ability to deviate from the established rules by way of regulation. In almost every part of the legislation, key issues are left to be addressed in the regulations, leaving far too much to be decided at a later date in a non-public forum. These regulations could have a fundamental impact on the very operation of the legislation and the privacy protections and individual rights that it provides.

I have a list of these; I'm going to read just a few of them because they're surprising. Subsection 68(13) states that the commissioner must conduct a review of a complaint in accordance with the procedure to be prescribed later by regulation. This is unthinkable to my office; I've never heard of this before. Why should a third party dictate how my office, an independent office, conducts its reviews? Surely that would have the effect of interfering with the independence of my office and the ability for us to impartially oversee this legislation. It's totally unacceptable; it's got to come out.

Subsection 25(1) requires a custodian who uses or discloses health information to provide the individual with information about the uses and disclosures that the custodian expects to make—this is a good thing; we applaud that—but only in the circumstances prescribed by the regs. Why would you leave this to the regs? It's far too important an area and you should address this right in the body of the legislation as other privacy laws do in other provinces.

Finally, clauses (d) and (e) in section 44 provide regulation-making power to exclude certain types of health information and information held by certain health information custodians from this part of the act which provides individuals with a general right of access and correction of their own health information. It doesn't make any sense. It would narrow the right of access and correction

in a way that isn't even identified here in the legislation; it would come later in the regulations. It's not accessible.

I could read on and on—I won't. You can read this later at your pleasure.

Overall the proposed legislation provides the Lieutenant Governor in Council with the power to make regulations in 30 areas—again, far too many. Since this rule-making-power process is not transparent to the public, the proposed number and scope of the regulations are unacceptable and we believe should be narrowed.

The final area I'll address today is the powers of the commissioners or lack thereof.

Part XI, which sets out the oversight and enforcement regime relating to personal health information, raises a number of serious concerns for my office. This part establishes the power of the commissioner to review complaints under the legislation and to conduct inquiries into complaints about access and correction.

The provisions of Bill 159 are totally inadequate and fail to provide Ontarians with a robust oversight over their most sensitive personal information.

I'd like to refer you to the investigation I tabled last year into the disclosure of personal information by the Province of Ontario Savings Office, and the reason I do this is that investigation provided ample evidence of the weaknesses of the current public sector oversight mandate.

This same weak oversight framework is essentially being replicated in Bill 159. We would not have the powers necessary to conduct investigations. The proposed legislation lacks strong and explicit powers to investigate the complaints of citizens and issue orders where personal information is being used or disclosed in breach of the legislation.

Without the clear authority to conduct an investigation and sufficient powers to gather the necessary evidence, an oversight body cannot adequately assess the extent to which custodians of health information are complying with their responsibilities.

The public cannot be confident that health custodians are being held accountable for their information management practices as they must be. In the case of the health care sector, the lack of public confidence in a strong and independent oversight agency may be fatal.

Accordingly, I recommend that the powers be amended so that the commissioner has the ability to do the following:

Investigate complaints—this is as basic as it gets. We need clear and explicit powers to investigate all complaints.

The ability to review decisions of custodians that relate to requests for the correction of one's personal information—my office is currently dealing with a case that is before us which will clearly demonstrate the importance of having these decisions subject to independent review by the commissioner. Under Bill 159, this type of review would not be possible. My order in this matter should be completed within about a month's time and I urge you to take a look at it when it comes out.

We should also be able to issue final and binding orders that are not appealable to the courts, as is presently the case under the public sector laws. We see no justification for introducing an additional level of appeal with the inherent costs and invariable delay that this would involve, particularly in light of our over 13 years of experience under the public sector laws that clearly demonstrate that this is not necessary. The system works very well.

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We should also have a general power to conduct privacy audits, to ensure compliance with any provision of the act.

Finally, there should be the elimination of any provision which would interfere with our ability to independently determine what procedures are most effective in doing our job.

Without these powers, my office will not be able to effectively carry out its mandate, and many of the public's rights and protections provided under the legislation will be virtually unenforceable, rendering them, in my view, of very little value.

I would like to conclude by reiterating two points. Yes, the legislation needs a lot of work, but no, it is not so fundamentally flawed that we need to start over again. My office is committed to working with the Ministry of Health to make the necessary changes to make this truly a privacy protection bill.

I should also point out that getting the bill to this point in the legislative process has been a major accomplishment not to be underestimated. The hard work that has gone into it shouldn't be ignored.

I believe the health care community, the public and other stakeholders have the will to work with this bill and mould it into legislation that will meet most of our needs. I doubt if you would ever be able to reach 100% consensus in this area but I think most of our issues can be addressed.

The challenge before us is to adequately protect this very sensitive information from inappropriate and unauthorized collection, use and disclosure while, under very limited and controlled circumstances and without infringing on the individual's right to privacy, making the necessary information available for purposes that can potentially benefit us all.

I ask that you consider the detailed recommendations that my office has made in our witness submission, which will be distributed to the committee, that I believe, if adopted, would indeed make this legislation workable and much more privacy-protective.

Later this month, during your public hearings, we will be submitting to the committee our suggested draft language—exact, precise language—for the changes we are seeking.

Thank you very much for your attention. Please feel free to call upon me or my office to assist in any way we can as this bill progresses through the legislative process.

I'd like to introduce two of my colleagues whom I will be asking to join me, and you can direct your questions to

any of us. I'd like to introduce my colleagues Tom Mitchinson, who is my assistant commissioner, and Brian Beamish, who is my director of policy and compliance, and I ask that they join me now. We are at your disposal to answer questions that you might have.

The Chair: Thank you, Ms Cavoukian, and welcome to your colleagues. First up we have Ms Papatello.

Mrs Papatello: Thanks so much for the presentation you've made to us. Can you give us some details about the lockbox part of the legislation which was in the draft, which you had a significant hand in preparing and advocating for with ministry officials? Can you tell us what was in it and why it needs to be put back in, in your view, as you've mentioned? Just give us some details and perhaps a couple of examples of how it would work for a patient or a client going through both a public health institution and a private institution.

Dr Cavoukian: The lockbox is a contentious area. From a privacy protection point of view, we think it's essential that an individual have the ability to prevent the disclosure of some sensitive information that they feel they do not want shared with other people in the health field or other fields.

The reason it's contentious—and I have to say this in fairness to health care providers—is that a physician might say to you, "We need access to all information, all medical records of an individual. The patient isn't in a position to determine what we need to properly treat an existing condition. Something they think is irrelevant may be relevant." I accept that. So individuals who choose to place information in a lockbox would have to accept responsibility for the decision they're making.

Having said that, an example: let's say someone had an abortion at a very young age—16, 18, whatever—and they're getting married anew and they're going with their husband to visit their new physician on a joint basis. For whatever reason, perhaps she doesn't want that information disclosed. It's from her past, she thinks it's no longer relevant and she wants to place that in a lockbox. It's nobody's business. I feel the individual should have the right to do that. The contentious part is that people in the health care field feel that it might impact on the treatment she receives in the here and now for an existing condition. So I think one places information in a lockbox with the responsibility that you are making a decision that may potentially have some impact on the provision of health care services in the future, but you do that knowingly.

Other jurisdictions allow that because, again, the central tenet of privacy is that you have control over the uses of your information and you should be the one in a position to make those decisions.

Mrs Papatello: Maybe it's a technical side, but the actual determination—it seems the OMA position, just at a glance—and I'm sure we'll get more detail—is very supportive of this lockbox concept other than they are the keepers of the lockbox. So, as you say, you acknowledge that the physician's education is critical to determine what should be and shouldn't be in there. Where you

differ then is that you feel the individual is responsible for the content? I guess, technologically, is it even reasonable to be discussing this? We can hardly get our doctors to get on-line in many instances or have their files kept by computer. A lot of historical data are in a format that you can't put it in a lockbox unless you physically give everyone a vault.

Dr Cavoukian: I agree with that, Ms Papatello. It's just in the future, if you look forward a decade or two, more and more information will be electronically retained and at that point—this is very forward-looking. You're right; the past historical archive data, forget it. But looking forward, at that point you might wish to prevent, electronically, information from being imparted. We feel that there should be some control for the individual to do that.

Mrs Papatello: OK. Do you differentiate between the safety of the health practitioner in what's been prevented from other providers to know? There may be an illness or a disease that is critical information for providers. Where do you draw that line, then, in what's appropriate for health providers to have to know, even in terms of how to give care, whether that's hepatitis C issues, anything like that. You could essentially want to prevent that information for employment purposes, but for health purposes you need to have this available and how to be treated. How do you determine all of that?

Dr Cavoukian: Very good questions and they require a lot of attention. I think the physician would have to be absolved from responsibility or liability in certain cases if information was necessary for him or her to effect treatment and can't because he didn't have access to it. So we'd have to sort out all those questions, but we can turn to other jurisdictions and statutes that have been enacted in other jurisdictions and look at how they're operating for some guidance.

Ms Lankin: In fact, that was the first question that I wanted to touch on as well and wondered if you could—perhaps it's in your written notes, but if you could provide us with an overview of other jurisdictions that have the lockbox, how it's used, and what the effects have been in real terms. I don't know how long these provisions have been in play. Is there any longitudinal study or anything yet that we can look to?

Dr Cavoukian: Unfortunately, Ms Lankin, the time frames are very narrow. The Alberta bill just got proclaimed. It was half a year ago; it just got proclaimed February 1. Saskatchewan is not proclaimed yet. Manitoba has been proclaimed and operating for a while. They have a lockbox but their experience with it is so limited. We meet with our counterparts in the provinces once a year and this year we'll be discussing it, but it hasn't even been a full year since proclamation. The data are very limited, so it's really hard to answer that question.

Ms Lankin: So the struggle that we're going to have as a committee is between what I see as a very basic, fundamental principle of individual control over our own information, something as private as health information,

and the demands that we individually also place on the health care system and health care providers for extensive quality health care. To use a medical doctor as one provider at this point in time—and I think we need to be careful that we're looking at the impact on a full range of providers, not simply medical doctors. But to use that as an example, and the work of the College of Physicians and Surgeons, where many of the cases of complaints that come forward from patients are, "We're not the informed professional. You ought to have known. You ought to have foreseen. You ought to have been in a position to advise me differently or to have made appropriate treatment decisions or to have helped me make better informed treatment decisions." There's a real conflict in those two worlds of expectations that we as individuals have: the right to our own privacy and our demands on a system to provide us with something. We're going to have to sort through that.

I personally have a fundamental respect for the right to privacy. I also, as a former health minister, want to see good management of the system. I don't think you need identifiable information to do that. I think you can get that in other ways. But I don't want to see health professionals hung out. It means a total revamping of what their liabilities are in the system and how we hold them accountable if we move in this direction.

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Dr Cavoukian: I actually have a lot of sympathy for your position. I think health care providers need a lot of information, and the lockbox from a privacy perspective is very important, the notion of control. It's not the deal-breaker in this statute. There are other issues that I think are far more important, that if we had some significant revision and amendment on, we would be quite satisfied to proceed with the bill.

Ms Lankin: May I continue, or do you want to—

The Chair: There are two other people already in the queue.

Ms Lankin: I have a number of other questions, so I don't know how you want to handle this. Do you want to rotate a little bit?

The Chair: I think, just to be fair, let's rotate. Mr Barrett.

Mr Barrett: Thank you for the presentation. I just wanted to get some more information on privacy issues, more of a provincial-federal relationship. Like many people in Ontario, my FAC ran out; this is a firearms acquisition certificate. People across the country are required, as of last December, to fill out a firearm owner's licence form. This is under the federal Firearms Act.

There are a number of questions that farmers and hunters would have to fill out on those forms with respect to marital status, divorce status, bankruptcy status and mental health history. It raised the question in my mind and in the minds of a number of my neighbours that, once this form is filled out, there would be a situation, I'm assuming, where a firearms officer would follow up if someone had outlined a fairly serious mental health

situation and they owned a number of guns and, say, they were a farmer or a hunter. Do we have the situation in the province of Ontario where provincial mental health records are transferred to the federal government, say, with respect to this case, for those people who perhaps collect antique guns or compete in marksmanship or things like that?

Dr Cavoukian: That's a very good question, Mr Barrett. Those questions with respect to the registry that's required are very invasive. We certainly object to the specificity and the details that are required in submitting that form. As you said, it can ask for mental health information. I believe it asks, "Have you ever contemplated suicide?" or something of that nature, and a great deal of very sensitive personal information. It is a matter under federal jurisdiction, as you know. I believe the federal privacy commissioner is actually objecting to some of the questions being asked.

Beyond that, would the federal government be able to obtain the records from the province relating to those mental health questions? I honestly don't know the answer to that. I would think that the only avenue available would be from law enforcement from the federal register to the Ontario register. My colleague is pointing something out.

Mr Brian Beamish: Just in terms of your question, Mr Barrett, the act does provide for a health information custodian to disclose records if they are permitted or required under another act of the province or of Canada. So, in technical terms, I assume that would be the authority for collecting the information. Whether that's proper or not is, I guess, another question.

Dr Cavoukian: We would fight that. The federal commissioner is now opposing it, I understand, and we would object to the exchange of that type of information.

Mr Barrett: Obviously no one wishes to have someone controlling a firearm if they have a serious mental health problem. As you may appreciate, this questionnaire is to be filled out by millions of people in the province of Ontario and across Canada. It's a screening process. Right now many farmers, for example, given the price of corn and what have you, have gone for counselling for stress. These are not criminals and they would quite honestly have checked that off.

I am just wondering, what are they going to see down the road? I have more questions than answers myself.

Dr Cavoukian: Potentially they could see all the records, from what I understand from what my colleague has indicated.

Mr Barrett: From a provincial agency? Yes? Thank you.

Mrs McLeod: I am selecting from a whole host of questions. I am looking forward to reading the written document you've given us. I recognize there are a lot more very detailed answers in your written document to some of the questions we may have, so it's a little hard to know how best to use your time today.

I'm going to try to focus on three areas of the act for your comment. I think they're related.

The first is section 6 of the act. It relates to the concern you expressed that there is a great deal of government control over directed disclosure at many different places in the act. One of the areas that we obviously raised as a concern when the bill was initially presented was the section of the bill which has now been deleted which would have authorized direct disclosure to the Attorney General. One of our remaining concerns has been that the Attorney General could still have access to personal health information under Bill 155, which is going through the committee process right now. The response we've been given by the Attorney General's department is that section 6 means that personal health information is not under the freedom of information act and the Attorney General therefore wouldn't have access to it. I guess basically I'm asking you whether or not you're satisfied that section 6 prohibits any ministries not identified in this bill from accessing personal health information.

I've tried to single out two other parts of this bill: subsection 24(3), which says, "Unless this act or some other law specifically provides otherwise," an individual shall not disclose information, and subsection 30(2): "A health information custodian may disclose personal health information to a person..."

So it's the number of places in the bill where there seems to be an openness to define under what circumstances there can be disclosure—you mentioned regulations can change the rules, and as we read this, other laws can change the rules—and whether in any way section 6 prohibits a fairly easy access to disclosure by other government to other government ministries.

Dr Cavoukian: I will ask my colleagues to assist me in answering that question.

Let me give you a general comment from a law enforcement perspective on what is permitted to be obtained by law enforcement officials in terms of access to medical records. There are two ways in which law enforcement can access medical records: by a court order, which is understandable, a warrant, and then the physician or health care provider is required by law to provide the information, but there's also a provision that enables, on a discretionary basis, a health care provider to disclose information to law enforcement if they feel there is some need to provide that information to law enforcement. So it's not simply on the basis of a court order or a warrant.

Mrs McLeod: That's as it is set out in this bill, which is, as I understand it, one of the concerns you're raising, that it is in your view too open?

Dr Cavoukian: Yes. We would prefer that personal health information can only be obtained by law enforcement via a court order. A warrant would have to be produced compelling a physician or a health care provider to provide the information to law enforcement.

Mr Beamish: The only additional comment I might offer is that section 6 still might not preclude health information records that are in the custody of a ministry that's not considered a custodian, so that if those health information records were with another ministry, I don't

think section 6 would apply. They would still be subject to FIPPA and the disclosure and access requirements under FIPPA.

Mrs Papatello: Can I address the comments you made regarding your ability to do an investigation with the savings-and-loan issue this past year? What was interesting is that you said you couldn't do a proper investigation; you didn't have the powers or authority to go in and get information on a timely basis and were stymied, as we remember the information at the time. You say that now with this bill, as an example, nothing would change. For example, if there were incidents where inappropriate information was given to inappropriate people, you can't go in, regardless of an appeal process they're putting in, ask the questions—

Dr Cavoukian: We couldn't enter premises, first of all, on our own. We would have to ask permission. We couldn't compel the production of records. We couldn't subpoena witnesses, that they would have to be subject to an interview by us. We do not have any of those powers.

Mrs Papatello: Is there anything under the federal legislation? I guess there's not.

Mr Tom Mitchinson: The power to investigate is one of the principal tenets of the CSA standard and the fair information practices of the OECD. In any properly scoped privacy oversight scheme, it's fundamental that you have an ability to conduct proper investigation. So in this scheme the investigative process and authority is as is under the current public sector law, which I think the POSO investigation showed the inadequacies of. It's fine if there's full co-operation; you can go in and do an investigation. But if it's necessary to rely on the authority to do so—

Mrs Papatello: It's interesting, because that is actually a public institution, and you couldn't get anywhere in a public institution.

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Dr Cavoukian: That's right.

Mrs Papatello: Given that the scope of this bill is to impact the encroaching private sector in the area of health delivery, how are you going to get in when there are so many more private companies involved? I guess my question is—

Dr Cavoukian: That is precisely the point. We have to have these powers. In the public sector, you get in one way or another because—

Mrs Papatello: You can't get in.

Dr Cavoukian: Well, you try. You try the best you can. Usually we get some co-operation, given that they are the government, but with the private sector we wouldn't have any power of persuasion or anything if we didn't have the explicit powers to conduct the investigation. Why would they humour us and invite us in and say, "Come and look around"? It's highly unlikely they would do that. All the more reason that these investigative powers are critical in terms of the private sector.

Mrs Papatello: I don't want to judge the private sector as having ulterior motives, but if they are not

going to be prepared to open the door to a privacy commission to go in and do an investigation, with the potential of abuse of information, then our comments too say, "What are they going to do with this information if it's other than appropriate planning for governments of the day to know how to deliver health care in the future?" Everyone acknowledges there is a great need for those kinds of data. There's nothing that compels the private sector to follow the law in terms of what we are going to say they do and who the custodian is and what the role of the custodian is. Why would the private sector be interested in going through all of this gamut of having a formalized plan of protection, a formalized plan of recovery, retention, maintenance, disposal? There's no incentive for them to be that concerned with this issue.

Dr Cavoukian: You have to have strong oversight. It is essential in this area because, as you put it so clearly, where's the carrot? What's going to make them comply, other than their wish to do so? So I think the need for oversight is even more necessary in the context of the private sector, and you can't have oversight without powers. It's just not going to work.

Ms Lankin: I'll touch on a couple of areas this time around. Let me follow up on the issue of powers. I think the POSO experience gives us a very explicit example of what your concerns are and why we need to address those in this bill.

One of the things I wonder, though: in the list you went through with us, you talked about the ability to issue final and binding orders that are not appealable other than through normal judicial appeal processes where there has been, I guess, an error in law. That says to me that we are talking much more than investigation. We are talking, essentially, the establishment of a quasi-administrative law tribunal—

Dr Cavoukian: As we have now.

Ms Lankin: With respect to FIPPA and MFIPPA, right?

Dr Cavoukian: Yes.

Ms Lankin: Can you tell us, would it require anything extraordinary in terms of the development of the tribunal, of practice laws, of due process—like, it's all in place; it's simply the powers under these acts to include these issues before the investigators in the tribunal process you have now?

Dr Cavoukian: I'm glad you raise that, because it would not require any additional infrastructure to what we have now. Obviously we'd require additional resources. We'd need more bodies because there is a lot more to cover, but that would essentially be it. We would do some fine-tuning, of course, but the infrastructure we need is in place right now. We've been doing it for 13 years. It works really well. The process is streamlined. I think the public has a great deal of satisfaction with it. So it's not the creation of some new function. It's the maintaining and extending of what we have now that applies to the public sector to the private sector, to health.

Mr Mitchinson: I just add one complementary point to that. Over the course of the last 13 years, we have been

before courts on judicial review applications, and one of the main issues under consideration in any judicial review is the level of deference that the court is prepared to give to a body of experts. We have over the years established a very good track record with the court in terms of their recognition that we are a tribunal which does have that expertise. I think that is just another reason why you should have confidence in not having to worry about, from a public interest perspective, the right of appeal.

Ms Lankin: I just wanted an opportunity for that to be discussed on the record because I think some of the comments I heard after the POSO report were critical. I think it's a bit of knee-jerk reaction when a public sector entity talks about expanding powers of some sort. It's like empire-building. I want it to be clearly on the record that the administrative tribunal aspect of your work is already well established. The precedents are there. The capacity of the infrastructure, as you referred to it, is there. It's a question with respect to which pieces of legislation. Currently it's FIPPA and MFIPPA, and here and in some other areas there are limitations in terms of what you can do. It's not the full job that you have been entitled to do and empowered to do.

Dr Cavoukian: If I can just add one more thing, we do investigations now; we've done them for 13 years. But we at times have to go cap in hand and ask, "Could we please come in and investigate this matter?" It's absurd. But it's not that we would be doing more than we're doing now. We are doing investigations. We would prefer to do them properly by having the proper authority in terms of the proper powers to be able to conduct them in a very thorough manner in those few cases where we don't have the co-operation that we normally get. In the public sector we've generally had a lot of co-operation, and we've always been doing investigations. In terms of empire-building, it's not seeking to have additional powers to do additional things we don't do now.

Ms Lankin: Quite frankly, when the right to investigate is spelled out in legislation, there are usually checks and balances, which you don't have on you at this point in time either. So it's a more open process.

The second question I wanted to ask is in the area of your concerns about undue directed disclosure and perhaps disclosure by exemption, set out here. Some of the directed disclosures are with respect to issues that—I'm going to bundle them up—the ministry and government and policy setters, all of us included, would look at as the balance with respect to the public good. I think it is important to have that capacity, to have it as limited as possible in terms of identifying information and all sorts of things, but the capacity's got to be there. I'd like to know how we limit it to what I think is a very necessary public good and not have it abused in terms of the language that's here.

The second group of directed disclosures and/or exemptions to disclose are in an area that I think of as more paternalistic. The Attorney General one is an example of that. Mr Sampson, as the former minister of

corrections, might have some comments with respect to the provisions that allow for information to be shared with penal institutions. They're similar with respect to psychiatric hospitals under the Mental Health Act, where it is deemed necessary for the best care and treatment of the individual. It's a very paternalistic approach there. Again I reference Brian's Law. We came at it from the other way, where there was a direction to share that information because it's deemed to be in the best interests of that person who, capable or not, is not making the right decisions for themselves.

So there's two sets of those things and I'd like you to distinguish between them, for me at least, if you do distinguish between them, because I want to see the ability to do one properly, with all the safeguards, and the other I'm not so sold on yet.

Dr Cavoukian: Here's something I'll offer you. We will be happy to work with you, the committee and officials from the Ministry of Health to sort that out because it's not clear to me. I hear what you're saying in terms that there are some areas where the exchange of information is beneficial both to the health care system and to yourself as a patient. This makes a lot of sense. It's necessary for planning, I understand that, but where is it? How do you narrow that in a very narrow, controlled way and prevent it from accessing it?

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What we're not clear on is, I guess, that first we have to have identified to us what are the directed disclosures now that must continue and remain, and are they truly necessary in their current form? In addition to that, what I understand this bill does is that it extends that. It could actually direct a disclosure of your medical information in your patient file from a physician. I don't understand that, I don't understand the need for it, so I would have to have that explained in some very convincing manner. We have not been convinced that that's necessary.

At this point, Ms Lankin, all I could do is offer to have a subcommittee do something so that we could work on that area here, because that is a critical area, and narrow it as much as possible. As a privacy commissioner I would like it eliminated because it is invasive of privacy. But privacy is not an absolute right; we recognize that. There are times when there are competing needs and that has to be addressed. But if we go that route, then it has to be extremely narrow and very justifiable and defensible to the public.

Mr Mitchinson: Could I just add one comment to that? Under the public sector law, the disclosure provision in the provincial act, section 42, most of the ones we encounter as disclosures, not in response to requests for access but proactive disclosures, are justified on the basis of their being a consistent purpose or on the basis of being authorized by statute. In those cases I guess, particularly the authorized-by-statute circumstance, there has been a public debate, there has been some public recognition—

Ms Lankin: Unless it's done in regulation.

Mr Mitchinson: —that that would happen. So I guess that's a vehicle for that.

I think the other way the public interest issues get addressed currently by our commission is through the appeal process, where we're asked to balance public interest considerations against other competing demands and bring what is often a very hard decision to make in that context. But at least there's a process for dealing with it.

Mr Wood: I wonder if you could describe for us what you would consider to be the essential elements that have to be in any act we might pass in order for it to be considered substantially similar to C-6?

Dr Cavoukian: That's a good question, Mr Wood. I would think it has to have the elements of the CSA code, the Canadian Standards Association model code, for the protection of privacy that is contained as a schedule at the back of C-6. It contains 10 principles which relate to rules on the proper collection, use and disclosure of personal information.

Many aspects of that are present in this bill but certainly not all of them. It certainly doesn't look like the CSA code. A number of the requirements of the CSA code are missing and from the broader C-6 are missing from this bill.

I'm going to ask my colleague Brian Beamish to give you some of the greater details.

Mr Beamish: I should preface it by saying we haven't done an extensive analysis of this bill against C-6. I understand the federal commissioner is speaking tomorrow and that really is his role.

I think there are some elements of this bill that might be considered not to be substantially similar, primarily around the degree of the collection, use and disclosure of personal information. In this bill there are a number of exceptions that aren't contained in C-6. We've talked about the directed disclosure provisions—I don't think there's anything analogous in C-6—the ability to collect, use and disclose information for the purposes of system management, planning etc.

There are a couple of other areas. The commissioner mentioned the need for audit powers in her remarks. That's contained in C-6; it's not found in this bill. But I think primarily it's the degree to which personal information can be collected, used and disclosed and the degree of exemptions that allow for the use of that information without consent.

Mr Wood: Who makes the determination as to whether or not it's substantially similar?

Dr Cavoukian: I understand that it will be the federal government, with the recommendation of the federal privacy commissioner.

Mr Wood: When you say the government, do you mean the cabinet?

Dr Cavoukian: Is it cabinet?

Mr Beamish: Yes.

Dr Cavoukian: I understand cabinet, again with the recommendation of the federal privacy commissioner.

Mr Wood: You proposed to us a regime where your office would be both an investigator and an adjudicator.

Dr Cavoukian: How did that begin, or—

Mr Wood: That's the regime that I understood you proposed to us, that you thought should be in this bill.

Dr Cavoukian: That's the regime we have in effect now, that we've been following since day one of the operation of our office, where we investigate complaints and we mediate. We have appeals that come to us in terms of appealing requests for access around information. If the government denied access, for example, you could appeal that to our office. We attempt to mediate a solution, and if that doesn't work, we adjudicate. It goes into the adjudication stream, and a binding order is issued by the adjudicator.

Mr Wood: Do you see any conflict of interest in having both roles in your office?

Dr Cavoukian: That's a good question. Objectively, that might appear to be the case. Having worked in the area, I don't believe that to be the case. What we generally do is, for example, when a case goes into mediation we have a mediator assigned to the file who attempts to do everything he or she can to effect a resolution, a mediated solution to the file. If he or she is unsuccessful, it goes to another individual, who is the adjudicator. There is a brick wall, sort of a Chinese wall between them. The adjudicator gets the file with the information. It is not effected by the investigator. The two parts are quite separate.

Tom, you can speak to that better. Tom heads the department of adjudication.

Mr Mitchinson: The concern that you raise is a very important concern. You can't have a model, which is a statutory model under the provincial act, which includes both mediation and adjudication under the same umbrella of the same commission unless you're very careful about honouring well-established concepts such as mediation privilege and allow for the two systems to work effectively together. It's a question of design and a question of procedural requirements, but it is no longer uncommon. Our statute, the provincial statute, was one of the first laws that actually introduced a statutory mediation scheme within an administrative tribunal. The idea of including a mediation function within an adjudicative body is, if anything, growing. It's becoming more the norm, I would say.

Mr Wood: My problem relates more to the investigation and the adjudication being in the same place. I understand why mediation and adjudication are linked. The short answer to that is what? Do you see a problem or don't you?

Dr Cavoukian: I don't. We have been doing that for 14 years. I think it's been effective. We have not had any complaints that I'm aware of with the system that we designed, which has incorporated both.

Mr Mitchinson: I think maybe what Mr Wood is getting at is more the statutory authority of investigating under the privacy complaint side and then being part of the inquiry for an appeal, not the request for your own personal information. Is that what you mean?

Mr Wood: What you're doing, in effect, is proposing a model where you have a role in the investigation and the adjudication.

Dr Cavoukian: Correct.

Mr Mitchinson: Yes.

Mr Wood: I'm inviting you to comment on whether or not you think that creates a conflict of interest.

Mr Mitchinson: I don't think it creates a conflict of interest, no. But at the same time, I think it's very important that you have properly designed procedures in order to protect the integrity of both of those complementary processes.

Dr Cavoukian: You have to be mindful of the issues you've raised for the reasons you've raised them, and cognizant of the need to create systems that manage those concerns. But having said that, it's doable, and I think our system does in fact manage it well. We invite you to take a closer look at it at your pleasure.

Mr Wood: Maybe I can come to another issue, which is a hypothetical one. The basic scheme of this act is to control both collection and disclosure. Presumably we could have gone to a model that controlled disclosure only, because that's the real concern. The concern is that people's information is disclosed, information that's theirs, without their consent. That's the fundamental concern we're addressing, I think, in this bill.

Dr Cavoukian: It's a huge concern for privacy. Certainly disclosure is a large concern. But fair information practices, which, as I mentioned earlier, form the basis of privacy protection worldwide—any statutes that reflect these things called fair information practices always start with the principle that limits the collection of information to only that which is needed to achieve the purpose of the collection. So I would argue that only limiting disclosure would not be sufficient, because in order to properly, in this day and age, limit disclosure you should start with limiting collection. Because the more you might collect that's not directly related to the purpose that you're trying to achieve, the greater the amount of information you have to manage in terms of the potential for its disclosure and abuse. The more you collect, the more information is at risk, so one of the basic principles of privacy is that you only collect the information that you need. I think you have to start there.

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Mr Beamish: I think there are many members of the public who are concerned about the collection issue. It's not uncommon for our office to get calls from people saying, "I went to fill out a particular application and I was asked for this set of information which appears to me to be totally unrelated to the purpose of the application. Do I have to provide it?" I don't think it's uncommon for people to be concerned about the extent of the collection of their information.

Mr Wood: I'm not taking away from the legitimacy of the concern. What I am trying to get a fix on is, is there any reason that we have to control collection in order to control disclosure?

Dr Cavoukian: The shortest answer would be that in order to be substantially similar to C-6 you would absolutely have to have limits on collection. It's one of the first principles in the CSA code.

The broader answer would be that I couldn't imagine any kind of privacy legislation that would not include a clause that would place restrictions on the information collected.

Mr Wood: That's not answering my question. Why do you have to do that in order to regulate disclosure? The law society, for example, tells me what I can disclose; they don't tell me what I can collect.

Dr Cavoukian: But the purpose of the bill is not only to regulate disclosure. One would argue that in this day and age where there's so much information about you collected routinely, disclosure is the worse-case scenario, that your information may be disclosed contrary to the proper uses, that collection is a huge issue and the goal should be data minimization. The goal is that you restrict and minimize the amount of personally identifiable information because by virtue of collecting it in that form you are subjecting it to the potential risk of unauthorized disclosure. So the rationale would be, restrict what you collect to only what you need and place restrictions on collection so that you minimize the potential problems of disclosure. Disclosure's a huge problem but the only intent of the bill is not to regulate disclosure.

Mrs McLeod: I wanted to ask you to address this whole issue of what I think you referred to as "anonymized" information, which to a layperson means non-personally identifiable information? Is that a fair translation?

Dr Cavoukian: Yes, absolutely.

Mrs McLeod: What I want to get at is, when is it really necessary to use personally identifiable health information, whether it's collection, use or disclosure? So my first question would be, is registration information considered to be non-personally identifiable information and under this bill, if it's just registration information, would be freer to be collected, used and disclosed than what might be considered personal health information?

Dr Cavoukian: If you think of it as a continuum, personally identifiable information would be all of your medical records and all of the content. Registration information is also personal information—personally identifiable information that identifies your name, your address, your OHIP number—but it is restricted to those qualifiers as opposed to having all your patient records associated with it. So registration information to me is personal information but it is a restricted subset of personal information that contains identifiers that identify you.

Mrs McLeod: One of the reasons it seems necessary to sort this out is to do what you've just talked about in terms of narrowly defining what needs to be collected, used and disclosed for public interest purposes—any number of them have already been talked about around the table—and the sense you've already conveyed that this bill goes too far in having too many uses of too broad a scope of information.

There are two specific areas I'd like you to address. One is the collection of information, and this would be under subsection 30(2), which I mentioned before, about the

health information custodian disclosing personal health information to a person for management of programs and services, which includes detection and monitoring of fraud. My question on that is, do you need the personal health records to deal with fraud if in fact—I'm assuming that the detection of fraud deals with the provision of services by the health care provider, not fraud on the part of the person receiving the services and holding the record.

The second major area—and I know it's a totally different area but it still, in my mind, comes back to this question of identifiable and non-identifiable information—is research. You spent a lot of time in your response to the consultation document on how careful you have to be about personally identifiable information used for the purposes of research. I understand there are some areas of research where you can transfer personally identifiable information now. I guess I'm questioning in how many cases of research you need fully personalized information when you need registration information. Are there ways of defining much more narrowly what each purpose requires and keeping as much anonymity as possible, and does this bill go nearly far enough in those areas?

Dr Cavoukian: I think there are indeed ways of doing that, but it requires a great deal of attention and focused work. Let me give you our take on it. I think you always start with the premise that you need consent. For research, ideally, you should always start with the consent of the individual. You always start there. Then you work down a continuum. The other side is aggregated data, with no personal identifiers at all. Do with it as you wish, because there are no personal identifiers. Between those two there's a continuum of how much identifiable information you need. We always say to get consent if at all possible. If you can't get consent, can you use anonymized data, can you use aggregate data, can you use coded data where you substitute a code? That can be done through an encryption scheme where the identifier doesn't link back to the identity. It can eventually, but you have to take many steps to get there.

In my view, there is only one subset of research that truly does require personal identifiers, and that's the narrow class of epidemiological research. It's population-based research and it requires access to all the population, therefore excluding the ability to obtain consent. There have been a number of studies that have demonstrated that in jurisdictions where consent is required before epidemiological research can be done, meaning that some small proportion of the population excludes themselves, it has swayed the results of the research, because even small percentages of individuals withdrawing affect population-based research. So in that very small subset of research I would accept non-consensual research, but it's a very small subset.

With the exception of that, I would always explore either obtaining consent or using the data in some way where clearly, if you must have a personal identifier, it is not the personal identifier itself that is linked to the

record, but some coded information that is several steps removed from the identifier and a great number of controls, both procedural and technical, put in place. There are ways to do this and there are a number of organizations that do it well now that we could point you to.

Mrs McLeod: In the case of epidemiological research, that would require identification by name as opposed to by anonymous record?

Dr Cavoukian: It never requires identification by name when you're working on the file. The reason at some point you would need to work back to a name is because 20 years down the road you need to find out, "This person has been smoking all their life. What is the effect?" You need to link it with results afterwards, and in order to do that you need the identifier to be able to connect back to this individual.

Mrs McLeod: Could you comment too on the identifiable versus non-identifiable information when it comes to detection of fraud?

Dr Cavoukian: That's a really tough one. I'm not an expert in this area; I only know about the privacy issues. Obviously, we are all opposed to fraud and we would seek to have it eliminated, and there have to be ways and places to address that issue. But I don't know why the individual, who is the innocent bystander usually in these cases, has to have their entire record subjected potentially to open records in court when the fraud charges, for example, against a health care provider work their way up and go before the courts. All of those patient records involved are then open. Why would that be the outcome? It's like you're penalizing the patients, who have had nothing to do with this, because you're pursuing fraud charges against a health care provider.

There has to be some means of working back, but I'm not convinced that the information has to be identifiable in terms of the patients of the individuals leading to the charge, that there has to be a way you can work back to that and access the data if necessary but that it shouldn't be readily available in identifiable form.

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Mrs McLeod: Have you seen that dealt with in legislation in other jurisdictions then?

Dr Cavoukian: It's so new. Do we know if they do in other statutes? We can get back to you on that, Ms McLeod. I really don't know how they handle that in other statutes.

Did you want to say something, Tom?

Mr Beamish: I just have one comment and I meant to make it when Ms Lankin asked her question about how you limit the type of information that's disclosed for the purposes of management of the system, going back to the directed disclosure.

Section 12 of this bill provides what I think are some fairly solid limitation principles and in effect it says, "Don't collect or use registration information if anonymous information will do. Don't collect and use identifiable health information if registration information will do, and if you really need to have people's personal

information, only collect what you have to collect." However, there is an exception, 12(8), which says these don't apply if the disclosure or use is required by the act. I would interpret that to say that those very good limitation principles don't apply to the directed disclosures under section 31, and we think they should.

Dr Cavoukian: One other positive element, Ms McLeod, of the bill is that it requires for research purposes that the research projects go through an ethics review board, which I think is a very positive development, that there are requirements before personally identifiable data can be accessed.

Mrs McLeod: I think it leaves out some of the areas that you had addressed in terms of demonstrating that it's necessary to collect this information for the public good etc. I'm content to waive and take a turn around again next time.

Ms Lankin: Working backwards on a number of those issues, on the fraud issue there are elements of this bill that deal with access to personal records and correction of records. I want to talk about the issue of amendment of records for a moment because OHIP is a very good example. Currently, as you know, if there have been incorrect billings for a doctor, whether they're purposely fraudulent or not, which are recorded against someone's OHIP number and that's discovered, it's impossible, it seems, for the individual to get that information removed from the OHIP file. So if it indicates incorrectly that you have been seen and been treated for some disease or some disorder, some of which unfortunately in our society are more stigmatized than others and so people have concern, but it's incorrect, the ability of the person to get that off the OHIP file is very problematic. It gets red-flagged and there are all sorts of notes, like this wasn't real, but it follows that person.

Does the bill, in correction of records, fix that? I can't see that it does. Are you concerned about that at all?

Dr Cavoukian: I can't speak to this issue because the order I was mentioning to you earlier that I will be adjudicating speaks to it, but Tom can speak to this generally.

Mr Mitchinson: I can speak to it in a general sense. I think that right now the correction appeal that Ann is involved with provides the oversight to determine whether that type of correction in fact can be made. I think that under the current drafting of this bill that is not an appealable decision. So that's a problem for us, that the dispute resolution in those correction request situations must, we think, be present in order to have an effective oversight scheme. The right of correction is in some ways as fundamental as your right of access.

Ms Lankin: Absolutely. This question was asked of the ministry earlier and they are going to get back to us with a response. I wonder if you have any comment. The registration information is defined within this act. One, we were interested in how standardized the definition of registration information is across existing Ontario statutes and other jurisdictions. Secondly, we wanted to know specifically why information about employment

status was included in registration information under our health act. Is this an area you can answer in terms of the standardization of the definition and, secondly, do you have any concern about status-of-employment information being part of the definition of registration information under our health information and privacy legislation?

Dr Cavoukian: It doesn't leap to mind. One of our lawyers has said that employment information sometimes is needed to determine eligibility for certain services.

Interjections.

Ms Lankin: Well, they'll get back to us on that. I'd ask you to take a look at the answer and see if you have any concerns. It jumps out at me as inappropriate in this piece of legislation in terms of what registration information would be collected and/or protected and/or directed to be disclosed. Employment status—somehow, I don't get it. It's not EI, it's not an Ontario Works program; it's health care.

Dr Cavoukian: We'll look at the other statutes and see what there is. I'm interested in that as well.

Ms Lankin: On the issue of collection of data versus disclosure of data, you were very specific in the breadth of your concerns about the number of directed disclosures and/or exemptions for ability to disclose. You didn't comment specifically if you had any concerns about the restrictions on collection of data. I think your associate did indicate that there were some good principles there, yet there was one override section which you wondered if that threw it out. Could you give us your comment on the bill in terms of how good a job it does on restricting unnecessary collection of data?

Dr Cavoukian: It's not too bad but we would add one requirement: that the collection of personal health information should be allowed only where it is required by law or necessary for a lawful purpose. As it reads now, subsection 22(1) states that a "custodian shall not collect personal health information unless ... authorized by or under an act or necessary for a lawful purpose related to a function or activity." We would just strengthen it a little by adding the word "required" by law, not that it's just simply authorized by law. That was the distinction we were making.

Generally speaking, we thought it was not bad. The only thing we would add is the word "required," and that's in our submission, which you will see.

Ms Lankin: A further note on the issue of collection, and I guess this goes to the question of substantial similarity to C-6: you indicated that in C-6, one of the principles is that bills must restrict collection for the purpose of systems management in particular, which is the issue I was getting at earlier around disclosure, so collection and disclosure.

I'm interested if you could tell me—and perhaps I should hold this question until tomorrow—how you see the impact it's going to have on the private sector. I'm thinking now in terms of health information collected by insurance companies. People have a huge concern there. Certainly there are a lot of reasons they do it, but systems management and claims management, where to put

resources, where to crack down, where to bring in experts or whatever they do, a lot of the collections and a lot of the information goes to that. Will the new system affecting the private sector, until Ontario brings in its own law, let's say—will C-6 have any kind of impact there on what they're doing?

Dr Cavoukian: I think it will have a huge impact. I don't know if you want to speak to it specifically. It will impact, there's no question. At the time you are applying for the insurance or are eligible for the services, you consent to it. So at the beginning, there is presumably something that would obtain your consent for a lot of those activities, and presumably you would provide your consent. But unless it's consent-based like that, there is no consistent purpose, there are no other clauses under C-6 that I'm aware of that would permit that type of use of information.

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Ms Lankin: Is there a common law principle, when you talk about these consents, where you provide consent, that it has to be informed consent? Is that built into this legislation that they have to be informed?

Mr Beamish: One area that I think is good about this legislation is that it does provide greater guidance around what is consent. We've made some recommendations in our submission on how to strengthen that to ensure that it is informed consent and set out what the elements are, but I think the bill is a good attempt at setting out what a consent would look like.

Mr Mitchinson: And there is common law direction.

Ms Lankin: I would have assumed that.

I have one other comment to make on a different issue, but just on this, Mr Wood: when you were raising some of these issues around do we need to do both of these things, I think the simple answer is that in order to have a bill that is substantially similar, we do.

I was also reminded, though, of the federal government recently, the revelation we all came to that there was this information being collected in HR. There was huge public concern about that, and it wasn't an issue of where it was being disclosed or how it was being disclosed. I think the balance that this legislation strikes around those two things is an important one for us to keep in mind in terms of public expectations.

When Mr Wood was asking you about your role of investigation versus adjudication and the possible conflict inherent in that, you answered this several times, but Mr Wood did continue to use the words, "You are proposing to have this dual role." I just wanted to get it clear again that it exists.

Dr Cavoukian: We do it now.

Ms Lankin: That's not to say that down the road people may not want to see a separation of these roles, but your proposal in terms of the powers under this act is to mirror the powers of final and binding orders under FIPPA and MFIPPA and to strengthen your powers in general with respect to the investigation in obtaining documents or obtaining entry, right?

Dr Cavoukian: That's right. It will create a parallel system, if you will. There would be no additional powers. The activities we're engaged in now would continue and extend to this area.

Ms Lankin: Right.

Mr Mitchinson: I was just going to say under the same scheme.

Mr Sampson: Along that theme of questioning, the exception you're proposing is that there be no appeal to another body. So I'm not terribly troubled by the investigation and adjudication roles that you currently have and that other independent commissions have. What would trouble me, though, is if there were a loss of appeal to what is generally the courts of this land as the final jurisdiction of appeal for these decisions. I'm a bit troubled by your suggestion that we really don't need that because we haven't made any mistakes so far.

Dr Cavoukian: I'll respond to that briefly and ask my assistant commissioner to respond in greater detail.

I could see how the optics of it might look self-serving, that we don't want another appeal body to review our decision and that it's not necessary. There is the ability now to seek a judicial review of our orders if there is a procedural error in law, so there is an ability to have some decisions reviewed. But if you look at the appeals to the appeal courts, it would add, in our view, an unnecessary additional layer that doesn't exist now, and it is a costly layer and it's a lengthy layer. We think it would impact the public poorly. It wouldn't impact us dramatically. We're very confident in the decisions we've made. We've had deference from the courts in terms of the expertise of our office. In terms of how it would impact us in fact would be minimal, but I think to the public, to complainants, to appellants, it would have a serious impact. I'll let Tom speak to that.

Mr Mitchinson: I just wanted to make sure you were clear that under the current scheme there is no appeal to a court. So it's not like we're suggesting—

Mr Sampson: There's a judicial appeal here.

Mr Mitchinson: No, a judicial review. Any decision of an adjudicative body would be subject to judicial review, but that's very different than an appeal. We're not suggesting that under this model there not be a right to apply for judicial review. Clearly there would be.

Mr Sampson: See—

Mr Mitchinson: If I could just complete my thought there, I guess the best parallel you could look to for the design of a system which would be like this is the Alberta model, which also has a commissioner with order-making powers that are not subject to appeal but nonetheless are subject to judicial review.

Mr Sampson: I heard your comments—and I'll read your submission in more detail later—that you wanted further powers to subpoena documents, subpoena individuals. Mind you, it only relates to section 45, appeals, but under section 69 there are some fairly substantial investigative tools that you have that even courts don't have, like the right to subpoena documents, the right to inquire and interview in the absence of the other party.

These are substantial. It only relates to section 5, inquiries, which I think has to do with having the record removed, altered or amended, but those are pretty substantial judicial rights that aren't even available in a general court of law to appellants and likewise. So I don't have problems with the proposal, with the exception that some sort of a final appeal, if it's not there, would lie there, and I just want to leave that.

Mr Mitchinson: The inquiry model that is proposed in the section of the bill that you're referring to is mirrored very much on the inquiry model under the public sector law for access and privacy right now.

The ability to hear evidence in the absence of other parties and that sort of thing is very much designed to protect the type of adjudication that is taking place within an access situation, where often you have other people's personal information which is at issue—

Mr Sampson: Yes. And there are reasons why—some of which we touched on in some questioning over there as it relates to the fraud case. I think it was a question of, why does a person's personal record have to be attached and their name attached, if you will? I understand that. When I saw that comment, it worried me a bit, and I'll think about it some more.

Mr Mitchinson: Just reflect on it, because it's not new. It's not suggesting something new. It's suggesting a model that would apply, an existing working model.

Mr Sampson: Yes. Maybe the existing model is problematic to begin with. I don't know. Just because we've done it before doesn't mean we do it again.

Ms Lankin: Mr Chair, could I just ask a question that follows up on the point? It might be that it is a research officer who would provide it, or the commission.

There are a whole lot of administrative law tribunals that are operating now with the right of final and binding orders that are not open to appeal, only open to judicial review, whether it be the labour board or the Workers' Compensation Appeals Tribunal or the municipal board or whatever.

Interjection.

Ms Lankin: There's a whole bunch. I just wondered if we could get an example so that we know, because some of them actually have appeals to cabinet. Not that cabinet would want this stuff being appealed to them, but if we know what the comparisons are, I would find that helpful.

Mr Sampson: Right now you can appeal it to cabinet, so—

The Chair: We'll get research to get a copy of that. Mr Sampson, are you just finishing up?

Mr Sampson: I have one more. Now I have to remember what it was. Oh, yes. It was very helpful to have Ms Lankin raise the issue of some disclosure requirements that might be important in a certain ministry I once had some control over.

Ms Lankin: Well, that's debatable.

Mr Sampson: It's 3:20, so I probably still have no control over it. At least that's where I am now.

It's very crucial for the safety and security of institutions to know the medical records of those who are being admitted, to maintain the safety and security of those who are housed in the institution, let alone those who work there. I'm quite encouraged to hear that you are prepared to work with us to try to find out where those exceptions are and deal with them. It would be a real challenge if somebody were able to say, "No, you can't have access to my records," and yet they were walking in the door of a correctional facility in this province with a disease that could be transmitted to the rest of the population and the workers. I would find that to be totally unacceptable and way past the bounds of what's acceptable to protect personal health information. In some cases it would be problematic if individuals could actually frustrate what goes on in the institution if they refused to disclose certain types of information, like their drug addiction history etc, which is very important to know the details of in corrections in order to deal with the ailment. I'm encouraged by your suggestion that you want to work with those solutions.

I don't know that you can actually buttonhole all those exceptions upfront. I don't think we're smart enough to do that collectively. I don't mean to imply upon you, Commissioner, but I don't think the legislators are smart enough to figure out all the exceptions here. So there's going to have to be some empowering legislation or regulation that helps us deal with these exceptions as they pop up from time to time.

1520

Dr Cavoukian: I recognize the concern you identify. I think that's a legitimate one. I believe the act provides that disclosures related to the individual—that a health information custodian could disclose, may disclose personal health information relating to an individual to a facility that provides health care. Is that correct?

Mr Sampson: Yes. But I thought you were somewhat frustrated with that general definition.

Dr Cavoukian: Not that one.

Mr Sampson: It's another one, then. OK.

Mr Beamish: The act will provide specific authority to disclose information to a correctional facility for the purpose of providing health care or managing an inmate in the facility. We didn't raise any difficulties with that in our submissions. We were fine with it.

Dr Cavoukian: Because we recognize there are times where there are legitimate disclosures that have to be made.

Mr Sampson: I'm sorry; I just picked up on the general comment, as I thought Frances did, that you were somewhat concerned about the general exceptions. I guess my point is, sometimes you've got to have the general exceptions, because I don't think we can collectively write down on a piece of paper all the exact exceptions.

Dr Cavoukian: I agree, and if you look at our submission, we given them in the same order that they appear in the act, and you'll see that we made no com-

ment on that section because we believe it is a legitimate disclosure.

Mrs Papatello: As an example of something that is currently happening in Ontario that many in the medical community have problems with, under the new Ontario Works Act and the ODSP, the disabilities plan, the physician has to sign the chit that authorizes the transportation costs, with a receipt, of the individual going to the psychiatrist on a weekly basis by bus. They can only get that receipt when the physician signs it, and the doctor has said, "I am not signing that because it's an identifier that this individual is a psychiatric patient," so that's a problem currently in Ontario.

Under the current law, what powers do you have to change the system under Ontario Works and/or ODSP so that that identifier doesn't exist and how will this bill improve that current situation?

Dr Cavoukian: I'm going to ask Tom to answer that.

Mr Mitchinson: If it's the same situation that you're describing, I believe we did have a complaint which was associated with that practice. Under the current system we would try to work co-operatively with the body that created the form and the expectation, ask them whether or not it was an allowable collection of personal information under the act or whether it was really necessary to do it. Speaking off the top of my head here, I believe that in the particular institution we were dealing with in that case, they agreed that it was not necessary and they agreed to amend their form to stop identifying that kind of information for the purpose of collecting the benefit.

Mrs Papatello: So were you at their whim, that they felt like agreeing with you?

Mr Mitchinson: I think that's the case in all of our investigations currently.

Mrs Papatello: Specifically, page 18 itemizes which acts supersede this privacy act. The Ontario Disability Support Program Act and the Ontario Works Act supersede this bill. So if they feel like it, that's great.

Dr Cavoukian: We would be forced to co-operate, to seek their co-operation and negotiate.

Mrs Papatello: The question around that, just in the area of what I guess many in the public would worry with the encroachment of more and more private companies in the area of the delivery of health: for example, in long-term care, every future provider or builder is likely going to be the private sector. The system, in my view, is set up so that they're the only ones that can finance these homes. It's in the best interests of a long-term-care facility to have the healthiest individuals in their beds. Under the current law, then, they can access all the information required to ensure they are getting the healthiest 100 people in the 100-bed facility that they are building. Can that happen today? If not, because this is what's happening currently and this bill is being touted as greater protection, then I have to assume that after this bill is passed, these people have better protection in that instance. There's an up-to-20,000 waiting list in Ontario for a long-term-care bed. It's in that private facility's best

interests to have the healthiest patients. They are not going to want to find the ones who have a long health history of certain types of illnesses and diseases. I wonder, in the current law, what protection there is, and what better protection there is after this bill, because this bill is for better protection.

Dr Cavoukian: Ms Papatello, we would have to review the legislation that governs that because I'm not intimately familiar with it, how it would interact with this bill. Any ideas?

Mr Beamish: No. I'd have to go back to the legislation for long-term care and see what authority they would have under that bill to collect that information to start with.

Ms Lankin: It's not just the long-term care. Municipal homes for the aged come under MFIPPA. There are some minor provisions in the Public Hospitals Act. There are health care provider professional regulations.

Mrs Papatello: But just as an example.

Dr Cavoukian: We'll get back to you on that.

Ms Lankin: I'm saying you can't look just to the one act to answer your questions, Sandra.

Mrs McLeod: The information is provided with CCACs that aren't governed by—

Mr Mitchinson: If we can get a handle on the current situation, really, and whether or not the law is adequate in correcting what you would perceive to be an inadequacy in the current regime, which is I think Ann's main point at the beginning. You know, people think, incorrectly, that there's a current level of protection that in fact doesn't exist.

Mrs Papatello: So if you're going to go to all of the trouble after 20 years, as we have individuals who have been on this project for 20 years, surely we're finally going forward with an act that is going to cover at minimum—half of the spending in the health ministry is other than the hospital act, say, that already has some protection. So of all the work that we've done, surely where we're spending the lion's share of health dollars we are going to now have greater protection. But in fact this bill does not cover what the CCACs do in their placements into a long-term-care facility. I mean, we have missed a huge sector. So then this is—I don't want to say, "This is the best we could do here after 20 years," and we've missed it.

Interjection.

Mrs Papatello: Depending on what it is, it clearly doesn't, and when I say the examples of what—

Dr Cavoukian: We'd have to look to see if that will be caught.

Mr Mitchinson: But it's arguably not a flaw with the design; it's a flaw with the application of the design. So if you're trying to control disclosure to only those circumstances where it's justifiable by law or by program or whatever, the framework of the law allows you to move back from the existing design and to identify those and to turn your mind to whether they are justifiable. So it's more of an application, I think.

Mrs Papatello: I guess a general question is, what will we not be able to do if there's a lockbox in this bill?

What can't we do that is absolutely critical enough that it is removed from the draft?

Dr Cavoukian: If there was a lockbox in the bill, what could you not do, the individual, or—

Mrs Papatello: All of the intent of the government—I mean, I haven't understood clearly from the ministry earlier this morning why the lockbox was taken out. I didn't understand the concept, what drove that. It's because we needed to—the research element wasn't there. Apparently, that's not the case. I couldn't find the rationale for taking it out, so clearly there's one. What can't we do as government in terms of protection if the lockbox is there?

Dr Cavoukian: I don't think it impacts on government, but quite frankly you would have to ask the government that. I don't know the reason it was taken out. I don't think it would impact government at all in terms of government decision-making, but you would have to ask the government. I'm sorry.

Mrs Papatello: So you can't predict what the government or anyone—what do we lose, what does society lose—

Dr Cavoukian: I don't think you as a society would lose anything. I really don't. I think the only impact would be, and this is an adverse impact for the individual patient, that perhaps in the future some treatment which they're getting might require knowledge of what they have locked up and that physician would be precluded from providing full and proper treatment because they didn't have knowledge of it. That's the only thing I can think of.

Mr Sampson: Mr Chair, maybe it would be appropriate to have Gilbert come up. I'm volunteering you, Gilbert, to sit at the table to maybe address this question. It's a legitimate question. We would like to hear kind of the other side of that—I don't mean there is another side—and then make joint questions if we can. Would that—

Dr Cavoukian: That's fair, and he would have the answers.

Mrs Papatello: We asked earlier about certain conditions: a patient who has AIDS, hep C. Health providers need to know about certain illnesses for their own protection to give the best medical advice, for the safety of themselves as providers in some cases. You can see why information is critical, but you're always motivated to give consent when you're asked, and that's the way it is today. When I'm in front of a doctor or I'm about to receive care, when I am going through an insurance process for a new job, if I don't sign on the line to give information, I likely am not getting the job, and there's nothing the privacy commissioner is going to do about that.

1530

Dr Cavoukian: No, that's right, and let me give you an example of that.

Mrs Papatello: It is implied, "You must consent."

Dr Cavoukian: That's right, but that's why in certain cases—if you look at genetic information, a number of the statutes coming out in the United States, where

they're way ahead of us, prohibit the employer from even asking the question, "Have you had any genetic testing done?" because as you're saying, just by virtue of asking the question, if you're applying for a job, there's pressure on you to answer. The question should not be asked.

Mrs Papatello: But in the health system today, that happens. I am not going to arrive at the emergency—when I can find an emergency room in Ontario—and say, "Here's my medical information, but I don't want to give it all to them." Just by virtue of shortage of service to provide, I will not get the service. So I am forced, as a member of the public, to provide information. Even if I don't want to, I will have to give consent. That's one side of it.

When I ask you about this toolbox, with all respect, it's been paper only—

Interjections: The lockbox.

Mr Sampson: You just gave us a heart attack over here.

Interjections.

The Chair: That's our last question, and we had agreed we would go back to clause-by-clause. Perhaps I might suggest that—

Mrs Papatello: Can you finish that question then, if you could?

The Chair: My only response to that, Ms Papatello, is we've already had the response from Ms Cavoukian and her staff. I would think it might make more sense to have the transition and have all of the ministry people there to give their perspective, recognizing we're almost out of the time we had committed anyway.

Mrs McLeod: Can I ask that one final question?

The Chair: Sure.

Mrs McLeod: Subsection 11(1): "In the event of a conflict between a provision in this act respecting confidentiality and one in any other act, this act prevails unless this act or the other act specifically provides otherwise."

In your view, does that really make all of this an exercise in futility?

Dr Cavoukian: The answer I will provide is, if you look at our submission, you'll see the areas we thought were problematic. We didn't have a problem with that.

Mrs McLeod: You don't have a problem with that?

Dr Cavoukian: We did not. If the other act specifically provides otherwise, you go to the other act and see what provisions are there in terms of confidentiality and protection. Usually there are some provisions that address the issue. For example, there's our act or some other act. There are many types of confidentiality requirements in various statutes.

Mr Mitchinson: I think the intent of that section is to say that the confidentiality expectations of this act will prevail over confidentiality provisions of another act, with the exception of those four circumstances identified in subsection (2). So it's a similar situation and confidentiality provision under the public sector act as well. There are a few limited circumstances where it says, "The other provisions, even if they're not as strong as the

ones that are in this law, nevertheless shall prevail." I think that's the same intent in this law.

Dr Cavoukian: We have that—

Mrs McLeod: Could you tell me why the other side of that coin is not equally at least possible under this bill, which is, if that clause that was removed from the bill that allows the Attorney General to access information in order to determine whether proceedings should be undertaken, the clause that was deleted—if the Attorney General decided to add that to Bill 155, why would that not take precedence over any confidentiality provisions in this bill under that clause?

Mr Mitchinson: I believe it would have to be listed in sub 11(2) as an exception.

Mrs McLeod: It would have to be specifically listed? OK.

Mr Mitchinson: There are a couple of ways in which you can override—

Mrs McLeod: So you don't see that as meaning that any future act can prevail?

Mr Mitchinson: Yes, you can have a provision—and unfortunately, from our perspective, it happens more often than we'd like—where a statute goes through and says "notwithstanding the Freedom of Information and Protection of Privacy Act." That is a problem, yes. But the structure of the design of section 11 here is not negative in that sense. It's saying that the default position is that the confidentiality provisions of this act prevail. So at least there is a requirement for an act to include an override, and for the Legislature to consider whether it's appropriate in the circumstances.

Ms Lankin: Unless such act sets out the power for cabinet to do that by regulation, which is the problem that we have over and over again.

Mr Mitchinson: It's the same issue. We've come up against that frequently as well.

Mrs McLeod: Can we express our appreciation for the presentation?

The Chair: Absolutely. We thank Ms Cavoukian and her colleagues very much for coming before us here today. It's been of great assistance, I'm sure, to the members as we digest this important bill. I appreciate both your opening comments and the critiques that you provided. In the ensuing weeks, should the committee members have any questions, I hope you would be in a position to deal with them. Also, should you have any further reflections, as you see the various deputations made before us, and you wish to comment, we would look forward to receiving those submissions at any time.

Mrs McLeod: The commissioner did suggest that she and her department would be prepared to work with us. As you know, we're into a process where we're looking at consensual amendments where that's possible, and I think that her input to that process would be invaluable. I would like to recommend that we invite that kind of participation after the hearings and as we get into an amendment process.

The Chair: Absolutely. We want input from all sources, but certainly the privacy commissioner is in a

unique position relative to this bill and we would look for her specific feedback.

Dr Cavoukian: We'd be very pleased, and we will be giving you draft language.

The Chair: That would be very helpful.

Ms Lankin: I was going to ask, with respect to that submission of draft language, if possible, could it be submitted prior to public hearings and deputations that the committee will be receiving, and second, if you have the capacity, to post such information on a Web site, if you have one? You know there are stakeholders who have very opposing views to some of the points that you're raising.

Dr Cavoukian: Oh yes.

Ms Lankin: It would be helpful to us if they're coming not only reacting to the bill but reacting to the advice that you're giving us with respect to the bill, because I think the advice of the commission does hold a lot of sway and the public should know about that and be able to respond to that.

Dr Cavoukian: We'll make every effort to do that.

Just let me conclude by saying that we really need this bill. It's got to be improved a lot. You've heard all the recommendations we have. But there has been no greater need for such a bill as there is now. I urge you to consider that. Thank you very much.

The Chair: Thank you again for your time. We appreciate it.

Ms Lankin: Do we have start dates for the hearings yet?

The Chair: Yes. February 26.

MINISTRY OF HEALTH

The Chair: Could we invite the Ministry of Health people back up to the witness table. We might as well start off with the question Ms Pupatello had raised. Seeing that all of the health ministry staff were in the room at the time, presumably there is no need to—

Ms Lankin: After that are we going to revert to clause-by-clause?

The Chair: We can go back to clause-by-clause, yes.

Mr Sharpe: If you like, Mr Chair, I can start off and—

Mrs Pupatello: Mr Jackson or Mr Sharpe, my question in general was, what is it that we—the public, the government—cannot do if the lockbox is in the legislation?

Mr Sharpe: Let me again, as historian, talk about where we're at, and then Mr Jackson—

Interjection.

Mr Sharpe: What can I do? I'm supposed to keep my role clear here.

The instinct we all have of course is that it's our information and it's very private and personal. Why shouldn't we control where it goes and who discloses it? Over the years of consultation we have heard from, and you will hear from, provider groups strongly supporting the position that the commissioner espoused as the rationale for not having a lockbox, which is continuity of

patient care so that information within the health network can be shared on a need-to-know basis by other providers to assist in looking after patients. If the patient locked out important information, tests would have to be duplicated and inappropriate treatments could be given. That's what we were told, and ultimately were convinced by those arguments, obviously, because the lockbox is not there, although there are other controls there.

1540

I should say just as an entrée, before Mr Jackson takes over, that for many years, in my experience, we have enjoyed the co-operation and assistance of the privacy commissioner's office. They have been very supportive, as they were today, of the need to have this legislation, and have been most helpful in a very constructive and instructive way to our work. We look forward to their invitation to continue to work with us to improve the bill.

Phil, do you want to take over?

Mr Jackson: Yes, just to specifically clarify on the lockbox. The lockbox concept, as it was set out in the earlier draft legislation, would have provided an individual patient with a statutory right to withhold a certain piece of information from the patient record. So basically we're talking about the statutory right, regardless of format.

The examples that were given—and the IPC has referred to other jurisdictions, Saskatchewan, as an example, where a lockbox provision exists. Now, the wording or the concept is being used in two different ways. In Saskatchewan, it's basically the right to opt out of electronic transfer. You're out of the electronic transfer, but it doesn't mean that the information can't be shared by a provider through a fax or through a paper record. It's a different concept than the concept that was in the original draft, which was a statutory right, regardless of the form in which the information would be shared. So it's two different pieces.

There's a specific question around the lockbox and its potential impact on patient care. I would suggest they are questions that you also ask the Ontario Medical Association and other providers who will come to present.

What has been articulated to us is that the record itself, yes, is the record of patient information, the patient's medical record, the record of treatment for conditions the person has been diagnosed with. It's also the information tool which a practitioner would use to decide whether or not to prescribe a certain drug, whether or not to recommend a certain form of treatment.

It's true that there are different classes of information. Some information is considered sensitive by society; some information is not considered sensitive or is considered less sensitive. The question they asked of us is, who is in the best position to determine the clinical impact of removing that information? The way it was articulated in the discussion documents and in responses we had was that the health care practitioner is in the best position to determine whether or not there is a potential impact on an individual patient's care by the lack of full information in the record.

That's to give you some of the background as to why the lockbox was removed. What you have in Bill 159 now is not a lockbox. First of all, it's the right of access to your own record; the right to make a correction on your own record; where there is a disagreement, the right to have an attached statement of disagreement on the record. So it's not a lockbox. It avoids the clinical complexity that providers indicated would be there, having the statutory right to withhold information across all uses. I hope that clears it up on lockbox.

Mrs Papatello: In summary, then, for continuity of health care, duplication of use of the system, is that what you are saying?

Mr Jackson: Sorry, could you repeat the question?

Mrs Papatello: In summary, without the lockbox, presumably we will have continuity of health care and no duplication, because you're saying that the reason for having removed it was continuity issues. People came to you and said, "You will have optimum continuity, with no limitation, with no lockbox." They said, "You can't get that duplication out of the system with the lockbox."

For example, I can go to three different doctors and get a prescription for Prozac. No one is going to know. When the pharmacy fills my prescription, there's no way to access that I haven't just filled this with another doctor up the street. When we were discussing fraud earlier, my sense was that you truly are looking at individual fraud, not health provider fraud, but most use of the system in that way. This kind of thing is what you perceive is preventing that or allowing the pharmacists then to access that.

Mr Jackson: No. I think the number one reason that was indicated to us is the potential issue of clinical safety. Number one, above all others, is the issue of whether, if that right exists in legislation across all, you in effect—and the question was raised—require a physician to undertake a diagnosis or prescribe a treatment without access to the best available information. That is one concern that has been raised.

On the issue of duplication of resources, it's almost a separate question because the lockbox issue, and I'd suggest that the committee will probably want to hear from providers about this because it is a very complex area, is about how much you can share and how much an individual patient should have control over their own records. So I would suggest it's from the health care providers that we heard opposition to the lockbox. It's not primarily, from the ministry's perspective, a way of either saving money or avoiding duplication. The primary issue is what's the potential clinical impact. Second, can it administratively be done? The issue there is that the concept itself is quite new. When we talk about a statutory block that would apply electronically, apply to paper, apply to faxes, it would have to apply across the board if it was going to be a tight scheme. How is that undertaken in a system where information is transferred in multiple ways now? I think the commissioner indicated some of the challenges around it. We're currently in a situation where there's no single method of transfer-

ring information. It's not an easy technological concept. You'd have to ensure it was across the entire system.

So there is the operational side of it. How would you operationalize the lockbox? One of the challenges we face, and a corollary issue which needs to be considered, is that there are US jurisdictions where they have considered this approach but it often comes with a corollary of, does the physician have the right to withhold treatment in the absence of full information? That's the flip side of the coin. When we've examined the issues, examined the responses, ultimately seeing in place a full statutory lockbox, we've not been in a position to say, "Where would this take us five years from now? What would the potential clinical impact be?" We can't honestly say we know the answer to that question.

Mr Sharpe: Arguably, if you had a lockbox, then the exception we have to the need for consent for continuity of care, which exists now in the Mental Health Act and the Public Hospitals Act to some extent, wouldn't be there because, if we're patients and our physician is intending to send a summary of our condition to the next health provider we're going to see or a discharge summary or whatever, which they do today I understand fairly routinely, they couldn't do that without letting us have a look at what's going to go in draft so that we could exercise our right to lock out the information that we consider to be very sensitive.

So administratively, as Phil has mentioned, one now gets into a mechanism of having to permit patients to exercise their right of access, which they have under this bill with some limitations, and then the ability to indicate which elements of their medical history are not to be disclosed to anyone or to be controlled under some circumstances. So then you might be imposing a consensual model on continuity of care where very little exists today. As Phil says, whether that's right or wrong, administrative hurdles should not be a barrier to exercising fundamental rights if this is considered important. But the concerns we heard came from the provider community. It wasn't generated out of government.

1550

Mrs McLeod: I hear what you're saying in terms of this came from the health provider community and not from the ministry, but in your transmission of their concerns to us I'm hearing that paternalism that Gilbert began this morning by saying we were trying to move away from. I guess if I think practically about, "Is an individual going to consent to have transfer of health information between the health care providers that he or she has entrusted their health care to?" I think most often are going to say yes.

What I think I heard the commissioner say—I'm more persuaded by my colleague's argument about repeated prescriptions for Prozac and that kind of thing; that's kind of an intriguing subset of that in terms of pharmaceutical record. I thought I heard the commissioner say that Saskatchewan legislation has a lockbox only for the transmission of electronic data and that the concern about how electronic data, the whole smart card issue—this

may be an issue of public education, etc, but nevertheless it's a public concern. Are you saying administratively that can't be done, that you can't put a lockbox on the transmission of electronic data?

Mr Jackson: In Saskatchewan, again, it pertains to electronic transfer. I should get the clause so that you can see the clause. The issue for committee to consider there is, if you go the route of basically the right to opt out of electronic transfer, from a system-level perspective, from a ministry perspective, one of the issues related to that is that you prolong dual record-keeping because there will be information that's different between this file and the paper file. An individual may be seeing multiple providers. They may be seeing different providers for different aspects of care. That's from a ministry level.

Mrs McLeod: If I may, I understand that. I do think, as was discussed earlier, that we're probably a decade away from having physicians records in an electronic format anyway. But if we're going to move that way, do we not also have to move some distance in terms of our confidence in the patient and the patient's buy-in to this new system? If we're talking about a new method of delivering primary care and co-ordinated care and we're doing it, not in the name of the ministry's concern for efficiency, however that might be achieved at the end, but for continuity of care for the patient, it seems to me that if the patient buys in, they're going to buy in because they believe it's important to them and because they have confidence in the way in which their data is being handled. If they have that confidence, then they won't want the lockbox provision.

It seems to me that somehow we've got to have some faith at the end of the day that the patient needs to buy into these new systems. I'm not sure I'm hearing that in this bill.

Mrs Pupatello: Can I add one element to that? That is with regard to the physicians and their comments immediately after the bill was tabled in the House. The primary concern for them is that patient confidentiality information with their doctor and the kind of relationship the doctor expects to have with his patient, and that is full disclosure between the patient and the physician. It seems, then, that the doctor was the protector of the purse, if you will: "This is my client's record. I will not let this client's record out except in a court of law when I'm forced to."

It's sort of that same sense of paternalism, I guess. You know, the doctor's got it all and the doctor will give it back to the patient. Those time's are long gone, I agree. We go in armed with 20 pages off the Internet for a little consultation about an earache any more, as it should be, I guess. So if there's no consent between the patient and the doctor in order of full disclosure, the doctor, as it is today, can say, "I am not prepared to treat you unless I have full disclosure." So I'm consenting to give my doctor all this information.

It's that same question I asked the commissioner earlier about the forced nature of giving consent. When you're under the gun, coming in the door on an

ambulance stretcher versus a walk-in, you know, I'm in pain, whatever, the conditions are never right for me to have a good sense of maybe I should be saying no right now to this consent. The truth is, in the health system you usually are under some level of duress and will give consent, in which case none of this matters because it's all about when consent isn't given or when they don't have to have this consent. So—

Mrs McLeod: It's confidence in coercion.

Mrs Pupatello: I know, it's going to happen. That's my concern. That currently exists today. There's a coercion around giving consent. If you are applying for a job, whatever it is, if you say no or if you say, "I'm not answering," or if you say, "This is what's going in the lockbox," that automatically gives people the idea, "There's trouble with this file." It's implied. I guess the point is, I don't know that this is going to resolve any of that anyway.

Mr Sharpe: The legal purpose of consent, of course, is to ultimately protect providers so that if someone alleges they did something improper, they'll say, "I had the permission of the patient to do it. I had their consent."

Mrs Pupatello: The patient will have to say, "I had no choice but to give consent."

Mr Sharpe: There are elements of consent that we've articulated in the legislation that are modelled on the Health Care Consent Act that include informed consent as an important ingredient, which has not been clear in the confidentiality area, but we're hoping we'll make it relatively clear now.

One other element is the voluntary nature of the consent. It's for the provider to decide whether the coercive aspects of the circumstances are so severe that they would cancel the voluntary nature of the consent and therefore the consent is useless as a protective measure for the provider. That's for them to decide.

There's a certain coercive element in any of us being in the emergency room of a hospital. We've all looked at our applications for insurance and the couple of lines that we sign at the bottom where we consent to everything and anything being disclosed. As a lawyer, it's likely that this consent would not protect anyone if there was any action ultimately, although providers and records departments of hospitals will rely on that signature on the bottom of the form. It's certainly not informed; it's likely coercive; it's probably not voluntary. It doesn't meet any of the tests, but we all sign it and information is given in reliance on it.

When I said this morning that I think sometimes we have to look at what existing practices are—those aren't good practices. We're hoping this type of law will make insurance companies and others pay a bit more attention to the types of consent they're requesting from individuals, because providers will find it more difficult to rely on those two lines under these circumstances.

Again, to get back to your—

Mrs Pupatello: Just on that note, I have to say that even if, as a function of this act being passed, this slow movement into the community at large and affecting how

private companies do their business, the insurance company will then be restricted from asking detailed questions, they may not be restricted from saying, "Would you consent to the release of information?" As soon as you say no, you're in the same coerced position as you were to not answer the series of 20 questions. They're just going to make the form shorter, to one question, and that one question is, "Will you give us information?" and if you say no you won't get coverage, as opposed to 20 questions on your historical health data.

My frustration is that you elect to bring in a bill after 20 years of work to address a whole host of areas that are of significant concern and there isn't really an example yet where I can see that life is going to be better after this bill is passed.

Mr Sharpe: We're hoping on the insurance example that what the providers will say when this little two-line consent comes in is, "This is no longer sufficient because the individual clearly has not understood the full gamut of what it is we're about to disclose as a provider and as a custodian of their information."

As an example, some years ago when I was doing counsel work for the government's psychiatric hospitals, the head of clinical records at one of the government facilities called and said, "I have an insurance form here and the questions that the insurance company asked are as follows. If I disclose this information and I have this consent, it's going to be very prejudicial to this ex-patient and I'm sure they're not aware of what's in this record and what I am about to release. What's your advice?"

We don't have this type of law now, so they could probably rely on this inadequate form, but I suggested they try to locate the ex-patient and have a discussion with them about what it is they've consented to and what's about to go.

A couple of days later I got a call back from this person and she said, "I had the discussion and the ex-patient has decided to withdraw their consent." What that means in terms of their application for coverage is, of course, their right to make that determination.

It was with that in mind that we tried to put some of this together.

Mrs Pupatello: It's a perfect example of how this bill is not going to change that outcome.

Mr Sharpe: We think the bill will, because it's going to require that custodians be mindful of appropriate full consents before they release patient information.

1600

Ms Lankin: I think it would be really helpful, even though there's limited experience, if we had some descriptive information about the application of this, because in fact it is not clear in certain jurisdictions that there is even a flag when a file is transferred to a referral doctor that there is a piece of information that is locked away and is being kept from you. So in terms of how the insurance company would know that it's not the full record, it's not clear until they devise a form which says, "You're not going to get this coverage unless you tell us whether you've locked something in a lockbox or not." I

think there's a lot we don't know about how it could practically be implemented, and there are presumptions in what all of us are saying, that it would be very useful for jurisdictions that are actually living with it to have some descriptive information from that.

I want to come at this from two other perspectives. I think there are many things in the clause-by-clause that I hope to get to, if not today then tomorrow, but this piece obviously is really controversial and it's quite key I think to the future of health systems reform and where we're headed with things.

Sandra's description and, Gilbert, your historical perspective of the move from paternalism to where we're headed—in the course of changes in the health system, one of the key things is the emergence of the patient as the centre of the system and informed consent, for example: "informed" consent, the right to informed consent, the right to advocacy, to challenge, the right to challenge declarations of your competency. There is a shift that is taking place. There's also a shift in terms of public attitude about what types of services they want to access. There's a shift in terms of health reformers looking at how services should be organized. Primary care reform comes to mind as an example.

In that, and this is very controversial for some providers, in particular medical doctors, the medical doctor is no longer the gatekeeper to the system. The patient becomes the informed decision-maker who interacts with a range of health care professionals and providers currently inside and outside of the existing health care system.

If you conceptualize the health care system that way, the existing record-keeping that we have is so antiquated and there's much that we have to determine beyond the ability for me to put a single piece of information in a locked box. There's a question, in moving to smart card technology, where I hold my file, of who has the need to know. It's a series of locked boxes. It's a file cabinet with a series of drawers, and in those drawers a series of files, all of them locked, with only certain individuals within the system on a need-to-know, with my consent, basis to access that information. Surely that's what we're going to get to. You can't go to smart card technology without having someone the keeper of the controls. I don't think society will accept that it will be a single health care professional. It's got to come back to the patient. So I think we have to have a much broader view of this concept of lockbox. These words have emerged just in the last little bit. It sort of reminds me of the US presidential election. Health care and that lockbox is annoying, actually, because it is a tiny baby step on the road to controlling the electronic transfer of information to give some patient control, and it does not acknowledge the complementary medicines, that people are going to want to have their information carried with them, the physiotherapy support they're receiving and what they need to access in terms of background information and what they shouldn't access, the pharmacist and on and on. Our framework has to be prepared to have the

controls in place to answer that when that technology is available, and I think we fall way short of it here.

I don't know how we move that issue forward but that to me is where the legislation has got to get to. Otherwise, even though this is really critical and a really important first step, we're not going to be able to do what we haven't been able to do for the last how many years we've been looking at this smart card technology. We can't do it because we don't have the framework in place. This isn't the framework that's going to allow us to do it either. I don't know if there are any thoughts back from the ministry.

Mr Jackson: It's extremely difficult to be crafting a piece of legislation that is responding to the multiple manners in which information is transferred now. So there would have to be consideration to, is it realistic given the world of largely paper records that we've got now? Is it realistic considering the emerging world X years from now?

On the one hand, there is the temptation to say, "Yes, the bill needs to be forward-looking; it needs to anticipate the changes in the way in which health care is delivered." It also needs to be workable on the ground for it to effect change in the way in which information is managed and used. That balance is a hard one to achieve because, as a number of people have spoken to, the use of electronic transfer is, relatively speaking, in its infancy in terms of the number of health care providers routinely using it. Is it going to grow? Yes. Can we anticipate how it will grow? No. That's one of the difficulties. We can't anticipate the twists and turns. So it does come back to, how specific can you get in this type of legislation that may apply 10 years from now if it's passed, when the very mechanisms by which information is transferred are still evolving? It's not a specific—

Mrs Papatello: Can I ask a question? What if the entire Ontario population decided to lock everything in the box, if you had the box, or if everyone in the province agreed to no consent for anything? What would the outcome be? Ultimately, if there's enough of an awareness in the population, a sensitivity around, "You own your data"—my view is that currently the general population, unless you are faced with this and something ugly really does happen, we don't understand the value of what it is we hold and our right to our information. There needs to be a better awareness of that out there. But if because of this it becomes an issue and everyone determines that "You will have no information from us," then the government's ability to plan, the government's ability to do reviews and research and all of that, would be stymied. As the commissioner mentioned, just a little group of those that would say no to data could change the outcome of research being done.

Mr Sharpe: I suppose if everything was locked away, then every time he saw a provider—a physician, an alternative therapist, whatever—the patient would have to give information to that person and they'd use it for the purpose of that one interaction, and then when you see someone else you'd start anew with that other person,

and when the lab was going to do a test, you'd have to consent to the lab giving the information. That would be the process.

Mrs Papatello: It seems that they're talking about these rostered groups of doctors. If you don't have this, you can't do that. The government has moved in this pilot project area that the group is to be penalized when people exit the group and go get health care elsewhere other than the group. We've got issues of doctors refusing patients, and especially in an underserved province that's a difficulty we face already. But if that rostered group has their set group of patients that they see, they won't know that the patient is going outside the circle for actual care and therefore the government can penalize the group.

Ms Lankin: OHIP.

Mrs Papatello: On a certain instance they would know.

Ms Lankin: You can't lock-box OHIP information.

The Chair: Mr Wood has questions. Was that a formal question or a musing?

Mrs Papatello: If you know it through OHIP, then why do you need to know more, if you can do it without it? I guess that's back to the issue that Dr Schumacher brought up initially. You have access to everything you need to essentially now. I'm saying, what if information was presented to you that that wasn't the case?

1610

Mr Sharpe: The discussions about integrated systems and restructuring and all of those things, Phil, you could address.

Ms Lankin has raised a fundamental question: does the patient or the provider ultimately control the information? I think right now the gatekeeper is the provider, particularly the physician. It's their record. They make the determination who should get it and how much they should get. What does the pharmacist need? Not the whole record, but some information. The lab gets less. Another provider may or may not require anything, depending on the circumstances. If we move that around to a situation where it's the patient making the ultimate call on who gets what, that would be a shift in ethics and principles from the way the world works today in health care. So it is a pretty basic question.

Ms Lankin: You can't have smart card technology without answering that question. That's the point I'm making.

Mr Wood: Could you tell me who would be able to give consent for an incompetent person under the bill? Would it be the personal care power of attorney or the property power of attorney?

Mr Sharpe: There's a list of substitute decision-makers that's based on existing law, the Health Care Consent Act, and it goes to a gradation of individuals. If there is a power of attorney for personal care, if there is an appointed substitute, if there is a legal guardian for personal care, they would kick in. In some circumstances, the individual can select someone through that process or through another tribunal process to make the deter-

mination. Failing those categories, it goes into a list of relatives and a certain prioritization that's been in our law for many years.

Mr Wood: Does the person who holds a property power of attorney have any status in this scheme?

Mr Sharpe: Not property; they'd have to have it for personal care.

Mr Wood: Do we have any means of ousting the application of C-6 other than showing that this act is substantially similar?

Mr Sharpe: No. If there was clear conflict in provisions and if we were looking at whatever commercial means—we're still not sure to what extent that applies within the province, but if it were several years from now and there was a conflict and some concern around it, it might become a matter legally of paramountcy and constitutional law as to which level of government ultimately can impose its will in these circumstances. One would hate to have to get into that type of conflict, and every effort is being made to avoid it.

Mr Wood: What do you consider we would have to have in this bill to make it substantially similar to C-6? What are the key elements you consider would have to be in there?

Mr Scott: On the issue of substantial similarity, the federal cabinet has not given any firm direction to date. There is no definition in the legislation that indicates what substantially similar legislation is, which does make our assessment of it slightly more difficult in terms of what the requirements would be.

Around the time Bill C-6 was enacted, then-Industry Minister John Manley suggested several criteria which should be followed by the provinces when they are determining whether their legislation is substantially similar. The three criteria he listed at that time were a basic set of fair information practices that are consistent with the CSA standard, oversight by an independent body, and redress for those who are aggrieved. Those were the criteria he indicated before the Senate standing committee on science and technology back in December 1999, but it is, again, somewhat difficult for the province to assess that in light of the fact that there is no definition of the term in their legislation and it is ultimately a decision for the federal cabinet.

The Chair: Thank you. Mr O'Toole.

Mr John O'Toole (Durham): I first want to apologize. I'm a sub on this committee. I'm just generally very interested in the issue. I just want to bring myself up to date without repeating, I'm sure, what all the other astute people have observed. The key operative words here, "collect," "use," and "disclose," are in some respects in place today, I suspect; however, there may be some rules—and I'm thinking that we're dealing with the medium by which those things are dealt with, moving to digital and interactive. Is it a fair assessment to say that there are some disclosures and disclaimers and sharing protocols today that are in need of refreshing? We're talking substantively about a medium of exchange, the digitization of information. Is that sort of a brief—

Mr Jackson: Just in terms of the thinking behind the way the legislation is currently crafted around Bill 159, it's crafted to cover the collection and use of disclosure of personal health information regardless of the means of transmission of that information.

Mr O'Toole: I appreciate your expertise; I've listened, from time to time, in prior situations, to your insight into this debate. If someone starts with the premise that we're somehow creating some inflexibility in the system, that's problematic for a lot of reasons—not just research, but for me getting the right help at the right time in the right place, in a timely matter.

I want to just look at, if we're applying it to a medium which is today's kind of pencil and paper mode or voice recorder with secretary mode—with assistant; pardon me—that stuff isn't very secure today, actually. It's lying around in various cupboards and files. If you really had a look at it, you'd say, "Where is it?" Isn't that a problem today, getting it? Isn't it important to organize it so I get the right help at the right time, blah, blah, blah? Isn't that what we're trying to do, without all the Big Brother connotations of the media genre?

Mr Jackson: I think it's fair to say that the thinking that has gone into the bill to date is that it should cover the issue of the files that are left open and it should be able to anticipate and respond to the changing ways the information moved around the system. In that, the impact to an individual of an inappropriate disclosure of personal health information, the potential impact to an individual is comparable where a file is badly disposed of, is improperly held by a custodian, or where it's inappropriately electronically shared. What Bill 159 contains within it for the first time is the elevation, for example, in the area of computer matching. It is an attempt to modernize, take what's currently in policy, bring it up into legislation and elevate the place of that sort of activity in the legislation. That's one attempt to anticipate the way the system may evolve.

It's also the case that there is a provision in Bill 159 which allows for the creation of specific rules pertaining to electronic transfer of information. The challenge around crafting those in detail now, as a number of people have said and the commissioner referred to earlier, is we are probably 10 years away, maybe more, from knowing what exactly that system is going to look like. So in terms of the specific rules regarding electronic transfer, first you need the broad parameter in place that says, "No matter how you share it, these are the principles we expect you to follow." That's the general limiting principle which is set out in section 12.

You then, ideally, would need the ability to come back and put in specific protections and specific regulations to address emerging areas of information transfer. This area legislatively is extremely new. Jurisdictions all over the world are grappling with the same question: how does law keep up with emergent technology.

Mr O'Toole: I appreciate this debate. I'll tell you, in some respects I'm looking at the UN lead, because this isn't just an Ontario issue. I'm sort of familiar, through

Gilbert and others, with the C-6 initiative and its lack of translation or lack of clarity, if you will, but you have given a two-year window here for subordinated governments to do some things which you—I commend you—are trying to do under some guidance to deal with where we are and where we might be. Have you looked at best practices and other jurisdictions? Spain has done an international health card dealing with some of the privacy stuff. There are other practices going on. Have we examined that in some expertise?

Mr Sharpe: Professor David Weisstub is here. Some of you may remember Professor Weisstub from his work on international comparisons on Brian's Law. He has been involved for some time in looking at international jurisdictions and developing a comparative analysis, which we hope will be of assistance to this committee when we get further down in our process. So we are involved in looking at that type of experience worldwide, in other provinces and in other countries.

1620

Mrs McLeod: I realize we have abandoned clause-by-clause in any systematic way, so I'll leap into section 48. I want to raise with you an issue of right of access to your own records. I think this morning you talked about the fact that that was one of the things the acts ought to do, provide a right of access, which is now only available under I think the Mental Health Act, and you may have mentioned another one.

This bill, as I understand it, considerably narrows the right of access to a health record. It applies to all health records, whereas the Mental Health Act obviously applies only to mental health records, but the way in which you can be refused access, the amount of time that a health care provider can decide, my understanding is—we've already talked about that. We don't have the comparison with other acts that would help us with this.

If I look at subsection 48(1), and the number of reasons why the health information custodian can refuse to grant an individual access to a record of personal health information, it's a little bit of the paternalism again. How much do we say can be done in the name of protecting an individual, including in this case denying the individual the right to see their record because there is a sense that harm will be done? The Mental Health Act I don't think has those kinds of limitations on your right to access your records.

Mr Sharpe: The Mental Health Act deals essentially with 48(1)(a), which is, "could reasonably be expected to result in harm to the treatment or recovery of the individual, injury to the mental condition of another individual or bodily harm to another individual." That's language that was placed there in the 1980s. You're right; the other provisions don't exist in the Mental Health Act.

The other thing that's in the Mental Health Act, further on, is the reverse onus, so that if the patient is requesting the information, the obligation is on the provider to justify why they're refusing, not on the patient to show why they want it. So that's here.

Where these other provisions largely come from is the Freedom of Information and Protection of Privacy Act sections dealing with access. We tried to harmonize this with other provincial law where you're dealing with access rights, and probably a number of these exist in any event. Solicitor-client privilege, for example, would probably override concerns here. But much of this was taken from the current freedom of information legislation.

Mrs McLeod: I really need to understand this. We're talking about a person's own health record. We're not talking about disclosure to somebody else. We're talking about the right to know what your health record is. Help me understand what legal proceeding or solicitor-client privilege could say, "I'm sorry, but you're going to end up in court and we're not going to tell you what evidence is going to be produced that's on your own health record." Under what circumstance would that ever be called on?

Mr Sharpe: It might not be the privilege of that patient, but often records will contain information about other people or disclosed by other people. That's why one of the provisions here talks about "an unjustified invasion of another individual's personal privacy." There may be privilege issues where lawyers are representing others. There might be family relationships and disputes involved, custody matters where a health care provider has been a therapist to a number of individuals in the family and they have a collective record. We were trying to embrace all notions of privacy protection for individuals in addition to the patient.

There is no question that the patient should have a right to information there about them, but often in the record there will be information about others, and other family members.

Mrs McLeod: But it's possible to draft legislation that could specifically say that you don't have a right to access information related to other individuals but you still have the right to access your own information. I'm not even sure, in this day and age, as we draft new legislation that supposedly has a little more recognition of individual rights, that subsection 1(a) has relevance. Who is protecting whom for what reason?

Ms Auksi: Could I just give one example that has been given to us? You might have a record of someone where, when they were a baby, let's say, there were some problems in the family, and a lot of the family dispute information is on the record, perhaps very painful information that it would be painful for the parent to have that child know when they become an adult. That could be considered an invasion of the parent's privacy. It would have been relevant to the care of the baby, let's say, at the time the record was made and of course if someone is trying to extend this exception too far there is the ability to complain to the privacy commissioner, with full rights of investigation and potentially overriding the refusal.

Mrs Pupatello: May I ask a question?

The Chair: Mrs Pupatello.

Mrs Papatello: I asked a question earlier about Ontario Works and the ODSP. Currently, when people are applying to access ODSP, the individual who makes the decision about whether an individual is disabled enough to be on ODSP is not a doctor, yet they're dealing with health information in order to make that determination. We had pointed out earlier where that act supersedes this act. That administrator, who is making a significant health decision whether someone is going to access disability or not through ODSP, are they covered in any current act anywhere that protects that information?

Ms Auksi: This act would apply only to the extent that if information is disclosed by a health information custodian to that system, the so-called recipient rule, which I don't know we've talked about today, in section 24 would apply. It might be a good time to take a look at that. If you could turn to section 24.

Mrs Papatello: What page is that?

Ms Auksi: It's on page 25. This speaks about something that was alluded to earlier, where the act does extend some protection where a disclosure is made even to someone who is not a health information custodian, so this would apply if it was to an insurer or to workers' comp, to Ontario disabilities, whatever, to any—

Mrs Papatello: If you were to turn that around in that instance, using what you are saying now about people not being health providers, the individual who's making the application to ODSP could refuse to give information to an individual who isn't even a health provider—because it's an administrator who's determining that they qualify for ODSP—and on that basis of not providing information they would be refused access to ODSP.

Ms Auksi: That definitely would not be governed by this act. That would be governed by the rules of that legislation—

Mrs Papatello: The Ontario Works or ODSP—

Ms Auksi: Right. I'm not sure exactly how the freedom of information and protection of privacy legislation might apply as well, with respect to some parts of that program.

Mrs Papatello: Do you think it would be under municipal employees'—

Ms Auksi: Do you know what? I'm not sure off the top of my head whether it's the municipal or the provincial, but it would not be subject to this act. What would be subject to this act is if information flows from a health information custodian who is governed by this act, like a health care provider, to that program, it would be limited in the hands of the recipient to being user-disposed only for the purpose for which the custodian under this act was authorized to disclose it to them or for a directly related purpose or a purpose to which the individual consents or a purpose authorized under some other law. That other law might be that legislation or it could be some other legislation if it's applicable, but getting it from a health information custodian, the recipient would not be free to do just anything with it; there are restrictions.

Mrs Papatello: I guess I was just looking at when we went through that bill in 1997 and the impracticality of a non-medical person making a decision over whether someone is disabled enough to access ODSP. The whole thing was completely bizarre to me. It didn't seem to be so to any government member. The bill passed and it now is in operation, where an administrative manager—non-medical personnel—goes through a file and determines that someone is disabled enough to get ODSP. It's ridiculous.

Having said all that—I realize this is all about privacy and disclosure etc, but there's no way to determine that the individuals who are getting access to private information who aren't necessarily medical, just like the insurance companies do—even an administrator of a welfare program or whatever you want to call it is accessing information. You're suggesting they may be covered or safe in that they only use the information to deal with for the purposes of which they act, not the inappropriateness of a non-medical personnel individual.

Mr Jackson: We can't speak to the appropriateness of the administration.

Mrs Papatello: You could speak to the inappropriate nature.

Mr Jackson: I will speak to the way in which the recipient rule works.

Ms Lankin: Can we continue tomorrow?

The Chair: I think we will. In deference to the committee members, who have already gone a half-hour over, I believe it was the consensus of opinion and I believe the ministry agreed that they were amenable to returning at 2 o'clock tomorrow afternoon.

Ms Lankin: Mr Chair, could I just ask on that front, why 2 o'clock? That's a two-hour lunch, and I'm wondering whether—I, for example, would be happier if we shortened the lunch period and got through as much as possible and then also as early as possible, provided afternoon commitments—

The Chair: I have no problem with that. I would just raise the concern that if the federal privacy commissioner ran late it would reduce our flexibility to deal with questions there, but if you'll—

Mr Wood: How about starting at 9?

The Chair: Well, he's coming from Ottawa. The federal witness is coming at 10 o'clock tomorrow.

Mr Wood: Why don't we have these people come at 9 and hear them for an hour?

The Chair: I'm in the hands of the committee.

Mr Wood: I'd come at 9. We have a number of—

Interjections.

Ms Lankin: What if we ask them to be here for 1 o'clock? If we go over with the federal commissioner we might say 1:15 and ask you to wait a little bit, but let's try now for 1 o'clock?

The Chair: All right. It's agreed? The health folks will reconvene here at 1 o'clock tomorrow? Excellent. With that, the committee stands recessed until 10 o'clock tomorrow morning.

The committee adjourned at 1632.

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Standing committee on general government

Personal Health Information
Privacy Act, 2000

Comité permanent des affaires gouvernementales

Loi de 2000 sur la confidentialité
des renseignements personnels
sur la santé



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ASSEMBLÉE LÉGISLATIVE DE L'ONTARIO

STANDING COMMITTEE ON
GENERAL GOVERNMENTCOMITÉ PERMANENT DES
AFFAIRES GOUVERNEMENTALES

Thursday 8 February 2001

Jeudi 8 février 2001

*The committee met at 1110 in committee room 1.*PERSONAL HEALTH INFORMATION
PRIVACY ACT, 2000LOI DE 2000 SUR LA CONFIDENTIALITÉ
DES RENSEIGNEMENTS PERSONNELS
SUR LA SANTÉ

Consideration of Bill 159, An Act respecting personal health information and related matters / Projet de loi 159, Loi concernant les renseignements personnels sur la santé et traitant de questions connexes.

PRIVACY COMMISSIONER OF CANADA

The Chair (Mr Steve Gilchrist): I call the committee to order. My thanks to all who have indulged the late starting time. Our first order of business today is to hear from the office of the Privacy Commissioner of Canada, Mr George Radwanski.

Mr Radwanski, if you'd like to come up to the witness table there. Thank you for coming all the way in from Ottawa and congratulations for planning far enough in advance that you weren't held up.

Mr George Radwanski: Thank you, Mr Chairman. Honourable members, good morning. I'd like to start by expressing my appreciation for the invitation to speak to you today. I'd like to make a substantive statement and, following that, I'll be happy to take your questions. I understand that notwithstanding the vicissitudes of the weather, we have two hours, and I am entirely at your disposal.

Privacy is an issue of importance to all Canadians, and your invitation is, in my view, an example of excellent co-operation across levels of government. This legislation is a very serious matter. I regretfully find that, in its current form, it is an assault on health privacy rights, not a defence of them. The legislation appears designed, in fact, to ensure that the government of Ontario and a virtually unlimited range of other organizations and individuals could have unrestricted access to the most private health information of every Ontarian.

I have very serious concerns about this and I'm grateful for the opportunity to bring these concerns to you and to the people of Ontario in this forum. I know that you heard yesterday from the Ontario Information and Privacy Commissioner, Dr Cavoukian, and that she

expressed many of the same concerns I will be sharing with you today. But in those instances where it may sound like we're covering the same ground, I trust that you will regard that as not merely repeating, but reinforcing a message that very much deserves reinforcement.

I know that you will also be hearing from representatives of many interest groups, and that there are some who might consider privacy advocates to be just another such group, but if that's true, then it's a very, very large interest group. All of us, when it comes to our own lives, are advocates for privacy. None of us wants to go through life feeling that at any moment someone may be, either metaphorically or even quite literally, looking over our shoulder. If we have to weigh every action, every purchase, every statement, wondering who might find out about it, misconstrue it, judge it or somehow use it to our detriment, we are not truly free. That is why privacy is a fundamental human right, recognized in the United Nations Universal Declaration of Human Rights, and no aspect of privacy is more fundamental than the privacy of our health information, information about the state of our own bodies and minds.

In the 1920s, Justice Louis Brandeis of the United States Supreme Court defined privacy as "the right to be let alone." But today we may think we are alone while our privacy is being invaded from a distance by ever more sophisticated methods of surveillance and information gathering. So I would define privacy as the right to control access to one's person and to information about oneself.

In an age when information crosses oceans and continents at the click of a button, when information—personal information—has itself become a commodity, that right to privacy is under threat as never before.

I have said many times since I assumed this position a few months ago, and I will say it again today, that I believe privacy will be the defining issue of this new decade. That's because we are at a crossroads. The choices we make now, the paths we follow over the next few months and years will to a very large extent define the type of society we leave to our children.

Until relatively recently, privacy was protected pretty much by default. As long as information about us was in paper records scattered over many locations, someone would have to go to a great deal of trouble to compile a detailed dossier on any particular individual. But now the

move to electronic record-keeping is eating away at the barriers of time, distance and cost that once guarded our privacy from all but the most determined of snoops.

We are also under almost constant surveillance. Cameras record us at the bank machine, at the corner store and at the casino, and biometric recognition technologies can rob us of our anonymity. Computers record every time we use an electronic pass card to enter or leave our workplace, for instance, or our parking garage. The personal information that is being collected about every one of us just as a matter of routine is mind-boggling: debit card records, credit card records, telephone records, the movies we rent, the books we borrow, the Web sites we access—you name it. The surveillance is so pervasive, the data banks so diverse and the computer networks so efficient that individuals have no idea who has what personal information about them, let alone what's being done with it.

This is why we now have the federal government's new Personal Information Protection and Electronic Documents Act, in effect since January, to give Canadians clear privacy rights in their dealings with the private sector, and it is why we have a federal Privacy Commissioner, who has been given the mandate to see that the law is respected. It's what civilized societies do: recognize certain fundamental rights and do what they can to keep them from being abused.

So I appear before you today as the Privacy Commissioner of Canada, an officer of Parliament appointed to be the guardian and champion of Canadians' right to privacy. The Privacy Commissioner of Canada does not work for or report to the government. The Privacy Commissioner works for and reports directly to the people of Canada through our national Parliament. It is my responsibility as the Privacy Commissioner of Canada to stand up for the privacy rights of all Canadians. The right to privacy is not divisible. It cannot be respected federally and violated provincially. It cannot be respected in one part of the country and violated in another. The door to our personal information is either closed or open. If it is open, it makes little practical difference which level of government has done the opening; our privacy is lost.

This is made very clear in the federal Personal Information Protection and Electronic Documents Act. In jurisdictions that do not have substantially similar legislation in place by the beginning of 2004, the federal act will apply to the entire commercial sector. To that end, the Privacy Commissioner of Canada is mandated under this act to report to Parliament on the extent to which provincial governments have passed legislation that is substantially similar.

I believe it is therefore very appropriate and very necessary for me to take this earliest possible opportunity to tell you that it is my considered opinion that the proposed legislation you are examining would fall fundamentally short of meeting this test. It is not substantially similar. It is radically different in content, in spirit and in apparent intent.

It is worth pointing out here, I think, that the new federal privacy law does not qualify as groundbreaking legislation. It does not set Canada apart, and it does not impose any kind of regulation that our trading partners are not prepared to implement or have not implemented already. The federal act is based on a set of internationally recognized principles of fair information practices, principles that have been refined to suit the Canadian reality through several years of consultation with Canadian business, consumer, and other groups. There is no doubt that the federal legislation represents a significant step forward for privacy in Canada, but it really does no more than bring us up to the minimum international standard. It recognizes the fundamental values of allowing individuals to retain some control over their personal information, and provides them with certain legal remedies and protections when they feel their privacy rights have been violated.

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These protections are all the more critical when the privacy and confidentiality of our personal medical information is involved. I can think of few other areas of our lives where we would want greater control than over our health information. When we talk about confidentiality, we are talking about trust. When we take someone into our confidence and share something personal about ourselves, we do so in the belief that we can trust that person not to divulge the secret to anyone else. This concept of trust is at the very heart of the doctor-patient relationship. As far back as the days when the Hippocratic oath was first conceived, it was understood that there can be no effective physician-patient relationship unless patients can feel free to be totally open and candid about their symptoms, habits, lifestyles and concerns. Doctors cannot provide good diagnosis and treatment without full information, and people are not likely to surrender full information if they fear that it might somehow be used against them. Even though we may not know our physicians especially well on a personal level, we do know that they have taken an oath to respect our privacy. We trust them to respect that oath. We tell our doctors things about ourselves we might not share even with our spouses, let alone our employers, our bankers, casual acquaintances or the government.

This privacy of personal health information is not only a fundamental human right, it is also a very important social good. We all have a stake in ensuring that our society as a whole is as healthy as possible. We all benefit when health care costs are kept down through early diagnosis, treatment and prevention programs, when contagious ailments are identified as early as possible, and when people with conditions that might cause accidents in the workplace or on the roads have them diagnosed and treated before harm is done. Yet it is no exaggeration to fear that lack of confidence in the privacy of health information could lead people to avoid seeking treatment. If someone is feeling severely stressed and angry at work, is that person likely to share this with their doctor and get psychological help if there is even a

chance that word might immediately get back to his employer? Is someone more or less likely to get a recommended blood test if all the details of the results might become known by an endless array of unknown third parties? Those choices are likely to be shaped by the realization that a violation of health care privacy can be catastrophic for the individual. It could change your entire life and deny you a whole range of opportunities.

Suppose, for instance, that your genetic profile were revealed to an especially interested third party. Your entire family could be stigmatized for generations to come. If you think this is far-fetched, I would draw to your attention that this week the newspaper the *Independent* in London reported that the Council for Responsible Genetics in the United States has identified more than 200 cases of genetic discrimination in employment, and these are cases where individuals lost or were denied employment even though the statistical risk of a debilitating condition arising was small, where the condition would not arise until much later in life, or where the condition could be treated. So these are not hypothetical concerns.

As with so many other aspects of our privacy, the security of this most personal of trust relationships, the relationship between patients and health care providers, is threatened. There is a powerful and steadily increasing demand for our personal health information from any number of secondary users. Much of the time we don't even know who they are.

The Canadian Medical Association has recognized the threat and has responded with its excellent health information privacy code. But with legislation like you are examining today, we are staring at the possibility of a user fee that no one could have imagined. We cannot allow our privacy to become the price of admission to our health care system.

Patients have a right to expect and be entirely confident that health information about them will not be collected beyond what is necessary for their care. They must be confident that the information will not be used for any purpose other than their care, or disclosed for any reason other than their care. Certainly they must be confident it will not be put to any use that could do them harm.

In my view, the proposed Personal Health Information Privacy Act falls desperately short of meeting that standard in a number of critical areas. It permits far too many people to access, collect, use and disclose personal information, often without regard to whether it is necessary for the care of the individual. It gives the Minister of Health—that is to say, the government of Ontario—broad powers to access and disclose personal health information at will through regulation. It permits the collection, use and disclosure of personal health information without the consent of the individual in far too broad a range of circumstances. It denies individuals ready and assured access to their personal health information, as well as the means to correct it. It fails to provide the powers of oversight needed to ensure that

privacy rights are respected, and effective means of redress when these rights are violated.

Let me turn now to the specifics. But I have to begin by telling you that this legislation is so extraordinarily convoluted that one would have to go through it clause by clause to parse all the exceptions, loopholes and openings for regulation that make most key provisions mean something quite different than what might at first appear. That would probably take all day, not the limited, though generous, time I am accorded this morning. So even though this is meant to be a technical briefing, I'm going to have to provide a somewhat broader and more schematic, less technically detailed overview than might be ideal.

That being said, the first major flaw of the bill is a lack of effective restriction on how and by whom personal health information may be accessed, collected, used and disclosed. This problem begins in section 2 with the almost absurdly broad listing of who qualifies as a health information custodian, that is, a person who can lawfully have custody or control of your health information. This list includes obvious health care providers such as doctors, hospitals, pharmacies and laboratories, and that's only normal. But it also includes many others that a patient would not be likely to see as having any legitimate business accessing such deeply private information, including the minister, members of district health councils and absolutely anyone else the cabinet decides to designate by regulation.

In my view, there is something fundamentally wrong right from the very outset with legislation that says that the Minister of Health has exactly the same right to hold your personal health information as your own doctor.

Although section 12 would appear to set some limits on the collection, use and disclosure of personal health information, the wording of the section is often vague, and even where limits are clear, they are often qualified by statements such as "more than reasonably necessary" and "to the extent reasonably possible."

The limits on collecting, using and disclosing personal health information are made weaker still by the fact that they would not apply to most of the people who do these things. As long as information was being collected or disclosed "for the purpose of providing or assisting in providing health care to an individual," then doctors, hospitals, pharmacists, nursing homes and laboratories, and others, would not be bound by these limits. There is no explanation why, for example, these custodians should be allowed to collect more information than they need to meet a specific purpose—a standard test under fair, accepted information practices.

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Cancer Care Ontario and registries of various diseases and conditions are also exempted from the limits on collection, use and disclosure, although it is not at all clear why. By including these organizations, the proposed legislation stretches the definition of "providing, or assisting in providing, health care to an individual" beyond what most would consider reasonable.

If Bill 159 provides few meaningful limits on the collection of personal health information, there are even fewer limits on disclosure. Subsection 12(9) and sections 29, 30, 31, 32 and 36 together allow for the disclosure of personal health information in a wide range of situations with few limits. With very few exceptions, these sections would allow anyone from a hospital administrator to a graduate student researcher to have access to your personal health information without your permission, without your knowledge and without regard to whether it is necessary for your health care.

That is a brief overview of problems related, in general, to collection, access and disclosure.

The second major failing of this act is the broad discretionary power it gives the Minister of Health to override its provisions. Section 30 allows health care custodians to disclose personal health information to the minister for a variety of reasons. This section also allows the minister to disclose personal health information to anyone the minister designates by regulation, and the next section allows the minister to order disclosure of an individual's personal health information.

These disclosures of personal health information to and by the minister can take place with virtually no accountability. There are provisions for review by the commissioner, but the conditions for review are so narrow that these arbitrary disclosures would rarely if ever require justification. It is in fact a distinguishing characteristic of this bill that it would allow the minister and the government virtually total power over the personal health information of everyone in Ontario.

They can decide by regulation that anyone they want is designated to be a custodian of health information, they can access anyone's health information by having the minister direct disclosure to himself or herself, and they can then disclose that information, in turn, to anyone designated by regulation. How that can be called a privacy bill is very frankly beyond me. In fact, to allow those in a position of political power the latitude to invade the privacy of individuals in this way would be extraordinary and simply unacceptable in a free society.

A third major failing of the proposed legislation is in the area of consent. Consent and privacy cannot be separated. If privacy is a right to control access to one's person and to personal information about oneself, as I indicated earlier, then it is the very essence of privacy that you cannot obtain, use or share my personal information without my permission. There is no control without the right of consent, and there is no privacy without control. It follows that the requirement for consent must be at the heart of any good privacy law. The collection, use and disclosure of personal information without the individual's consent should occur only in the most exceptional of circumstances, but this act would allow all three in a variety of circumstances.

Section 22, for example, offers a list of situations in which an individual's personal health information could be collected from a third party. Several of these would allow someone's personal information to be collected

from some other source without either knowledge or consent.

Section 27 details numerous ways an individual's personal health information can be used without their consent. In one instance, the legislation would allow someone's information to be used without consent for "a purpose that is directly related to the use for which it was collected." This is a variation on a phrase that has been used in some privacy laws in the past. I say "in the past" because it was found to be too open to interpretation and allowed a lot of secondary uses for personal information that bore only a very remote connection to the original use.

The principles of fair information practices require that personal information cannot be put to a second use, related or otherwise, without the consent of the person from whom the information was collected. Many of the secondary uses that would be allowed under this legislation also involve disclosure of personal health information without consent, another violation of the basic principles of fair information practices.

I have already discussed the many ways sections 29, 30, 31, 32 and 36 would allow disclosure without either the knowledge or consent of the individual. I find the allowance for disclosure of personal information for research purposes to be a particular affront to the notion of consent. Section 32 says that a custodian can disclose personal health information to a researcher provided a research ethics review board has approved the researcher's project. Not only is the right of individuals to give or withhold consent denied, but someone else would have the power to exercise that right for them. Further, there is no assurance in the legislation that an ethics review board would include anyone with an interest in patients' rights, let alone patients' privacy rights.

I turn now to the fourth major failing of this act. The fundamental principles of fair information practices which I have said are considered the minimum standard for the protection of privacy state that an individual has a right to access their personal information and to make corrections to that information if there are inaccuracies. And yet, section 44 of the legislation says that patients have no right of access whatsoever to several categories of their personal health information, including personal health information exempted from access by whatever regulations the government chooses to pass.

Section 48 would allow a custodian to refuse a person access to their information if it could be expected to result in harm to the treatment or the recovery of the individual. This is stated broadly enough that a person with no medical training could use this provision to deny access.

Custodians would charge a fee to allow people to see their personal health information. Since the fee would be set by regulation, we have no way of knowing whether this would present yet another barrier to access.

Individuals could ask the custodian of their personal health information to correct errors or omissions in the

record, but the custodian can refuse. If the custodian did refuse but added a statement of disagreement to the individual's file, that would be the end of it. The individual would lose any right to complain to the Information and Privacy Commissioner. This is important because obviously a finding by the commissioner that the record is wrong would carry a lot more weight than a simple statement of disagreement from an individual.

This mention of the commissioner brings me to the fifth major failing of the proposed Personal Health Information Privacy Act. It permits neither sufficiently effective oversight to ensure that privacy rights will be respected, nor sufficiently strong means of redress when these rights have been violated.

Section 68 allows individuals to file a complaint with the Information and Privacy Commissioner, but they must pay a fee to do it. The fee would be set, not by the commissioner but by the regulations. This extremely unusual provision raises the possibility that your ability to exercise your right to privacy would be determined by your ability to pay for the privilege.

Section 68 also provides that the commissioner would have to conduct the review of any complaints in accordance with procedures to be set out by the government in regulations. I must say that, given the skill, knowledge and experience of the commissioner's staff, I fail to understand how or why the government would try to improve the procedures already in place. But it's clear that telling the commissioner how to do her job would be the very opposite of independent, arm's-length oversight.

I am equally troubled by the distinction between the right of review under section 68 and the power of inquiry under section 69. The power of inquiry allows the commissioner to investigate a complaint by demanding the production of documents, entering premises to obtain them, and summoning the witnesses to testify under oath if any of these are necessary. The Privacy Commissioner of Canada has those powers with regard to investigating any complaint or conducting any audit. The right of review, on the other hand, comes without any power. The Ontario commissioner can ask for information or documents, but if the request is denied, she's out of luck and that's the end of it.

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Under section 68, the commissioner would have only the right of review with regard to any complaints about the collection, use or disclosure of personal health information. People would have to pay to have their complaints considered, the commissioner's activities would be potentially restricted by regulations, and then she wouldn't necessarily even be able to obtain any documents or information to assess the merits of the complaints. With all respect, that would be a travesty of oversight.

The commissioner would have the power of inquiry under section 69 only with regard to the right of individuals to see their personal information and to have a statement of disagreement attached.

There are also important gaps in the provisions for redress. If the commissioner reviewed a complaint and found that personal health information was being collected in contravention of the act, section 68 enables her to issue an order to cease such collection and to destroy the improperly collected information. But there is no corresponding power to stop the unlawful use or disclosure of personal health information. The commissioner could neither issue a direct order to end the wrongdoing nor ask a court to do so. All she could do is make comments or recommendations.

I'm at a loss to understand this lack of symmetry. All I can speculate is that the provisions regarding collection are so broad that it would be hard to find any collection unlawful, that the drafters of this bill didn't want to take even the slightest chance of having restrictions imposed on the use or disclosure of health information.

In the case of complaints about the rights of individuals to access their own information, the commissioner can order a custodian to let the person see his or her personal health information. When the accuracy of the information is in dispute, the commissioner can order the custodian to attach a statement of disagreement to a person's file. Orders made by the commissioner could be appealed to the Divisional Court, whose decision would be final, but there is no general right to appeal the failure of a health information custodian to follow the requirements of the law.

Those are what I would classify as the most major failings of the proposed legislation. It is by no means a complete listing of my concerns.

Computer matching of personal health information, for instance, is a big concern because of the exceptions in section 14. Only rarely would the commissioner be able to review and comment on any proposed matching before it took place. In essence, computer matching is another disclosure without consent.

I also have extremely serious misgivings about section 76, dealing with the regulations. This section would grant discretionary powers to the Lieutenant Governor in Council—the cabinet, in other words—to change by decree many, if not most, of the key provisions and definitions in the act.

All of this brings me back to the point I raised earlier about the extent to which this act could meet the test of being substantially similar to the federal privacy legislation. This is an important test. As you know, in provinces that do not have substantially similar laws in place by 2004, the federal Personal Information Protection and Electronic Documents Act will apply. In the health care field, that would mean that key parts of the sector, including doctors' offices, laboratories, some clinics and pharmacies would fall under the jurisdiction of the federal act.

In applying this test and reporting my findings to Parliament, I will interpret "substantially similar" as meaning equal or superior to the federal law in the degree and quality of privacy protection provided. The federal law is a threshold or floor. A provincial privacy law must

be at least as good or it is not substantially similar. I regard substantial similarity as involving all the 10 principles in the CSA code of privacy protection, but as having four particularly key components: consent, access and correction rights, oversight and redress.

In every speech and interview I have given and in the information materials issued by my office, I have stressed that these are the main features of the new federal law. Except in very limited and specific circumstances, no organization can collect, use or disclose personal information about you without your consent, and they can collect, use or disclose it only for the purpose for which you gave consent.

You have the right to see the personal information an organization has about you and to have it corrected if it is wrong. If you believe that your privacy rights have been violated or that the law is not being respected, you can complain to the privacy commissioner, who has full oversight power to investigate your complaint. If the commissioner finds your complaint well-founded but is unable to negotiate a satisfactory resolution, there are two forms of redress: he can bring pressure to bear on the organization by making his findings public and he can ask the federal court to order the organization to comply with the law, as well as to award damages to the complainant. You can also apply to the federal court yourself for these remedies. The decision of the federal court can be appealed to the Supreme Court of Canada.

I don't want to belabour the obvious by pointing out in any great detail how far the proposed Ontario legislation falls short of being similar to these provisions. The federal law says that consent must be informed and that any collection, use or disclosure of personal information without consent must have a clear and compelling rationale. The legislation we are discussing today recognizes consent, but too often does not require it. This legislation not only allows disclosure without consent, it requires custodians to release personal information to the minister, regardless of patient consent or knowledge.

On access and correction rights, the federal law is clear and open. The Ontario legislation is restrictive and not transparent. Under Bill 159, people would be denied any access to whole categories of personal information, including some categories yet to be defined under the regulations. When access is granted, a fee is required to see it. If access is denied, a fee is required to lodge a complaint. If your information is incorrect or incomplete, the custodian can end the matter by attaching your statement of disagreement to the file. You have no other recourse under the legislation. The federal law allows the individual to challenge the accuracy of the information and to have it amended as appropriate.

With regard to oversight, under the federal act, the Privacy Commissioner of Canada is a fully independent ombudsman with a mandate to resolve privacy complaints through investigation, mediation, conciliation and recommendation. If necessary, the Privacy Commissioner of Canada can use broad and unhindered powers of investigation. He can seize documents, enter

premises and compel testimony. He can also initiate audits of an organization's privacy practices. Bill 159, in contrast, does not give the Ontario commissioner the appropriate tools to carry out investigations of complaints, other than complaints about denial of access.

As for redress, the federal act allows the commissioner or individual to apply for a hearing in the federal court of Canada. Based on that hearing, the court may order an organization to correct its information-handling practices and make public the steps it has taken to do so. The court can also award damages for the complainant. Decisions of the federal court can be appealed to the Supreme Court of Canada. Bill 159 does not provide for similarly broad access to the courts. It makes no reference to damage awards, and if a custodian succeeds in having an order of the commissioner reversed by the divisional court, the decision is final; the complainant has no right of appeal.

I am sure you will understand that if Bill 159 were to pass in anything resembling its current form, I would have no choice but to report to Parliament that it is not substantially similar. The final decision would be up to the Governor in Council, but I frankly don't see how anyone could say that legislation that violates or ignores fundamental privacy rights at every turn is substantially similar to the federal law or, for that matter, to meaningful privacy law anywhere in the world.

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I'm painfully aware that I've given you a very scathing and critical view of this bill. In the spirit of wanting to be constructive, I would very much like to find some positive things to say about it, but in all truth, looking for good in a privacy bill that violates fundamental privacy rights does not strike me as a particularly constructive exercise.

I am sure that some people would say this bill is at least a start, that even if it were to pass with some of its many flaws uncorrected, the government can be counted on to do the right things over time. To me, that would be the wrong way to approach such vitally important legislation, even under the very best of circumstances. Laws should not be enacted until and unless they can be expected to achieve the purposes they purport to serve. And laws that leave the most important powers up for grabs by regulation are among the worst laws of all, because they defy the requirement for transparency and accountability. But what is even more troubling is that with regard to privacy, it is particularly difficult to assume that this government would in fact do the right things.

This government's record on privacy to date is, I regret to say, far from reassuring. It wants to subject welfare recipients to the privacy invasion of mandatory drug testing. It has twice announced the names of young offenders in the Legislature. It gave the names, addresses and bank balances of 50,000 of its citizens to a polling company. It tried to use personal information to discredit an individual when a staff member offered confidential information about a doctor's income to a reporter. It has sold personal information for profit in the form of names

and addresses from drivers' licences. It appears enthusiastic about introducing smart cards with the possibility of province-wide fingerprinting or retina scanning.

I would like to believe that these are the results of a lack of understanding of privacy issues or a lack of sufficient attention to them, rather than of a deliberate willingness to attack the privacy rights of Canadians in Ontario. I very, very much hope that is the case. If so, these hearings on Bill 159 and the public interest I am sure they will generate can perhaps be the occasion for a new focus by the government on the importance of privacy rights and for a rededication to ensuring that they are truly and fully respected in law and in practice.

As for Bill 159, I don't believe a law that is so fundamentally flawed in virtually every provision can readily be fixed. The government would have to rework nearly every section, reverse nearly every policy thrust and rethink nearly every assumption, which would be a massive task with so complex a piece of legislation. My suggestion would be to scrap it and start afresh in a new spirit. I believe the people of Ontario deserve nothing less.

Privacy is not a partisan issue nor a political one. It is not an issue of left or right, of federal versus provincial or of business versus government. It is an issue that goes to the core of our shared values as Canadians and of our fundamental rights as individuals. Privacy is an issue that should unite us, not divide us, and the privacy of health information, that most fundamental of fundamental privacy rights, is not only an issue but an opportunity. It is an opportunity for Ontario to be a model for the rest of the country and for this government to show it is coming to understand the importance of privacy as the defining issue of this new decade. So in keeping with my responsibilities as a Parliament-appointed guardian of the privacy rights of all Canadians, it is my privilege and my duty to recommend that this flawed legislation be withdrawn and that a fresh start be made.

Thank you very much for your kind attention. I'd be happy to answer questions or engage in a discussion.

The Chair: Thank you very much. First question, Mrs McLeod.

Mrs Lyn McLeod (Thunder Bay-Atikokan): I appreciate the fact you have raised a number of concerns and also that there are other specific concerns about the bill which you would raise. In the event that your last recommendation of simply scrapping—

Mr Radwanski: Forgive me, I'm having trouble hearing you with the crosstalk.

Mrs McLeod: You have given us, as you said, a broader overview of some of the technical concerns with the bill. In the event of not acting on your last suggestion and scrapping it and starting fresh, it would certainly be helpful, if possible, to get the further technical outline of concerns you have with the bill. But I want to lead off our discussion with some more general areas—I guess it falls under the question, "What next?"

If I can elaborate just a little on "What next?" in two respects: first of all, if this bill goes forward without the kinds of changes you've discussed today, and your recommendation to Parliament is that this is not compatible with federal legislation, my question of "What next?" stands there. What happens then to the Ontario bill? What is the position of the Ontario bill legally if it is not compatible with the federal bill?

The second part of my "What next?" question is, if the Ontario bill doesn't go forward because of non-compatibility, then where are we in Ontario left in terms of health privacy legislation? I raise this concern in the context of having heard yesterday the plea from the provincial privacy commissioner that we not be left without health privacy legislation, and I think that's a very real concern.

As I understand it, the federal bill really just deals with commercial transactions. It may deal with privacy issues related to health in commercial and private situations, but it would still leave the issue of health privacy, in terms of any exchange of information within the publicly funded and administered health system, without any rules. One of the things we heard yesterday was that there are no rules now governing the collection, use and disclosure of personal health information among those who hold it as public administrators and deliverers of health care.

So my questions are: What next in terms of compatibility? What happens to this bill if it's not compatible? Where does Ontario go because Bill C-54 doesn't solve the problems of health privacy protection?

Mr Radwanski: Those are, I think, very pertinent questions indeed.

On your first question—What happens?—let me take you through the steps. First of all, in due course, I am mandated to report to Parliament on the extent to which provinces have passed legislation that is substantially similar. In this instance, when that time came, if this law passed, let's say, in its current form or anything similar, I would have to report that Ontario, certainly with regard to health care, would not be among the jurisdictions that had passed substantially similar legislation.

The determination to exempt a sector or the entire private sector in a province from the federal legislation is ultimately not up to the commissioner but up to order in council. But obviously that would be guided to some significant extent by the report of the commissioner, and in an instance like this, although one can never presume to speak for the political process, I think it would be extraordinarily difficult for anyone to say with a straight face that legislation like this is substantially similar. So I doubt that would occur, though I cannot presume to predict.

If we were in that situation, I guess part of the answer to your question is that nothing happens to the provincial law, in that it is not disallowed or set aside or anything of that nature. It stands as a provincial law. But what happens is that in the areas covered by the federal law, at the point where it extends to the entire private sector in

2004, federal law takes precedence. So what you have is a reasonably messy situation where there is a provincial law which says that people can or must do certain things, but if they did them, they would be in violation of the federal law and would be subject obviously to the overview of the commissioner, but would also be subject to enforcement even in the courts under the legislation. So for all practical purposes, the standard that would have to obtain would be the federal law. But you would have a situation that is obviously not comfortable, that is not neat and that can best be avoided by having laws across Canada that are substantially similar, which is simply to say laws that genuinely respect the privacy rights of individuals.

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Substantial similarity, as I said in my earlier remarks, does not involve meeting some extraordinary standard by any stretch of the imagination. It simply involves showing the minimal necessary record of respect for privacy rights. So that's the first part of my answer.

The second: I'm aware of Commissioner Cavoukian's comments yesterday. I respectfully have a different view. I don't see how the health privacy rights of individuals are assisted by enacting into law privacy legislation that violates those health privacy rights. In fact, the effect would be to legitimize and enshrine in law the right to invade the privacy of individuals in Ontario with regard to their health information.

To me, giving cover of right and of law to what from a privacy perspective is wrongdoing is not progress. It's possible, though I certainly wouldn't want to give a legal opinion, that in some respects it might actually reduce the rights of people to have that kind of deficient law, because at present, if your health privacy rights were egregiously violated and you suffered some serious detriment as a result, in the absence of any law that permits that kind of egregious violation, it is possible that an individual could go to court and obtain damages simply for general violations under tort law. Obviously if it were under cover of right, under cover of law, that would not be the case. So I can't make the argument that badly flawed legislation is better than no legislation.

I believe it is possible, without having to spend another umpteen years, to craft privacy legislation that is substantially similar to, in fact consistent with, the federal law. Past a certain point, quite honestly—it is not even such new ground that it can't be brought forward. A lot of research and work have obviously been done. But I don't believe that anything as badly flawed as this can be fixed by a process of amendment, because you will literally have to go through every clause and in many cases reverse its purpose, reverse its wording.

I would use the example of looking to buy a car in which the engine is shot, the transmission is busted, the body is rusted out and full of holes, and the tires are worn. Yes, maybe it's possible to put in a new engine, replace or rebuild the transmission, reconstruct the body and buy new tires, but if you told someone you were considering getting that car and doing that, I think most

sane people would tell you, "Don't do that. Go get another car and avoid all these problems."

I think that's the kind of problem you face with legislation that from start to finish is riddled with deficiencies of this sort. I don't know if that fully answers your question.

Mrs McLeod: Just to comment, governments find this very difficult legislation to bring forward, and this is the first time we've had a health privacy bill come forward and make it this far. It hasn't made it to second reading yet, but it's the first time it's come this far. Suppose the government just says, "Forget it. It's too tough. Let's just scrap the whole thing." I think that's the fear Ms Cavoukian was expressing yesterday. What are we left with? Bill C-54 doesn't speak to much of the area where we need health privacy protection; at least that's my understanding of C-54. Perhaps you could just comment on whether C-54 serves the purpose that needs very much to be met.

Mr Radwanski: It doesn't meet all purposes, obviously. If there were no law, it would cover certain segments, which is somewhat broader than one might think. Obviously, a lot of this will be open to interpretation by the commissioner and maybe eventually the courts. But my view, for instance, is that doctors' practices would be covered by the federal law because—

Mrs McLeod: Would they?

Mr Radwanski: Yes, because a doctor's office is a private sector activity that is for-profit. From whom the profit is received is a secondary concern, so doctors' offices would be covered, laboratories would be covered, a range of clinics would be covered, pharmacies would be covered. That's a large chunk. Hospitals most likely would not be covered, though there are some arguments that could be made. I don't want to make a pronouncement on that, but I would not include them among the ones that definitely would be covered.

You would have gaps, no question. A large chunk of the sector would be covered by law that provides meaningful protection but really is built on the right information practices and that, other than in exceptional circumstances, requires the right of consent, provides redress and so forth. For the rest, you'd have a gap, as you do now.

But frankly, there is one other element to factor in, and that is, when I say that privacy will be the defining issue of this decade, one of the things I am talking about is the degree to which public awareness of the importance of privacy is very much on the rise. You need only look at the media to see there are stories every second day in the media on this. A very important part of my own mandate under the new federal legislation is public education, which means raising the level of awareness in the country, which I am doing in a variety of ways, including things like being here today, and will be doing a lot of over the time ahead. Commissioner Cavoukian and her office also have a role in raising public awareness. The media are on the case.

So my answer to your question is, rather than put in a bad law, don't worry; public opinion will require a good law, and before very long. I don't think we need worry that the public, once it becomes aware of the degree to which personal health information is up for grabs—because I think many people still believe that information that goes from them to their doctor stays there and don't know all the secondary uses, all the ways it goes around. When people know this, I think the issue will be self-limiting and that there will be a climate in which good privacy law can be passed. Frankly, that's better than creating a law that may appear to be doing good things, and it's only, as one goes through experience with it—you know, nobody can read this law and understand what it says.

Let me just add, I have a degree in law and I've spent most of my adult life dealing in one capacity or another with issues that involved reading bills. I have spent hours reading this thing and I have to draw charts. I have to track: "Well, it seems to mean this, so-and-so is covered by this, except there is this other provision where they're not covered." But of course none of this matters, because a regulation may do something yet different. Having a law like that, I would argue we should not be afraid to see it done right.

Ms Frances Lankin (Beaches-East York): Commissioner, I'm tempted to ask you to tell us what you really think.

I guess I want to place on the record that there are a lot of people who will feel reassured by your commitment to the protection of Canadian's privacy and that there is a champion and watchdog in the federal commissioner's position who will do that. Mrs McLeod raised the preliminary question I had as well in terms of, if not this, what? I hear what you're saying clearly.

I feel saddened by that in a sense because I'm well aware of the history of the attempt of many fine people in the bureaucracy of the province of Ontario who have worked to try and bring forward health privacy legislation through at least three governments, several terms of governments and many ministers of health, myself included. And what's interesting about your comments is that you see a change in the political landscape led by public opinion that will make this more of a priority legislative activity for a government. In days of polarized politics and ideological swings in politics, it's not often that a non-ideological bill can find its way on to a government's priority agenda and find its way to a committee for serious work. We're at that moment in time, in a sense.

1210

I've got lots of thoughts about why the government is bereft of ideas at this point in time and how this made it, but it's here and it is a moment in time where members of both opposition parties, Ms McLeod and myself as health critics for our respective parties, have indicated a real interest in working to bring about health privacy legislation, a framework for this province. While we see significant problems with the bill, we were willing to,

through this process of hearings, take this to a working table where we sit down and seriously work through consensual amendments to build a good piece of legislation with tripartite support.

I think that's what our Ontario commissioner was urging us to do. I believe I'm in substantial agreement with you about the nature of the job, how big a job that would be, but I would genuinely hate to see this bill pulled from the public agenda at this point in time as a result of your urging, and hope that among things like a cabinet shuffle happening today, a new minister—although I can see some of the political staff of the outgoing minister probably feeling a little bit like there's a silver lining in this move that they hadn't thought of before, not having to deal with the fallout of today. A new minister, a potential House-proroguing—there are a lot of issues that could really just set this whole initiative back two or three years at this point in time, despite what you're saying, that there's growing public pressure.

I guess I still, in the context of our work, hope that we can work to fix the very many problems—substantial problems. As I listen to you, I hear the problems listed, if I can summarize and you can perhaps tell me if I've got it right. There is not enough protection in terms of collection of information, what we collect; there is too much directed disclosure; there is too much discretion in terms of what the minister can do after the fact through regulation; there is not enough guarantee of access to one's own information; there is not sufficient oversight and accountability through the commission; and there's not adequate redress for individuals. Wrap it all up in a very complex bill that's not very transparent and you've got a big problem.

I would be interested in, first of all, your comments in those areas. Do I understand what you're saying clearly? Are those the key problems? If we had an undertaking of the three parties to move to some kind of working process here to reconstruct the bill rather than scrap it—because I give you my political caution that it won't be back in a couple of months, it will take much longer than that—can we count on a dialogue being opened, as we have with our Ontario commissioner, with your office in which the legislative drafters have an opportunity to seek your input on the issue of substantial similarity? I think one of the things that's been difficult for the Ontario policy developers and legislative drafters was for them to know what standards would be used for judging substantial similarity. I think you've made that much clearer today. Perhaps if we could have a line of communication established with you as we engage in this project and the people within the ministry who will be doing much of the work of rewriting, that might move us quicker than your suggestion of actually pulling this off the table and starting again.

Mr Radwanski: I hear what you're saying. Let me try to respond.

Ms Lankin: And remember, this is an opposition member speaking here.

Mr Radwanski: It's not my job to take that into account one way or the other. In fact, I was just going to say that it's not for me to comment on the politics of this one way or another.

I guess in one way what you are describing in terms of the work of this committee—if you are saying in effect that this committee could rewrite this bill more or less from start to finish and produce a good privacy law, obviously what matters is the outcome. If your committee can basically change every provision and in effect start from scratch and write a meaningful privacy law, then I suppose it wouldn't much matter if the desired end was achieved by your committee doing that rewriting or if the bill is withdrawn and another process produces a good privacy bill. So in that sense, whether it's withdrawn or rewritten here or anywhere else is not the crucial issue.

My concern is that what normally happens in this kind of process is there is some amendment, some improvement. A lot, in the case of a bill like this, of really unfortunate features would still remain. Then it gets put through under the guise of being much-improved legislation and you end up with a law which still falls far short and which leaves privacy rights very badly at risk. That would be a very unattractive outcome. That is really my concern, and frankly, when one looks at rewriting and fixing this bill, wherever it's done, it's a Herculean task and it would be an unusual task for a committee to be able to achieve, in my view. I'll put it that way.

Again, I won't argue against it. If it can be done, more power to you. But if this weren't called a privacy bill, if the name of this were the Widest Possible Access to Personal Health Information Act, I don't know if one would still be saying, "We can fix it with a few amendments here and there," because that, in its essence, is what it is. So one is talking not about changing a word here or there, modifying a clause; one is talking about, as I've said, reversing the policy thrust of most provisions, removing a huge host of exceptions. You end up with a new bill. If it can be done in committee, that would be a marvellous achievement for a committee, but it's what matters at the end of the day that is critical.

On your second question, we're into virgin territory here, of course; this is all new. The law is new; the issues this province is trying to pass legislation in compliance with are new. Certainly I'm open to an ongoing dialogue with myself and my office and would be glad to be helpful in whatever way I can. I guess the only caveats are that my office too does not have unlimited resources—far from it—and there may be a lot of provinces with a lot of legislation in a similar boat, so it's a question of degree as to what's feasible on one hand in terms of analysis and resources. Also, obviously, it is not for me to write provincial laws; far from it. But to the extent that an ongoing dialogue with a committee or with a government—ie, an ongoing, in no way partisan dialogue—is invited, it's certainly my job to try to advance the cause of privacy in any way I can, and that would certainly be a large part of it.

The disposition, I should add, as witness my presence here today, is not to keep people in suspense, let provinces or provincial governments pass legislation of one kind or another and then pop down at the end of the day and say, "Uh-uh, you fail. That doesn't meet the standard," or whatever. I'd much rather be able to make a positive contribution to people understanding what the criteria are, what "substantially similar" means, in helping them to get there. So yes, if I can help with that, I'd be delighted.

Ms Lankin: I suspect that your presentation today will aid in your other mandate of public education. I also suspect that the new minister tomorrow morning will have a very important issue on his desk to deal with, leading from the headlines in the paper.

I don't have any other questions. Thank you.

1220

Mr Toby Barrett (Haldimand-Norfolk-Brant): Thank you, Mr Radwanski, for your presentation.

I want to raise an issue I raised yesterday with our Ontario privacy commissioner with respect to the firearms owner's licence application form, which many, many of us filled in by the deadline, the end of last year. On that form, I know there were a number of questions or boxes to check off, one relating to an applicant's mental health history. It's my understanding that in the province of Ontario our community mental health centres really have very few barriers for clients' mental health information to be disseminated, perhaps to a lawyer or a spouse around a custody battle. These are things that are reported to me in my riding, but with respect to this application form, I'm assuming once someone checks off that box that they do have a mental health history—I know there's a follow-up; at minimum, there could be a telephone follow-up. I'm not clear about how detailed the investigation is, whether they would, as police can do, access our Ontario community mental health centres for this information.

With respect to the application form—you mentioned the importance of the media, and there are people in my riding who follow some of your work in the media in respect to this what many consider a privacy issue. Under the current rules, gun owners or potential owners are required to state on the form whether in the past five years they have—and I can quote several of the issues—"threatened or attempted suicide," "been diagnosed or treated by a medical practitioner for: depression, alcohol, drug or substance abuse, behavioural problems, or emotional problems," and in addition, to quote further, "experienced a divorce, breakdown of a significant relationship, job loss or bankruptcy."

I represent a rural riding. Most farmers are gun owners, for example. Many have a .22 in the barn to shoot raccoons and things like this that kill chickens. Many farmers are on the verge of bankruptcy and are being encouraged by the Ontario government to go for stress counselling, and I fully encourage that in my farm community. If they were telling the truth, they would check off this box, and I'm unclear where this lies. Could

you comment on that issue with respect to privacy? I understand you've done a bit of work on this.

Mr Radwanski: Sure. I'll be glad to comment, even though it's a little outside the scope of our discussion today. I'm happy to comment, in any event.

Mr Barrett: And I couch it in terms of our mental health system. As I understand it, in Ontario, community mental health centres are pretty open as far as passing out clients' information. I'm aware of clients who don't come back for counselling any more once their spouse or their spouse's lawyer gets that information. That's part of my concern.

Mr Radwanski: On that point, you're touching on one of the reasons why good health privacy law is very important, because you're exactly describing what can happen if privacy rights are violated. That's the point I was making, that if people can't be confident that their health information is private, they may not seek the kind of care they need, and that can be devastating not only for them but for society. So I think we're very much in agreement on that.

On the gun law, that falls very much under my jurisdiction under the federal privacy act. As you know, there are two separate pieces of legislation. The one I've been referring to today, C-6, is the new law that pertains to the private sector. There has been in effect, as you know, a federal privacy act pertaining to areas of the federal government, federal institutions, for many years, and the gun registration aspects fall under that. So they do fall under my office.

We have been conducting an informal review of many aspects of the application of a gun law and so forth. The office, under my predecessor, expressed concerns about many of the questions that were being asked on the forms. Some modifications were made as a result of those concerns in the early stages of preparing this law. On some of the questions about which you were asking, a number of experts were brought in and presented to my predecessor, making the arguments why these things might be important indicators of potential violence by people if they acquired guns, and my predecessor was persuaded.

To be very honest with you, I'm not fully persuaded that all those questions are appropriate or necessary in the circumstance and in this process. That is why I have initiated a review of those questions. For instance, to be candid with you, some of the questions in my mind are: does there need to be a distinction between what you would want to ask someone seeking to acquire a firearm for the first time and someone who may have had one or several for the last 20 years? If someone has just lost a job or is in the midst of an imminent marriage breakup and develops a sudden urge to own firearms, that could be an indicator that is worth considering, but if someone has had firearms for 20 years and went through a divorce three years ago, what has that got to do with anything?

These are the kinds of questions I am going to look at. I won't prejudge it by telling you what my finding would be, because I don't know. I will have to hear the

arguments afresh on some of those points. Obviously the protection of the public and the public interest are paramount considerations, but the principle is that only information that is truly necessary to achieve the purpose should be sought, and I will have to be persuaded that that in fact is the case in this instance. So you raise a legitimate concern and one that I will try to have a response to at the earliest time.

Mr Barrett: Beyond the form, I understand that if a person does check one of the boxes there is a follow-up by the firearms officer, or they may delegate that responsibility to local police. As I understand, it's done by telephone. Whoever picks up the phone, or it may be the person who is listed on the form as a reference, is also asked a number of questions. As I understand it, this is just done on the phone, that nobody signs anything; it's merely a telephone interview in many cases. The questions that are coming in by phone are, has the applicant acted in a manner that suggests they are disturbed or distraught or suicidal or may be suffering from a personality disorder, or are known to have a history of mental illness, or are they under any financial pressures?

It seems so vague to be doing this by telephone. I don't know how whoever answers the phone is identified as being the reference or the spouse. It seems like an awfully vague way of following up on this, as I understand it. How is it verified? These may be technical issues.

Mr Radwanski: You're raising questions that deserve responses. I would have to say in a broad sense that one area that is exempted, generally speaking, is the right of the police to conduct investigations, to conduct inquiries, for whatever reasons. They are allowed to ask questions. So the extent to which the questions or the research processes would be in violation is a technical question that I would not presume to answer off the top like this. But you are raising questions that merit consideration and, as I said, are part of what I and my office are going to be reviewing and are reviewing as we speak. The best I can tell you is that those kinds of questions are not foreign to me. They are under advisement and it is part of my responsibility to ensure that privacy principles and the privacy law are being respected in this field as in every other. Certainly when we reach findings, whatever they are, they will not be kept secret, so you will know what I conclude. But I appreciate the question.

1230

Mrs Sandra Pupatello (Windsor West): Thanks so much for your presentation today. Could you clarify what you think the process—

Mr Radwanski: Sorry, again I'm having—I guess it's the translation. Could you speak up a bit? I'm having trouble hearing you.

Mrs Pupatello: I never have trouble being heard. I'm enjoying this.

The Chair: Forgive me, Mrs Pupatello. In fact, Hansard has been saying they are having trouble hearing,

so could the members lean closer to the microphones. Thank you.

Mrs Pupatello: Thank you so much for your presentation today. Could you walk me through the steps: if this bill is passed and an individual's rights are violated in terms of information being forwarded that is in accordance with the Ontario law but in contravention of the federal law, tell me what an individual would have to do to be aware this has happened, which in itself, as you have described, is a major item because they may not know—we don't tend to know now what are the secondary uses of information. But in describing the limited authority of the Ontario privacy commissioner—of investigation, of audit, even of frankly being at the whim of somebody's mood as to whether they can access information for an investigation—tell me what would happen with an individual going forward with a complaint.

Mr Radwanski: Very simply, the provincial law would be in place, but for my purposes what it permits or not would not be relevant. An individual would complain to my office that they had reason to believe a privacy right under the federal law had been violated. They would be put in touch with an investigator, they would be asked to state their complaint in writing, and then we would investigate. As I said, we have extensive powers of investigation, full powers. I am happy to say that in the case of the public sector law, the federal Privacy Act, we have never once had to use those powers under any of my predecessors because we have always been able to get voluntary compliance, voluntary co-operation. But I am quite sure we've only had voluntary co-operation because those powers were in reserve. There is not much point in saying, "No, you can't see this," if we can turn around and say, "We're invoking our powers. We will see it."

In the private sector area we would have full power to investigate. An investigator would go and follow the chain of what appears to be an inappropriate disclosure or collection or whatnot, and find out what had transpired. The complaint may be valid or it may not, but we can see any document, ask any question, and get to the bottom of a complaint. I am very fortunate in that I've inherited an excellent office in that regard, with very well trained investigators, and we are expanding our resources to meet the challenges of the new private sector law as well. So the investigation would be carried out.

If there is a problem—if it's an ongoing pattern, for instance—one tries to resolve these things in an amicable way, as an ombudsman function. I am an ombudsman. One tries, first of all, to persuade the organization or entity with whom the issue arises—the complaint—to cease and desist from doing whatever is inappropriate and to remedy a situation in whatever way is possible.

Mrs Pupatello: In that case, correct?

Mr Radwanski: Yes, but also more broadly if there is a systemic pattern. For instance, if somebody is systemically collecting or disclosing information they have no business doing—

Mrs Pupatello: Would you need to have several cases come before you in order to determine the systemic nature of that?

Mr Radwanski: It might become clear in the course of investigating one case. If somebody says, "My information got to so-and-so," and you investigate and find it got to so-and-so because this entity has a process whereby information is provided to whomever, you don't have to have umpteen cases to say, "You can't do that. Stop doing it right now."

Mrs Pupatello: At what point and in what way do you have the authority to have the Ontario law struck down?

Mr Radwanski: I don't. There is no issue of striking it down. But the point is that the federal law takes precedence.

Mrs Pupatello: So do you continue—

Mr Radwanski: I understand what's confusing you. There is an Ontario law on the books that says you must provide your information to such and such and there is a federal law on the books that says, in effect, you cannot be providing information over there because you can't justify it and there is no basis for it and you don't have consent. That's what you're asking. What happens then?

What happens then is, I exercise my responsibilities to say that cannot be done. Let's say hypothetically—and we are in the realm of hypothesis—but let's say that the provincial government tried to enforce its law and that ended up in court. It is an established principle of Canadian law that where there is a conflict, federal law takes precedence where there is a legitimate law.

So the fact is that, without presuming to speak for the courts, the logical outcome is that the finding would then be that the federal law prevails, that the person or the organization must cease and desist from what is in violation of the federal law and that therefore they are in a sense exempt from any penalty under the provincial law, because if one law takes precedence over the other, then in that sense, where there is a conflict, the other law does not obtain. Do you follow?

Mrs Pupatello: Yes. The reason given that the Ontario government went forward with concerns over federal law was that they were going to be very restrictive in moving forward on the integration of health services.

How do you respond to that concern? It seems to me that your law federally does cover the private sector, and the concern in Ontario is that further integration may well mean further privatization and their access to personal information for a whole variety of reasons.

How do you explain then that your law was not extensive enough to deal with integrated systems which every province in Canada is dealing with? Does every province have to come up with a health privacy bill because your federal law did not widen its scope enough for it and, if so, why didn't you?

Mr Radwanski: It's not why didn't I, to be clear. I had nothing to do with passing the law and I'm not part of the government of Canada. I am at arm's length.

Mrs Papatello: Why didn't they? They went to all that trouble. Apparently every province is dealing with the same issues of health delivery as Ontario, and Ontario doubly so.

Mr Radwanski: But what the federal government cannot do is pass laws that govern a provincial government. What is directly under a part of a provincial government activity, that sector cannot be regulated by federal law.

The federal law can only apply to areas where, under various constitutional powers, federal jurisdiction can extend. I don't want to get into the constitutional argument under any circumstances here, but it can extend to the sectors I've described. It cannot extend to sectors that are a public sector of a provincial government.

Is it imperfect in that sense? Yes. But it extends as far as it is possible for the federal law to extend and, frankly, I would imagine the hope in drafting this legislation is that all governments would agree on the fundamental importance of privacy, the desirability of protecting the privacy rights of Canadians and that all provinces will in fact avoid the kind of complexities that we've been discussing today by passing laws that are at least of the same quality, in terms of their privacy protection, as the federal law, which civilized jurisdictions around the world are doing. So it was not seen as a particularly far-fetched assumption that the provinces would want to step up to the plate.

There is also the possibility regarding the private sector that some provinces, particularly the smaller ones, might choose not to have to get into the challenges of oversight and so forth that would be involved in overseeing the private sector and might quite simply prefer in the private sector to have the federal law apply and have my office have the oversight in the same way that some provinces, for instance, don't have their own provincial police but use the RCMP. There's that aspect as well.

1240

Mrs Papatello: Do you think then with the Ontario law, given what may happen if it's implemented and the chaos or misunderstandings that may occur in the private sector involvement in health care—given the two levels of law being so different—that we're actually creating a larger hurdle in integrating health care if we pass the bill than if we scrap it?

Mr Radwanski: You're getting there into areas that really aren't for me to say. What I will say is that passing a bill that is not substantially similar to the federal law is going to cause problems and confusion and it is going to subject, certainly in any area where the supply is, elements that are covered by such a provincial law to a great deal of confusion, and it's just not an ideal outcome to end up with a conflict of laws. That's clear.

Is that worrisome? If I understand your question, it is a bigger problem if you pass a law that will end up creating confusion and be in conflict than if there is a void there and the federal law simply applies without having to have that contest and the conflicts and people being

whipsawed by conflicting provisions, yes. I'm not going to comment on the integration aspects, but certainly in terms of the—

Mrs Papatello: It was the one significant reason apparently that the Ontario government was asking for that window to create their own, because they felt it would be such a barrier to integrating health services.

Mr Radwanski: Well, it's good if they create their own, but it should be a law that protects privacy.

Ms Lankin: My understanding is slightly different in terms of the integration issue. The concern on the part of the province of Ontario is not that there would be federal legislation governing one section of health and nothing governing the other—that in fact would be problematic, there's no doubt about that—and another level beyond that. The goal of health reform, which I'm not asking you to comment on, by many governments of many different political stripes—and we may debate how we go about it, but many people have agreed on some of the principles—sees systems integration in terms of treating the patient at the centre of it and the services being well-informed in terms of good decision-making for the patient.

I guess in a sense it comes down to the issue of consent, though. The way to get around all that is to have the patient's consent. There are other issues, however, that governments are concerned about with respect to management of a very complex health care system, and this is where I would like your comment, because certainly there are decisions: how many hospital beds you're going to have, how many appendectomies you're going to staff for, what kind of in-patient versus outpatient, what type of epidemiological outcomes there are of certain kinds of procedures, what kind of rate of caesarean sections we are experiencing in Kingston versus London and why, and how we effect medical doctors' practices for best outcomes.

There are a lot of very good and important social health goals, and there must be a way for us to do that without violating individual privacy, because I don't want my individual health privacy violated. I'm not asking you to comment on this legislation, because I think the problems that you've identified are clear there, but I'm asking you to envision how you draft provisions that allow the kind of research or systems management issues to be addressed. Is it always going to be anonymous information? Is it always going to be coded with steps in between? What are the protections for privacy that can be put in place that still allow these other goals to be met?

Mr Radwanski: I don't mean to suggest that you are raising it that way, but this whole question of management of the health system as regards personal information is a bit of a red herring in this sense: in the examples you're giving, to plan what the needs of the system are regionally, province-wide, whatever, yes, you may need to know how many appendectomies are being performed or what the trend line is, for example, what the demand would be. So you ask the hospitals or you ask the surgeons, "How many appendectomies did you

perform?" You don't need to ask, "Let's see the names of the people on whom you performed them." That simply makes no sense. The kind of management information we're talking about has nothing to do with—

Ms Lankin: Perhaps I didn't give you good enough examples, because I think that's a bit of a simplistic—

Mr Radwanski: I'm responding simplistically to make the point that most management issues with regard to the health care system don't require the wide circulation of the personal health information of any individual. There are systemic questions, there are statistical questions, and you're talking quantities, rates, incidence and so on. You're not talking about needing to put the personal facts of an individual into play. There can be exceptions, but that's why one talks about exceptions having to be justified and carefully circumscribed, not simply documented but explained, circumscribed and so forth on a real need basis. But there's no need for information to be whizzing all over the place under some vague rubric of management, not that kind of information. So that's really the answer to your question.

Coming back to consent—I just want to pick up on that first part—yes, consent is the key, but it's also critical that it be, first of all, obviously, informed consent, that you understand what you're consenting to, that it be specific consent, and that it be free consent. It's one of the principles that access to a service should not be denied as a consequence of declining consent to a use of information or a disclosure of information that is not intrinsically crucial for the provision of that service in a direct sense. In other words, it would be fundamentally wrong to say in effect, yes, consent, but we'll make it a condition of having your costs reimbursed by OHIP or we'll make it a condition of admission to this institution that you must sign a consent form that permits X, Y, Z forms of circulating your information. That would not be good consent. I don't know if I've fully answered your question or not.

Ms Lankin: I think you have. I do think it would be useful to explore the issue of—for example, the Ontario commissioner talked about some circumstances like epidemiological research. There's longitudinal research being done where it's important to track back what's happened to individuals, and yet it's being done on a population health basis. So a certain part of the population exempting itself from that study creates problems in terms of the quality of the outcome. She actually said that was a circumstance where she felt there was a possible reason for exception to privacy.

Mr Radwanski: It might be. I would have to say I've heard that argument made and I've heard a lot of anecdotal evidence that not having the full sample somehow badly skews epidemiological research. Not to say it is not out there, but I have not seen the persuasive evidence that this is in fact the case. I have not had somebody point to, "The following studies that were of real importance turned out to be badly flawed because...." for instance.

Ms Lankin: The question is, how would we know yet? I lot of this stuff's ongoing.

Mr Radwanski: You can make arguments for violating privacy in that general sense: "Something bad will happen if...."

Ms Lankin: I agree with you.

Mr Radwanski: You can go across the board on issues and make that kind of hypothetical argument, but there has to be real evidence that that would be a problem, and even for that kind of research, my broad view is that Canadians are a very co-operative people in a lot of ways—and I've said this—in a lot of senses, and they are a sensible people. If you ask for consent for a limited specific purpose, you satisfy them that it will not be used for any other purpose and that it is a good purpose, the great majority of Canadians will give their consent. So does violating privacy rights stand as a precondition of good research? I don't believe it.

1250

Ms Lankin: I think it'll be important for the committee to examine some of those arguments that are put forth. Maybe we need to look beyond the assertions and look at debunking some of that and understanding it better. There is a lot of language that gets thrown around and, if you're not working in the field, it's hard to assess. I appreciate your comments on that.

Mr Radwanski: I should add that some of the arguments for research—research covers a multitude of forms of activity and some of that cloak of research is wrapped around activities that are quite simply commercial and for-profit, and yet they are enveloped in a cloak of public interest which, again, in looking at the fundamental privacy rights of Canadians, anyone entrusted with these areas should look at very, very closely.

Ms Lankin: I'm going to take you back into the realm of the hypothetical again. There is a piece of legislation that was passed in the province of Ontario called Brian's Law and it provided amendments to the Mental Health Act to do a number of things with respect to the involuntary commission of people to psychiatric hospitals. It created a new regime, a new system, called community treatment orders. In the section with respect to community treatment orders—I'm sorry I don't have it in front of me—there was a provision, in a sense, for directed disclosure about people's personal health information that had to do with a certain number of individuals—doctors, family and community people—who would be involved in the creation of the order and the maintenance, the servicing of the order, so the care plan for the individual.

At the time, there was a concern in committee that there was no protection for this information that was being shared. Some of the groups in the community aren't under any government ministries so they weren't covered by freedom of information and privacy, so there was no protection. We did a little clause in committee which probably isn't sufficient enough, but tried to cap that. But I'm wondering whether that whole area is a problem now. If in a community one of the partners in

the delivery of the services under a community treatment order happens to be a private, for-profit addictions service, and if we don't have health privacy legislation in Ontario—or even if we do and there's a conflict; if they're under Brian's Law, they're directed to be part of this—your law, the federal law, takes effect and we could have situations where a person might actually come to appeal to your office that there's been a violation of their privacy rights under the federal law. We're into this already in terms of the problems, hypothetically, do you think?

Mr Radwanski: Well, your last sentence touched on what was flashing through my mind as you said this, which is that because hypothetically someone might come to my office with that kind of a complaint—

Ms Lankin: You'd better not comment on it.

Mr Radwanski: —I cannot comment on it because the one thing I cannot do is basically prejudge issues that might come before me for adjudication.

Ms Lankin: Fair enough. I'm thinking this complex area is becoming more complex as the day goes on.

Mr Chair, I'm not sure when we're going to wrap up the questioning.

The Chair: Two more questions.

Ms Lankin: I do have questions and/or recommendations for the parliamentary assistant. I actually feel that before we talk about whether the committee proceeds with public hearings and those sorts of things, given that we have been told clearly on the record the federal commissioner's recommendation is one that there is not substantial similarity, there's a preliminary question for us to deal with.

Mr Bob Wood (London West): I've got some questions I want to put—

Ms Lankin: On that point?

Mr Wood: Could we deal with that at the end, after we adjourn?

Ms Lankin: Sure. Thanks.

Mr John O'Toole (Durham): I have a couple of questions and I'm sure, if time permits, Mr Wood will as well. I'm quite interested in following up on the remark you made to Ms Papatello. In a general sense I'm wondering if you felt that we have to look at health care in a national or potentially global setting, as in many issues in the e-world. I think the United Nations provoked Bill C-6 federally. My first question is, do you think Bill C-6 substantially went far enough? The shorter answer would be the one I'd be looking for, like a yes or no.

Mr Radwanski: Well, we're not in court and I won't be restricted to yes or no, but I will say that I think it is an extremely important step forward. Certainly there are additional features one might wish for, but I believe it is a good privacy law that is consistent with international standards of privacy protection.

Mr O'Toole: The reason I was asking is that I'm trying to lead to some discussion about the comment you made about "substantially similar," in other words, that drafted provincial or subordinated legislation has to be substantially similar to the provisions and guidance with-

in the primacy of the federal government in areas of jurisdiction. I wonder if you could tell me what is the test for "substantially similar." Can you tell me that the test involves the consent, the disclosure? That's ultimately what I would like to understand. Is there a test or is that still part of what the debate is about?

Mr Radwanski: No. In large measure, the test is not spelled out in the legislation. That's clear. However, the Privacy Commissioner—in this case, myself—is required under the legislation to report to Parliament on the extent to which provinces have passed substantially similar legislation. Therefore, part of my responsibility is to determine what is an appropriate criterion for me to apply in determining whether something is substantially similar.

The obvious criterion is the privacy principles, the information-handling principles, that are the international standard, that are the CSA code and that are embedded in the legislation, in the schedule. For me, although to be substantially similar it must be in accordance with all those principles, the ones I regard as the particularly important elements of the test are: first of all, consent—that goes to the very heart of it; second, access and correction, because your privacy is utterly violated if you can't find out what information is held about you and if you can't do anything about it if it's wrong; third, oversight—any privacy protection regime is only as good as the mechanisms for knowing whether it is in fact being followed; and finally, redress, because all the good intentions in the world won't do you much good if you don't have the means of ensuring that the law is in fact respected.

Mr O'Toole: I appreciate that. I'm wondering if there has been some test. Industry Canada declared that the Quebec privacy legislation in 1999 was substantially similar. From what you've said, they have made an assessment based on no prescriptive formula for what "substantially similar" is. As you've described it, you still haven't filed your report.

It does alarm me somewhat, I might say, that somebody is telling me two things. When you look at the CSA and other international standards, which I'm sure you're constantly studying, can you give this committee some guidance so we don't end up with some charter challenge, a very expensive, convoluted process? Should you rule or should the courts rule on this? Who has primacy, you or the courts? Is it the Supreme Court that should rule on this?

1300

Mr Radwanski: On what? To what are you referring?

Mr O'Toole: "Substantially similar," and defining some formula for the testing, whether it's on informed consent, disclosure, redress—the number of elements you mentioned. I don't disagree with any of them; I'm just saying in the context of somebody saying the Quebec law was substantially similar—they can't say that, because they have no test to say that. That's the kind of logic I'm following.

How does it actually get determined? First, I suspect the primacy should fall to you as an independent

commissioner—or does it fall to the Supreme Court, which is another independent commission?

Mr Radwanski: The legislation doesn't provide for any recourse to the courts on this point.

Mr O'Toole: No courts will decide this?

Mr Radwanski: On this point, the legislation makes no reference to that. Let me put it this way: I am required to report to Parliament on the extent to which substantially similar legislation has been passed. I am an officer of Parliament. I don't believe there is any mechanism that can constrain my freedom to report things as I see fit. Are you with me so far? Do you agree so far?

Mr O'Toole: Oh, yes, absolutely.

Mr Radwanski: So I will report to Parliament, and obviously I will have to use my best judgment as to what it is fair to regard as criteria for "substantially similar." The recourse, I suppose, is for someone to say, "This guy is an idiot. There's no way it's reasonable to regard that as a criterion." But hopefully I will be fair-minded and the criteria that I've described today are appropriate ones. That is as far as my responsibility goes.

The next thing that happens is that the cabinet, by order in council under this law, may—not "shall"; not "must," but "may"—exempt from the application of this law sectors or the whole private sector in a province where a provincial government has passed legislation that is substantially similar. The logic of this is that they will base themselves on my recommendation, at least to a significant extent, because why else would that be in the law? But technically speaking, through the order-in-council process, cabinet can make any determination it wants. It is not bound. There's nothing in the law that binds it to follow my recommendation. The right of a cabinet to make its own determination of what is substantially similar under this law, again, I don't believe is appealable to a court, because that isn't the prerogative of the cabinet to decide—it's a "may," so I presume it can go either way, because it's not even a "must" or a "shall."

My reading of it would be that what's involved in this instance is not a judicial process. That's one man's opinion; someone else might have a different view. I can only give you my opinion.

Mr Chairman, I don't want to cut this short, but I do have to express a concern that I had assumed, in our original planning, that this would be from 10 to 12, for two hours. I'm happy to be here, but I have another commitment.

The Chair: I think, Mr Radwanski, we only have two quick questions left. If you can accommodate those—

Mr Radwanski: I'd be delighted.

The Chair: Mr Wood and then Ms McLeod.

Mr Radwanski: I'm under some pressure, because I have another commitment that I've already pushed back, but please ask what you need to ask. I'm here to be helpful.

Mr Wood: Could you give the committee members a copy of your statement today? Could you make that available now?

Mr Radwanski: I don't know that we have enough with us to do it now, but it will be up on the Web site later today, so you can certainly get it that way.

The Chair: The clerk will make copies, if you even have one copy.

Mr Wood: Could you give us a complete list of your concerns by letter? You've given us an overview of your concerns. You said you had some detailed concerns that time did not permit you to address today. Could you give us a letter outlining your concerns?

Mr Radwanski: Part of what I said—I can certainly give you a letter confirming these concerns, although my statement does. What I said was that parsing this thing clause-by-clause would be a Herculean task and frankly goes beyond my responsibilities or the need for this purpose. Literally to itemize them clause-by-clause, word by word, would be days of analytical work. I was referring only to the time it would take to explain them here. But I think I've given you directionally what the problem is. It's not my place, nor do we have the resources, to get into trying to detail every weakness in this comprehensive a bill. That would be a huge task, and I think that's for your committee to do, with the expertise it can command.

Mr Wood: Do you agree that the test of "substantially similar" should be applied in the same way to all the provinces?

Mr Radwanski: Of course.

Mr Wood: Would you consider Quebec's act to be based on a CSA code?

Mr Radwanski: I'm not going to make a comment today on the Quebec act. That is a piece of legislation that is in place. The time will come when it is appropriate for me to make a report to Parliament on that. I am here because I was invited to be here in the spirit of being helpful at a time when legislation is being considered, so I'm happy to give my take on it at the earliest possible time. If the insights and comments I'm able to afford are helpful to this committee, I'm glad to provide them. But I'm not going to go into commenting on the legislation of any other province at this point.

Mr Wood: Did I correctly understand that you do not have a problem with the use of information about patients as long as it doesn't identify them, as long as it's anonymous?

Mr Radwanski: No. I was referring before with Ms Lankin to statistical information, which is distinct from anonymous information; statistical certainly in the sense of saying that a hospital performed, as an example I used, 800 appendectomies over such and such a time period. That does not involve people's rights.

Mr Wood: You would not have a problem?

Mr Radwanski: With that, no. Now, if you get into anonymous, ie, here's information on patient X but it has been anonymized, there's no name on it or something, you're into a much more complex area because there has been a lot of research done that shows that even supposedly anonymized information can lead to the identification of individuals. In a small community, for

example, seemingly anonymous information can very readily point to an identifiable individual. So there's a big distinction between aggregated statistical information and anonymized information.

Mr Wood: You have no problem with the minister asking things like, "How many appendectomies did the system do last year?"

Mr Radwanski: No, because that's not personal health information about any individual.

Mr Wood: OK. Do you have a problem with information flowing through the system in order to facilitate continuity of care; in other words, information being transferred from emergency to hospital to doctor?

Mr Radwanski: It's impossible to answer that except on a case-by-case basis of what kind of information, for what purpose, with or without consent, with justified reason given for the transfer or just by fiat. You've got a whole range of circumstances and issues that are involved in that. That can't be answered yes or no. Some information would be transferred by consent; some information might be transferred in circumstances, even in keeping with the federal law, where it's a natural and necessary consequence or need to provide care. Other information might be totally inappropriate to transfer. So that can't be answered with a generalization.

Mr Wood: For example, if someone arrives unconscious in an emergency room, would you have a problem with the hospital accessing their information without their consent because they couldn't give it?

Mr Radwanski: It depends on the information accessed, and that's where we run into this issue you heard about yesterday from Commissioner Cavoukian.

Mr Wood: Surely they need all the information in those circumstances.

Mr Radwanski: Not necessarily.

Mr Wood: What would you withhold?

Mr Radwanski: For example, if you arrive unconscious in a hospital—not you; this is a gender-specific example—do they need to know whether you had an abortion five years ago? I doubt it very much.

Mr Wood: How do you know that, unless you're the doctor?

Mr Radwanski: Well, by that logic, everybody needs all information about everybody.

Mr Wood: This is a medical file that's being transferred.

Mr Radwanski: Even if they're imperilling their own health, quite frankly, people have the right to say, "I don't want anybody to know this or the other thing about me."

1310

Mr Wood: But suppose, if you could have gotten my consent, I wanted you to have the whole file?

Mr Radwanski: But you have a right to determine—that's where the lockbox provision comes in that Commissioner Cavoukian tried to explain to you, I believe, yesterday, which is that you have a right to say beforehand, "Even in an emergency situation, I do not want anybody except my designated caregiver to be

given the following information." It's your information. Part of this debate that often is lost is that your health information belongs to you and you have the right to determine who gets to see it, for what reason, and in what circumstances. If you want to say that you're prepared to take the risk, however infinitesimally small it may be, as an individual that you might suffer some detriment to your health by an emergency room physician not knowing that you had an abortion five years ago or whatever else it might be, that at some point in your past you were a drug addict—you name it—that is your right as a human being. That is your right as an individual. It's not for the system to say, "We are going to substitute ourselves for your rights as a human being and as an individual to say, 'None of your business.'"

Mr Wood: An oversight committee to consider research projects: are you opposed in principle to that or are you opposed to the criteria being too wide as to what they can allow access to? What do you think about the principle of an oversight committee?

Mr Radwanski: I think there should be oversight committees to oversee research projects for many reasons: ethics, relevance, you name it. I've got no opinion as commissioner on oversight committees or ethics committees, but if you come to privacy, I believe that access to your information for research purposes should be contingent on your consent. I don't know about you, but I don't want some unspecified committee deciding for me that this is a really neat piece of research, and if my privacy is going to be violated, so be it.

Mr Wood: Are you an absolutist on this point?

Mr Radwanski: I'm not an absolutist, sir, on any point. I am simply—

Mr Wood: In what way are you not absolute on this point?

Mr Radwanski: There may be circumstances that would have to be documented, justified, where there would be a compelling public interest under very clear safeguards for that one particular type of research purpose needing to have a broader range of access. I would say that the proper authority to determine whether such an exceptional circumstance exists is not some unspecified ethics committee, but a duly mandated Privacy Commissioner, in the same way that there are public interest disclosures that may be made and the Privacy Commissioner may be asked to pass comment on whether this is an appropriate instance where there is an overriding public interest in disclosing something.

So I am not an absolutist. I think common sense has to apply. There are instances where the public interest must take precedence, but there is a huge world of difference between saying that and putting in mechanisms that would make that the rule rather than the very, very narrow exception.

Mr Wood: Thank you for your indulgence.

Mr Radwanski: My pleasure.

The Chair: Mrs McLeod, you had a very quick question?

Mrs McLeod: It will be quick because you may not be prepared to answer. I'm going to set aside all the technical questions because I assume we can come back to you should this ever get to a clause-by-clause consideration.

You spoke in your opening remarks about the intent of this bill being very different from the intent of federal legislation. As we've heard from the Ministry of Health and as we look at some of the specifics that are outlined in the bill in writing in terms of, "Why would the minister have access? Why would there be disclosure?" it's always for the purposes of managing the health care system, for providing for the best care of the patient. I'm paraphrasing. Those are the sorts of good-intent reasons that are put forward for the collection, use and disclosure of the health information.

You've raised the concern, as Ms Cavoukian did, about the 30 areas in which any of this can be overturned by regulation. What would be your fear? What could be done? What would be the greatest danger of what could be changed through regulation? It may be an unfair question, and if it is I'll just leave it as a rhetorical question. What is the fear of the unknown because of that ability to virtually change any of this that's written down now?

Mr Radwanski: It's everything. It's the same fear that permeates one's reading of this legislation, which is that it is open season on your personal health information. Regulation can determine what is personal health information that is covered; regulation can determine who's entitled to be a custodian in the possession of it; regulation can determine to whom it must be disclosed; regulation can determine if a government can turn around and disclose it in turn; regulation can determine the extent to which the commissioner has any powers at all. It provides for setting out the procedures she must follow. Maybe the procedure is not to ask anybody any questions for five years. I don't know.

I'm being facetious, but I'm saying it's a wide open universe, and I can give you a worst-case scenario. The worst-case scenario is simply that your personal health information that you have the right to control as an individual in a free society can already under this law, but even more under regulation, circulate absolutely anywhere without your consent and without recourse by you to stop that from happening or to protect your right to your integrity as an individual. The regulation aspect only increases the degree to which this is a law that says the government can do what it wants with your personal health information.

Mrs McLeod: I will not ask you to speculate on why any government would want that kind of flexibility, because you won't answer that question.

Mr Radwanski: That wouldn't be my job.

The Chair: Thank you. We've actually gone over the two hours by a few minutes, but thank you very much again for your indulgence here in our scheduling conundrum.

To the folks from the Ministry of Health, I think we have a consensus among the committee members that rather than impose on you today and on those members who were going to come in for the afternoon session, we instead reconvene to continue our clause-by-clause discussion at 1:30 on February 19.

Ms Lankin: I would like to just put on the record my concern about the process of consideration of this bill from this point forward.

One of the obvious threshold questions for legislators in the province of Ontario, where we know there is a federal law that is a superior law in the sense that the provincial law must defer to it and when we have the commissioner telling us that he is of the firm belief that it will in no way meet the test of substantial similarity, given that that's still a cabinet decision to make—I understand that—I think it's important for a decision to be made about whether we proceed through the process with this bill, committee hearings and deputants, as a matter of course, or whether we ask the parliamentary assistant to take some time with the new minister and consider whether we as a committee work to try to address some of the shortfalls in this bill or whether the government chooses to do that without the committee, and that that work be done before deputants are asked to come forward.

If we can assume—this may be a big assumption, but I'm guessing, based on what I've heard today, that the end shape of any bill that is going to be passed is going to be dramatically different from the one that is before us right now. I don't think it's fair to the public interests that have asked to come forward to ask them to comment on a bill that we probably all know, with basic common sense, is going to be dramatically changed. I'd rather see that work done, given to people, and a chance for them to respond based on the new bill.

The Chair: Thank you for those comments. I'm not going to entertain any debate. The fact of—

Mr Wood: Can I make a comment here?

The Chair: Well, we're actually over our time. You can make a very brief comment.

Mr Wood: If you don't mind. I think that comment touches on a significant point. What I'd like to do is take that back to the ministry. There are two sides to that issue. One is, should we hear these people and find out what they're saying on the issue, which is important, or should indeed we say we're going to take a look at a different bill, if indeed that's what we're going to do, and defer it? It's a point that will be taken to the minister for consideration.

1320

Mr O'Toole: If I could just make one comment, with respect, I'm not sure on what grounds, unless it's a generalized presumption at this point of what's substantially similar and consistent with, without the body of the points, the model of what that means. So if there is one—you said you were going to report to cabinet with respect to consistency and substantially similar. I think we need your guidance, quite seriously, to

go forward. All of this has, I'm sure, been broadly consulted; I'm sure our ministry people have on two or three occasions that I'm aware of. So we need that kind of guidance, otherwise we are spinning our wheels, because we could just throw it in the garbage after six months of consultations. We should listen to your sage advice.

Mrs McLeod: Can I second what Mr O'Toole has just said in one further respect? Ms Cavoukian undertook yesterday to do a significant piece of work in terms of proposing amendments to this bill. I'm not sure how to put these two things together, but it would obviously be totally inappropriate for Ms Cavoukian to be asked to do that kind of work for us if in fact this bill, as it currently exists, is not going forward. I'm wondering if there is a way of the federal office and the provincial office in some way working together to produce the kind of model that Mr O'Toole is talking about. It seems to me that essentially that's our only hope for having a piece of legislation with which we can go forward with the kind of consensual process we've been discussing.

Mr Wood: Could I make one other suggestion? I think if change is indicated or considered, the subcommittee might deal with that. Simply, if I receive word there's some interest in not proceeding with the hearings, the subcommittee can deal with that. Is there any objection to that?

The Chair: That, I would argue, is the only mechanism to interfere with the order of the House under which we are operating.

Ms Lankin: Yes, but—

The Chair: Ms Lankin, if I may—as I said, I didn't want to enter the debate—the whole point of inviting the Ministry of Health back was to hear their response to Ms Cavoukian and Mr Radwanski. I've sat through a number of bills. It is not the practice of the House to necessarily change direction on the basis of any one submission. I think to do justice to this and to respect the order of the House, it is incumbent on us to listen to all sides, obviously. I've taken the suggestions from all three parties. I'd be happy to have the subcommittee meet between now and the 19th, if that is your wish, and we can debate this matter further. But in the meantime, I think in order to be fair to the Ministry of Health, they should at least be given some time frame in which to prepare their response, not just to Mr Radwanski but to Ms Cavoukian as well. That's all that we have done here today in suggesting that the next meeting of the committee is the 19th.

Mr Radwanski: Mr Chair, if I could make one comment on Ms McLeod's point, to avoid any misunderstanding. While I'm happy to provide the kind of input that I did in this setting, and would be happy to provide if I'm asked questions as we go, I wouldn't want there to be any sense that I've undertaken a process where my office and the office of the Ontario

commissioner would be involved in somehow jointly trying to draft amendments to provincial legislation. That would be—

Mrs McLeod: But you could comment on the compatibility of proposed amendments.

Mr Radwanski: I can comment when something is put before me—

Mrs McLeod: Right. That's really all I meant.

Mr Radwanski: —in total, whether it would be substantially similar. But the office can't be involved in a joint process of drafting amendments, because that would be completely inappropriate.

Mrs McLeod: My thinking was that any amendments that were proposed by Ms Cavoukian could have already—it could have been determined whether or not they met the test of compatibility, which would enhance our comfort level with them proceeding.

Mr Radwanski: If you show us a bill, we'll tell you whether it meets the test, in my view, but I can't really go beyond that in terms of amendments and how they would merge with other stuff and so on. But I can provide any input that I can properly provide.

Ms Lankin: Just in response to you, Mr Chair, thank you for the lecture. It wasn't required. My intent was to communicate with the parliamentary assistant on the record that I think it was a preliminary issue that should be discussed. He has undertaken to do that. I'm quite satisfied with that. I think in terms of fairness to the ministry, it's something I have a record of. Again, I don't think a lecture is warranted.

I would like to say that the comment or the suggestion that I think the parliamentary assistant was making with respect to the subcommittee was also seeking the committee's agreement that the subcommittee could make a decision with respect to that, as opposed to a recommendation to come back, should we choose to do it. It may be just useful to have that motion on the record. It may not be of any assistance to you, Mr Chair, I don't know.

The Chair: It also would be out of order. The subcommittee can make recommendations to this committee. Only the committee can approve any change in direction. I would be happy to have the subcommittee—

Ms Lankin: The committee can give a certain decision to the subcommittee by a motion here that the subcommittee can determine whether we return on the 19th or not, for example. It has to be spelled out.

Mr Radwanski: Mr Chair, I express my thanks and take my leave.

The Chair: Absolutely, Mr Radwanski. Thank you very much.

Mr Radwanski: It has been a great pleasure to have this opportunity.

The Chair: With that, the committee still stands adjourned until February 19 at 1:30.

The committee adjourned at 1325.

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Standing committee on general government

Personal Health Information
Privacy Act, 2000

Comité permanent des affaires gouvernementales

Loi de 2000 sur la confidentialité
des renseignements personnels
sur la santé

Chair: Steve Gilchrist
Clerk: Anne Stokes

Président : Steve Gilchrist
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LEGISLATIVE ASSEMBLY OF ONTARIO

ASSEMBLÉE LÉGISLATIVE DE L'ONTARIO

STANDING COMMITTEE ON
GENERAL GOVERNMENTCOMITÉ PERMANENT DES
AFFAIRES GOUVERNEMENTALES

Monday 19 February 2001

Lundi 19 février 2001

*The committee met at 1337 in room 1.*PERSONAL HEALTH INFORMATION
PRIVACY ACT, 2000LOI DE 2000 SUR LA CONFIDENTIALITÉ
DES RENSEIGNEMENTS PERSONNELS
SUR LA SANTÉ

Consideration of Bill 159, An Act respecting personal health information and related matters / Projet de loi 159, Loi concernant les renseignements personnels sur la santé et traitant de questions connexes.

The Chair (Mr Steve Gilchrist): I call the committee to order to continue our technical briefing on Bill 159, An Act respecting personal health information and related matters. We're joined again today by staff from the Ministry of Health.

As committee members will recall, we weren't following any strict protocol in terms of going through clause-by-clause for the deliberations. I think there were some outstanding issues the ministry wanted to get back to, particularly to Ms Lankin and Ms McLeod. Ms Lankin, do you want to kick things off today?

Ms Frances Lankin (Beaches-East York): I think some questions to the ministry were put on record. I was just looking to see if I could find it, and I haven't got the reference yet. One was with respect to a complete explanation of the disclosures that are made now, under ministerial direction. We haven't received anything in writing. Is that information going to be presented today?

Mr Phil Jackson: That information will be presented. We presented two of the pieces that were requested. That has just been handed over. The issue of current uses of information is a very large piece of work. We are completing that. We should be at the stage to share it with you when it comes.

Ms Lankin: Mr Chair, could you ask the clerk if information has been submitted by the ministry that's been circulated to committee members, or are we awaiting that?

The Chair: I know the clerk just handed out one document. Are both responses combined in that?

Mr Jackson: We have passed on the registration information as well. It was to go to Mr Wood. We are able to answer the question on the registration information and have the written response.

The Chair: Unfortunately, Mr Wood has been subbed off today. Do you know when?

Mr Jackson: We can provide you with that today.

The Chair: I'd appreciate that.

Ms Lankin: Could you clarify again for the record the two pieces of information that are prepared for the committee today, and what's been circulated and what hasn't yet?

Mr Jackson: The answer to the question you raised, Ms Lankin, on the definition of registration information that is used in the draft legislation, specifically the question that was asked on the use of employment status—we can answer that question.

Ms Lankin: Has that been submitted in writing?

Mr Jackson: That has been prepared and submitted. The parliamentary assistant is the liaison for the ministry.

Ms Lankin: But you will get that to the clerk this afternoon so we'll have that?

Mr Jackson: Yes, we'll get that to the clerk this afternoon.

Ms Lankin: And the other?

Mr Jackson: The other was the overview of my presentation from the last technical committee briefing that you requested, which has been provided.

The third piece, the current collection uses and disclosures for personal health information, is a very broad area. We have our research unit looking at the research agreements we currently have in place and compiling some of those. As you're aware, they are significant.

Ms Lankin: OK. For further clarification, is this the document you were talking about, the summary of the presentation?

Mr Jackson: Yes.

Ms Lankin: Thank you very much.

The Chair: Mrs McLeod.

Mrs Lyn McLeod (Thunder Bay-Atikokan): I'm just wondering about a method of proceeding. You're right, in the sense that we had some outstanding areas to raise when we left the last technical briefing, but I think we postponed the technical briefing on the understanding that the ministry might want to respond to some of the concerns raised by the two privacy commissioners. I'm hoping that is what the ministry has come prepared to do today.

I'm also wondering, since we have tabled amendments proposed from the provincial privacy commissioner, whether the ministry intends to respond to those in any

kind of formal or informal way today or at some future point?

The Chair: Thank you, Mrs McLeod. Like you, I expect that would be the bulk of their presentation. I just didn't want to truncate or prevent any members from putting on the record any questions that had come up in the interim. So, if you'd just like to start with the ministry, then we can respond.

Mrs McLeod: I'd be most comfortable going through—I'm assuming the ministry will take us through it in a fairly orderly way in terms of responding to the points of the commissioners. I'd be happy, with your permission, to raise questions as they go along. That would certainly accommodate any outstanding questions I have.

The Chair: Excellent. With that, Mr Jackson, perhaps you would like to walk us through any responses or any further detail.

Mr Jackson: Certainly. In terms of the comments of the federal Privacy Commissioner, it's not our position, in terms of technicians working on this file, to comment substantively on the manner or format in which those comments were raised. I do want to go through some of the specific areas that were raised by the federal commissioner, and we welcome the offer from the federal commissioner to keep open lines of communication. We've certainly tried to keep open lines of communication with our own Information and Privacy Commissioner.

In terms of specifics of the comments that were raised, as you know, the federal Privacy Commissioner called for the scrapping of the bill. We would note that the Ontario Information and Privacy Commissioner strongly urged that work be undertaken to improve the bill that's in front of you.

On some of the specifics that were raised, the point was made that the legislation appears designed to allow for virtually an unlimited range of organizations with unrestricted access. We would draw attention to limiting principles set out in section 12 of Bill 159. Section 12 enunciates that there should be no collection of identifiable personal health information if other information would serve the purpose; the collection, use or disclosure should be limited to registration information, if registration information if registration information will serve the purpose; there should be collection of only as much personal health information as is reasonably necessary for the purpose; the collection, use and disclosure should be undertaken in a manner that conceals the identity of the person to the extent possible.

I would also draw attention to part IV of Bill 159, which would include a requirement for health information custodians to establish and maintain administrative, technical and physical safeguards to protect the integrity, accuracy and confidentiality of personal health information.

When you take these components in comparison to the existing rules that are in place, and in some cases are not in place in many components of the health sector, it's certainly the intent of the bill to introduce limitations and

requirements that are currently not in place for many custodians of health information.

Mrs McLeod: Could I just ask for some clarification as to what's the most appropriate way to raise our questions. For example, we've just had a response to the limitations and access under section 12. Do you want us to raise questions under those sections or do you want us to wait until you've finished?

Mr Jackson: It would probably be easier to actually go through and then take them together at the end.

Mrs McLeod: And then come back?

Mr Jackson: Yes, if that's acceptable to the committee.

I would raise the federal Privacy Commissioner's comment that Bill 159 permits far too many people to access, collect, use and disclose personal health information without regard to whether it is necessary for the care of the individual. Bill 159 permits the collection, use and disclosure of personal health information for purposes other than for the purposes of providing health care, but so do all other provinces with health information privacy legislation: Alberta, Manitoba and Saskatchewan.

I would draw attention to the fact that a comment was made by the federal Privacy Commissioner stating that a number of other provincial jurisdictions may be in the same boat. Certainly the comments that were made by the commissioner at the previous presentation raised implications not only for Ontario but for other jurisdictions.

We would also draw attention to the European Union directive, article 8, which is the measure passed by the European Union regarding personal information. Article 8 of the European Union directive also permits the collection, use and disclosure of health information for purposes other than health care, including for the management of health services, for the processing that occurs between competent bodies of health professionals or between persons bound by an equivalent oath of secrecy or for a matter of substantial interest.

I draw attention to the European Union directive, article 8, as this was one of the drivers behind the introduction of federal Bill C-6—compliance with the European Union directive, around the appropriate protections and uses of personal information. So Ontario Bill 159 is not in isolation in recognizing that for personal health information there are uses other than care to which that information may be put without an individual's consent.

A comment was made specific to regulations and the broad powers to access and disclose personal health information through regulation. On this, we would say regulations, section 76 specifically, do not specially allow for additional power. What they would do is allow for the addition of criteria when directed disclosures or other disclosures take place within the health system.

Again, specific mention of section 22 was made, collection without consent, and section 27, use without consent. Here we would draw attention between the different challenges faced by a health system piece of legislation and federal Bill C-6, which has largely been structured

with the interests of commerce in mind. It's not unusual for a health care bill to focus on uses of information other than the immediate provision of patient care. This is an issue that is perhaps less grappled with in terms of the complexity of managing and organizing the day-to-day provision of care. It's perhaps more grappled with at the provincial level because of the provincial involvement in the planning and management of health care delivery than it is necessarily at the federal level, where some of the major issues of what is an appropriate resource allocation, what is an appropriate level of utilization for a service are less immediate to the day-to-day running of the system.

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We'd also point out that collection, uses and disclosures without consent are contained in other jurisdictions, such as New Zealand and the Australian Capital Territory. We'd also point out the European Union Directive on Data Protection 95/46/EC goes well beyond the existing rules set out in C-6, permitting to allow for the collection, use and disclosure of sensitive data, including medical information without consent; for example, for the management of health care services. This is consistent with the European directive around which a number of European states are to legislate.

Ms Lankin: Mr Chair, I'm sorry to interrupt at this point. Yet again you're reading from notes and there are a lot of technical things that you're specifying. It would be very helpful if we could have that in front of us so we can make notes to come back and ask you, because I can't write as fast as you are reading it. Is there an extra copy that someone has that the clerk could copy now and distribute as you're presenting?

Mr Jackson: Can we commit, as we did with the registration information, to get you that in writing?

Ms Lankin: No. You see, the problem is, how do I come back and ask you questions about some of the technical points? I'm trying to be helpful. If there's a spare copy that someone else has that could be copied while you're presenting, that would be—

Mr Jackson: This also contains my notes.

Ms Lankin: I'm not trying to be difficult; I'm just saying that some of these technical things that you're raising, I'd like to make a note beside and come back and ask you a question. I can't keep it all straight to be able to have a good dialogue with you afterwards.

Mr Jackson: If you can give us a couple of days, we can give you a clean version, or if you want me to clarify at any given point, I can clarify any given point or repeat something.

The Chair: Perhaps, Mr Jackson, another alternative would be to allow questions throughout your presentation, in deference to Ms Lankin. I certainly can appreciate that trying to make all of your notes throughout this whole presentation might make it difficult to summarize at the end in questions. So if you would be happy, I would allow questions throughout the presentation.

Ms Lankin: I appreciate that flexibility. I don't think that addresses my concern. I think what will happen is

that we'll go through this, we'll ask some questions and we'll get the Hansard and we'll go through it and we'll have more questions. I think it just prolongs it, unfortunately. It's the second time going through this that we've run into this problem, where we're getting the presentation—that's why it's helpful to have a written presentation.

Mr Jackson: I appreciate that. We're also responding to an anticipated position from the federal Privacy Commissioner, so we have prepared very quickly in response to that. I'm touching on areas where we know we've done the research and where we know we have solved it. In other areas that are in this paper, there is additional legal research that I would like. Hence, I am speaking from what is essentially a working draft. We hadn't anticipated having to make this presentation after the federal Privacy Commissioner's comments. But it's not an attempt to conceal anything.

Ms Lankin: And I wouldn't suggest that. I'm trying to have this flow in a way that is useful for dialogue and for intelligent questions flowing from the new information being presented. Could I ask if there's any further advance on the annotated act that we talked about last time that wasn't ready at that point.

Mr Jackson: We believe those were side by side—

The Chair: I believe Mr Wood may be the custodian of that as well.

Mr Jackson: We provided those.

Ms Lankin: I was told that there was a version that the ministry was working on that wasn't ready, it wasn't completed. Is that not the case?

Interjection.

Ms Lankin: OK, that's fine. I withdraw that question.

Mrs McLeod: Perhaps it would be helpful if we were to back up, because I'm finding the same problem as Ms Lankin is finding. My questions are going to take you back over exactly the same material that you've presented because I can't cross-reference your notes to mine. I've cross-referenced the bill with the comments of both the provincial and the federal Privacy Commissioners. Maybe we could start doing clause-by-clause, raise the issues that the commissioners raised and ask you for your response to those specific issues so we can follow in the bill and you can give your response in relationship to those sections.

Mr Jackson: Would it be permissible with the Chair just to finish our response to the federal Privacy Commissioner? I'm quite happy to engage in discussion around the clause-by-clause. It was a fairly significant presentation.

The Chair: How much longer would you anticipate your presentation taking?

Mr Jackson: I'm at the mercy of the committee, but 10 or 15 minutes.

The Chair: Would that be reasonable? Finish that and then we will go in sequence clause-by-clause and ask for any further information.

Mr Jackson: I would refer to the comments around "substantially similar." This is an area that has been the

most challenging in working on this legislation and potentially is the most challenging for not only Ontario's consideration of Bill 159; obviously the requirement for Bill 159 to be substantially similar to C-6 goes to the heart of the discussion.

The first comment is that the federal Privacy Commissioner recommends to cabinet regarding what is or isn't deemed to be substantially similar. Subsection 27.2(2) of Bill C-6.

I would also repeat that there's no definition of "substantially similar" in C-6. The clarifications that were offered by the privacy commissioner, while welcome, when dealing with a bill of this technical level merely provide us with four guideposts to areas considered important. They don't provide the technical information required to be able to assess whether or not a bill is substantially similar.

Statements were made that also referred to federal Bill C-6 being the floor for any bill to be considered substantially similar. It's the first time we've heard an articulation of the C-6 provisions being the floor, a basic high-water mark or benchmark. It's an interpretation of "substantially similar" that we're not familiar with. It basically sets as a minimum in C-6 what will be required.

We were also caught by surprise, it's fair to say, by the federal Privacy Commissioner's comments that suggested doctors' offices would be covered under federal Bill C-6 in the event that provincial legislation was not in place in this area. This seems to us somewhat inconsistent with the comments that had been made previously by Industry Canada and introduces a new variable in what is an extremely foggy area. We would compare the comment of the federal commissioner with statements made by then-industry minister John Manley at the Senate standing committee on social affairs, science and technology on Thursday, December 2, 1999:

"We are trying to be respectful of provincial jurisdiction. We are looking for similar principles. In other words, both our bill and the Quebec bill are based on the same root idea, which is the OECD standard. We are looking for independent oversight, for redress for individuals, and we are not trying to prescribe in detail what the provinces need to do."

Further comment from industry minister John Manley:

"I am not willing to reach into the Quebec jurisdiction and say that the federal government has decided that we will let your government and your doctors do this. We are setting a general standard that provinces can legislate around. It's fair to say we've been working from an assumption of a general standard that provinces can legislate around."

It's also fair to say that we came away from the briefing by the federal Privacy Commissioner with more questions, rather than fewer, regarding what constitutes "substantially similar" and whether or not doctors will be caught under the federal legislation in the event that this legislation does not go forward. We would also raise the question that if federal Bill C-6 is the floor, it's difficult

to see how other provincial legislation in this area will pass the test of "substantially similar."

It's also important to know that article 8 of the European Union directive, which deals with sensitive data and was one of the motivating factors behind C-6 being passed, contains provisions permitting disclosure without consent in various circumstances: under article 8(2)(c), the vital interests of the data subject; under 8(3) for the management of health care services; under 8(4) for substantial public interest. There are no comparable provisions in Bill C-6, yet this is the standard to which the European Union has agreed.

Other provinces with health privacy legislation will face the same challenge. Alberta, Saskatchewan and Manitoba all have exceptions that allow for the collection, disclosure and use of health information without consent.

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I would draw your attention to the comment, "The first major flaw of the bill is the lack of a restriction on how and by whom personal health information may be accessed, collected, used and disclosed."

The problem begins in section 2, with the almost absurdly broad listing of who qualifies as a health information custodian. I'd like to make two points with regard to that. The discussion of who is or is not considered a health information custodian is also an issue of who is bound by the obligations that are placed upon a health information custodian.

Under Bill 159 as it's currently drafted, being designated a health information custodian carries with it significant requirements: management requirements, information practice requirements, requirements to notify individuals and requirements to have transparency around how your health information is managed.

It's also fair to say that while the commissioner's comments focused on the breadth of individuals designated as health information custodians, it's true to say that others have criticized the bill for not having enough people designated as health information custodians; for not, for example, sufficiently touching the insurance sector, or that there are community programs that fall outside the ambit of health that may hold health information that should be considered for inclusion. There has been discussion on both sides around who should or should not be designated as a health information custodian.

Being designated as a health information custodian, as Bill 159 spells out, doesn't give carte blanche as to how you use, collect or disclose information. For many sectors, especially for health professionals who are currently unregulated, it introduced for the first time privacy protection considerations and privacy rules where they don't exist.

A question was asked whether the minister and district health councils should be subject to the same standard. The act for the first time, specifically to the health information that the Ministry of Health holds, would make the Ministry of Health a health information custodian and would make the Minister of Health accountable for the

uses within the Ministry of Health, with oversight by the privacy commissioner. This builds on what's there in FIPPA and MFIPPA now.

I want to refer to the issue around access to your own record. The comment was made that the bill denies individuals ready and assured access to their personal health information. I draw attention to section 45 of the bill, which makes it clear that an individual is entitled, with certain limited exceptions set out in section 48, to obtain access to records of personal health information relating to the individual that are in the control or custody of the health information custodian.

Those exceptions set out in section 48 are time-tested exceptions, already present in other Ontario statutes, such as FIPPA, the Mental Health Act or the long-term care act. For example, a custodian must consider, when there is a request for disclosure of information and disclosure of an individual's file to that individual, whether the file itself contains information that violates the privacy of another person. This is one example of the sorts of exception that a health information custodian is grappling with when you're dealing with a complex file that potentially includes information not only about an individual but about an individual's family or an individual's children.

Certainly, the intent is not to deny individuals ready and assured access to their personal health information. By providing a legislated right to access your own files, the bill takes what is currently in place only in common law and expands it legislatively across the health system. It also takes the place of what's currently in the Mental Health Act and expands it. I'm sure there are significant areas of legitimate disagreement and discussion around what the exceptions should be; however, it's hard to construe the intent as a mechanism for denying people access to their records.

On section 48, which is the access provision, the comment was made that section 48 would allow a custodian to refuse a person access to their information if it could be expected to result in harm to the treatment or recovery of the individual. This is consistent with an exception that's been used for many years under section 36 of the Mental Health Act. Its purpose is to not allow the patient access to information in very limited circumstances where the information might be detrimental to an individual's recovery, as it's written in the Mental Health Act. Recall that the Mental Health Act provisions in section 36 are repealed by Bill 159. Therefore, it's a carry-over of what's already in place. The Supreme Court of Canada decision in *McInerney v MacDonald* recognized that the presumption of access can be limited where disclosure would result in harm to the patient or a third person.

On the issue of fees, and this is one where I think it's important to look at what's currently the practice, "Custodians would charge a fee to allow people to see their personal health information. Since the fee will be set by regulation, we have no way of knowing whether this would present yet another barrier to access."

Fees set by regulation allow you to place a limit on what can be charged by an individual health information custodian to a patient seeking to access their file. There is currently no limit; it's not set. In fact, this is an area where we anticipate there will be significant discussion and there will probably be differing ideas on whether it's appropriate to set a limit. But for clarification, the ability to set a limit is one that should be understood as a cap, not the ability to introduce payment.

The issue around a fee for accessing information, having information copied: the general approach under the Freedom of Information and Protection of Privacy Act is that individuals seeking access to information under FIPPA are required to pay fees prescribed in the regulations. It's consistent with FIPPA. Certainly in terms of the intent of the bill with regard to its rolling out in the health sector, we've heard, through consultations, concern that there isn't a limit on how much a physician or another health information custodian can charge to get a copy of your file. So the language may not be clear, the drafting may not be clear; the intent is to place a limit.

A comment was made that section 68 allows individuals to file a complaint with the IPC, but they must pay a fee to do it. Here we would refer to section 51.1 of FIPPA. This is not a provision that's been invented; it's a provision that's in place now. Setting a fee by regulation can mean setting a fee of \$1. It can mean setting a fee with certain provisions that would recognize cases of individual hardship. There's flexibility around how you set a fee through reg, which is in part why you would use a reg to do it. It's also a way of keeping up as times change.

With regard to the issue of the statement of disagreement and the attachment of a statement of disagreement to an individual patient's file, I'm respectfully going to ask not to comment specifically on that section, as there is litigation underway that the Ministry of Health is involved with regarding a statement of disagreement. I would merely outline in general terms that currently the intent of the bill is to allow an individual requesting a correction to their file, where there is a disagreement and the IPC, after mediation, is unable to resolve that disagreement and the health information custodian will not make a change to the file, the bill as proposed would give the IPC the power to issue an order to attach a statement of disagreement.

I understand this is going to be an extremely difficult situation to discuss an important clause in the bill. However, as the IPC commented, it's hard to go into great detail around this whilst litigation is underway. We've been seeking advice from our legal department on how far we can and can't go around this piece.

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Ms Lankin: Could I just ask a brief question on that? What I understand is that the current OHIP provisions of refusing to correct the factual record of the treatment received by the patient is under litigation. This is a new bill that's before us. I can't see why anything would prohibit you from talking about the actual provisions in

this legislation, what will and won't be done and why it will and won't be done. It's quite separate from the existing situation, which is subject to litigation.

Mr Jackson: That's a fair comment. But as you're aware, when the committee goes down the road, sometimes it doesn't stay exactly on discussion of the bill before committee. But insofar as I can speak factually about what's in the bill, I'm prepared to speak factually about what's in the bill.

Ms Lankin: When we get to that section and ask questions like why it would be the Ministry of Health's position in this legislation that someone can't correct the record, you'll be able to answer that, because that's the position that is taken in this legislation as well.

Mr Jackson: I'm not going to be able to answer in terms of anticipating what may or may not be the Ministry of Health's arguments before the court.

Ms Lankin: No, no, defending the legislation as it is proposed in front of us. I understand there's overlap, but come on, the committee has to deal with the bill and we can't be told there are sections of the bill we can't deal with because existing legislation is under litigation. I know it's a fine line, but I'm asking you to walk it and to co-operate with us in terms of what this bill proposes and the ministry's defence of this proposal.

Mr Jackson: Insofar as there's a recognition of that fine line, and sometimes I'll be trying to stay on the right side of it, then yes.

Ms Lankin: Fair enough.

Mrs McLeod: Mr Chair, can I ask Mr Jackson to repeat the very last comment he made about appealability under this section?

Mr Jackson: Sorry. Could you repeat the question?

Mrs McLeod: Could you repeat the statement you made about the ability of an individual to appeal under section 50?

Mr Jackson: Where an agreement to change the record has not been reached, the individual can go to the commissioner and basically complain to the commissioner. The commissioner has the power, then, to enforce the attachment of a statement of disagreement.

Mrs McLeod: I'll just raise it as a question now, and hopefully we can get some clarification. That's not how I was reading subsection 50(9), and that is not how either privacy commissioner understood the right to appeal. I think subsection 50(9) qualifies it in such a way that the right to appeal is not there, providing a reason for refusal has been given. I would appreciate some clarification before we get to clause-by-clause.

Mr Jackson: With regard to directed disclosures—this is the authority of the minister to direct the disclosure of certain information and data for purposes set out in the act—the comment was made that the disclosure of personal health information to and by the minister can take place with virtually no accountability. What we would draw attention to are the current directed disclosure provisions that exist in several pieces of legislation without oversight. We would also draw attention to the fact that

the section 12 limits are there to be put in place on directed disclosure, and the general—

Ms Lankin: Sorry. Would you repeat that?

Mr Jackson: The section 12 limits are in place also to apply to directed disclosure. It is the general right of an aggrieved person to complain to the IPC. Insofar as this constitutes virtually no accountability, we would have to juxtapose that with the status quo.

On the issue of research, to quote the commissioner, "Section 32 says that a custodian can disclose personal health information to a researcher provided a research ethics review board has approved the researcher's project. Not only is the right of individuals to give or withhold consent denied, but someone else would have the power to exercise that right for them."

A mandatory research ethics review is required in other provincial privacy legislation—Alberta and Saskatchewan. Manitoba has approval for the research given by the information and privacy commissioner established under the act.

The consent of the individual with regard to large-scale research or research projects and the requirement of mandatory ethics review: mandatory ethics review would take us from a current situation where there is no requirement to go through ethics review to seek to utilize personal health information, to a situation where it would be mandatory, and if the ethics review board determined that consent would be required, consent would have to be sought if you wished to proceed with that project.

The question was also raised around the composition of the ethics review committee. I think it's fair to say that that, in and of itself, is an extremely complex area. We've got a large number of research ethics review boards up and running now, and the intent of the regulation around that is partly to be able to look at and do a thorough review of the existing ethics review committees that are up and running and how best to ensure a consistent standard across the board. It's not one where it's easy to come up with, "OK, you've got to have these five interests." It's a complex area that there has been masses of writing on. The proposal in Bill 159 basically makes us consistent with a number of other jurisdictions and tightens the research requirements.

Under this area, I would also draw attention to Bill C-6. Although consent is the general rule under C-6, the organization need not obtain consent for the use or disclosure for research purposes, provided it informs the federal Privacy Commissioner of the disclosure.

In a jurisdiction as large as Ontario, with multiple researchers involved in multiple aspects of day-to-day research in terms of epidemiological trends, health system utilization trends, health system demand management trends, we would ask the committee to consider whether the requirement to notify an IPC, or approval through an IPC, would be a workable solution for the day-to-day significant number of research projects that take place. The issue of whether research should be authorized to proceed without consent is most appropriately considered, looking at the privacy aspect only or

the privacy aspect vis-à-vis the social good that may come from a research initiative. It's one that other jurisdictions have grappled with. The issue of whether IPC approval is required before, becomes a large question of whether that is operationally feasible, given the sheer volume of research that takes place in Ontario.

Comments were made by the federal Privacy Commissioner regarding computer matching. The computer matching of personal health information, for instance, is a big concern because of the exceptions in section 14. It was termed, in essence, that computer matching is another disclosure without consent.

On computer matching, it is fair to say that it's difficult to know how computer matching is best regulated, because legislative rules are still evolving in this area. It's a very new area. The challenge of coming up with rules that are workable next year and that will be workable 10 years from now is a significant issue. There are also no legislated provisions in Ontario's public sector privacy legislation, FIPPA and MFIPPA. Insofar as the issue of computer matching is elevated to the status of legislation for consideration and discussion, it brings us forward in terms of the scope and technicality of the privacy protections you are putting in place.

It at least lays the foundation for a more modern approach to privacy protection, one that recognizes the unique challenges that come through things such as computer matching. It's also true to say that Manitoba and Saskatchewan chose not to regulate in the area of computer matching; only Alberta has data matching in its health information statute.

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Comments received during the consultation on the 1997 draft indicated that the ministry needed to remain fairly flexible in the way in which it structured the section of the bill, in large part because of the rapid pace at which computer matching was growing.

Ms Lankin: Which section does this refer to?

Mr Jackson: Section 14 is computer matching, and the 1997 draft and the comments that we received on that.

We were grateful for the offer of the federal Privacy Commissioner to maintain an open door and to engage with the process. We anticipate that there are areas where there are going to need to be examinations and re-examinations. That's fairly consistent with processes that other jurisdictions have gone through in crafting legislation of this type.

We would suggest, by way of final comments, that ultimately the issue of the balance between privacy and the appropriate use of health information within the health sector is both complex and nuanced. You're legislating in an area where other legislation currently exists, where there are multiple challenges.

It's certainly true that the draft legislation of Bill 159 before you is complex; I will not deny it's complex. Perhaps the bill is too complex. With the situation out there with regard to the utilization of health care information by hundreds upon hundreds of providers, hospitals, long-

term-care facilities, mental health clinics, all with somewhat different needs, and given the increased sensitivity of this area, perhaps the bill can be less complex; but the issues are extremely tough and we would be saddened to see the work that has gone on to date, which has gone on under not only the current government but governments before it, withdrawn because of the complexity of the issues.

The Chair: Thank you very much. With that, perhaps we can start our deliberations, go through section by section. I think, Mrs McLeod, that was your preference.

Mrs McLeod: Yes, thank you very much, Mr Chair. Could I ask a general question before we get down to clause-by-clause and then we'll look for your direction as to how proceed with the clause-by-clause questioning?

The Chair: Sure.

Mrs McLeod: I appreciate the fact that you were, to use your terms, caught by surprise by the federal Privacy Commissioner's presentation. We'll go through and look in more detail at why this bill is different from what the federal and provincial privacy commissioners in many areas have said is indeed in place in most jurisdictions. What we're trying to do here is establish the differences in intent as well as the specific differences in clause, because clearly in the presentation of the two privacy commissioners they've said that this bill goes far and away beyond in terms of both opportunities for collection disclosure and in the limitations on access than the bills in any other jurisdiction.

So even though you've made reference to other jurisdictions at different points, as we pursue it clause by clause, I think we'll see that this bill goes beyond what is place in those other jurisdictions in terms of how—yes, there are limitation in other jurisdictions; yes, there are exclusions in other jurisdictions; yes, there are definitions of custodians; but the comments of the commissioners were that this goes far beyond what other jurisdictions do.

But I guess my overview question, because that becomes part of clause-by-clause discussion, is that at the end of the day surely this has to be compatible with federal legislation. I agree that we want to have a health privacy bill, but if it's not compatible, the confusion that is introduced is not manageable for any of the people who are either collecting, using or potentially disclosing health information.

Mr Jackson: With regard to the first question, on the comparability, it varies area by area. There are areas where the bill in front of you has tighter provisions and there are areas where it has weaker provisions. It varies jurisdiction by jurisdiction. It would be hard to say *carte blanche*—

Mrs McLeod: That's why I was going to do that in clause-by-clause. I acknowledge that.

Mr Jackson: Yes. It's something you can only understand in clause-by-clause. There are differences both ways.

With regard to C-6, as you know, the requirement in C-6 is that for C-6 not to apply, provincial jurisdictions

would have to have in place substantially similar legislation. Certainly from what we've heard in the past from health care providers in Ontario, there is concern that without some sort of overall framework, C-6, wherever it gets determined, inside or outside of the doctor's office, establishes one set of rules and FIPPA and MFIPPA are already out there. Yes, I think the federal Privacy Commissioner, in the comments about the waste that would exist in terms of the regulations—it's a concern that many in health care share.

Mrs McLeod: How would you like to proceed, Mr Chair?

The Chair: If I may just answer that, we had actually got no further than the definitions section, as I recall, so if you want to continue on in that section if there are any other questions of the ministry, or we can move into subsequent sections now.

Ms Lankin: I would just like to ask one preliminary general question as well. I agree with you that if we could move into the clause-by-clause, I think having the ministry present the clause, the intent, any comment they have about the controversy that may exist around that clause from people in the field and/or either of the privacy commissioners, and then allow members of the committee to question might be a reasonable way to approach it.

On the general question of the response to the federal Privacy Commissioner's remarks that you provided us, I guess this flows from what Mrs McLeod just raised. The commissioner could not have been any more blunt or direct; it was a bit breathtaking for all of us. He said very clearly that this did not make the grade in terms of the test of "substantially similar" in terms of his assessment of it. It is a cabinet decision, but his recommendation to cabinet, if this bill remains, not unchanged—because if you read his comments he says it's without hope, it can't be fixed, it has to be scrapped, and start again. It's a pretty high bar that he has set for us to reach, through committee, committee amendment, House amendment and passage of a bill—it's pretty hard to reach a point where he will be recommending this framework, even with amendments, as being substantially similar.

I'm not sure where that leaves the work that you're doing on a policy basis and/or that this committee will be doing on a policy basis, and whether or not there are some preliminary discussions that need to take place to understand where the federal government is at with respect to provincial health privacy legislation, not just in Ontario but across Canada, because you have and will continue to draw our attention to similarities with other provincial jurisdictions. It feels a bit to me as if we're just going to roll merrily along here. If not, if there is a sense within the ministry of needing to go back to preliminary discussions about the expectations of the federal government around C-6 and provincial legislation, and/or that may lead the ministry to look at a major rewrite of the legislation, I still have the question in my mind, of what benefit is it for the committee to proceed with hearing from all sorts of stakeholders on all the points of view

that have already been done through two consultations around these provisions, if they are going to be subject to dramatic change?

If I may, even in your presentation you specified many areas that could be rewritten, redrafted, could be changed, could be tightened up. I feel as if the ministry is not at the point of really having a near final piece of legislation to present to us as a committee to work with, and I wonder if there have been discussions within the ministry and/or with the minister. Can you share with us what the intent is in terms of a more substantive response to the dilemma the federal Privacy Commissioner has presented you and this committee with?

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Mr Jackson: Certainly in the opening comments I made around the presentation of the material, one of the first points that we stated is the challenge of not having "substantially similar" defined in general ways. "Substantially similar" is still not defined. The federal Privacy Commissioner has provided some insight into what that might be.

Ms Lankin: At the very least he says this doesn't cut it.

Mr Jackson: It raises a much bigger issue. I'm not going to go down the road of other jurisdictions. However, should Ontario know what constitutes "substantially similar"? The answer is it needs to know in more detail than currently exists.

Ms Lankin: The second part of the question was: has there been any discussion that you can share with us that would enlighten us as to the ministry's advised path for this piece of legislation, given that we don't have a more definitive view from the federal government on what "substantially similar" means?

Mr Jackson: It's a determination that's going to have to be made through the Chair and through the committee.

Ms Lankin: That's a lot of power he just gave us, Mr Chair? I'm not sure the minister would agree with that.

The Chair: Well, all those federal MPs just talk about it—glad to see we've taken the action at this end.

Ms Lankin: Thank you.

The Chair: With that, in the interest of getting the maximum benefit out of the folks from the Ministry of Health while we have Ms Cavoukian's comments here—and, just to be fair to them, apparently these just arrived—as we go through, if you wanted to cross-reference anything Ms Cavoukian has said, then you could do that at the same time.

Mrs Sandra Papatello (Windsor West): Chair, if I could ask a question of the staff before we get into this clause-by-clause?

I'll put it as an example. In what you presented, while we weren't able to follow it specifically along with you, take the matter of the fees for accessing your own medical record, for example. What your explanation is, given the concerns that the federal commissioner had in suggesting that it is not acceptable to have this enacted, you came back today and suggested that the intent, in fact, was not to have these exorbitant fees to access

personal records, but rather you were intent on putting it in legislation so as to ensure there's a cap on it.

Just use that as the example. If the commissioner came to us a week or more ago and said that this is highly inappropriate, you come back today and tell us that the intent is actually to place a cap on it, so—much like the FOIs now, we pay exorbitant amounts in some cases to access information that should be very easily accessible to the public and it becomes prohibitive—there's clearly a difference in opinion as to the basis of it. You've selected to say that you can cap it, while the federal commissioner says no, that's a very different position on that example and every one that you've spoken of, where there's clearly a difference philosophically of the intent of the bill, I would suggest would be the best example of the definition of “substantially different.”

So, while you're saying to us in one breath, initially, “We don't understand what they mean by ‘substantially similar to C-6,’” I'm suggesting to you that it's actually quite easy to determine what they see as substantially different. On each point they raised, it's clear they're pointing out that you've managed to change the very intent of what the law should be. If we in fact asked the commissioner what in the long run happens if you pass this bill, and that it eventually will be litigated and go through all the machinations and we lose, and the province of Ontario cannot support bringing in this bill, because it is not parallel to what the feds are looking for, do you think it's in our best interests then to take every one of the examples that both the provincial and federal commissioners—but more so the federal commissioner—have made, where it's so apparently different, that the intent of the law was written differently, that we've come to some determination, and it might become a political decision, then, that our intent is X? Down the road that means they are simply never going to agree with what you are bringing in as potential legislation. It's not a quandary to me, based on what I heard from the federal commissioner, why he thinks this is so different. I can only pick one example of the one you gave, like the fee-setting. Your intent is different, and he made many examples of where your intent is different from theirs. So I think it's not difficult to understand why they're not supportive of this. Ultimately, someone makes the decision that it's written in a manner, and it's of no interest what the feds say about this law; we're going to go forward because our intent is much further access, little or no cap fund disclosure etc, as we perceive this bill to have been written.

Mr Jackson: It's for the Ontario Legislature to determine what the final bill is, but just in terms of the issue of C-6 and the issue of fees with regard to access, it's certainly the intent of C-6—it's drafted largely as a commercial bill—to regulate e-commerce. That's some of the main intent behind the bill. So, in that it was not drafted with the intent of regulating health care, there are going to be areas where “substantially similar,” for it to work within health care, will need to be interpreted certainly more broadly than the FPC's comments around

the interpretation. Does that mean the bill could not evolve into a piece that was closer? Yes, but there are going to be certain areas where there are unique needs for health care; for example, directed disclosures. There is no grappling with the issue of directed disclosures in C-6 because the health system is regulated by and large on a provincial level. It's a provincial absence of data that will show up in the auditor's reports at the provincial level. So there are specific challenges to the health sector that need specific provincial solutions, whether it's through this act or whether it's through a future act under a future government. The problems will be there and the problems will still be specific to health.

If I can speak specifically to the issue of fees to access your own information, this is one where it's fair to say that we have had an extensive dialogue with the provincial privacy commissioner over many years, not just myself but my predecessor and my predecessor's predecessor, on this type of framework, and it's also true to say that the provincial privacy commissioner faces the challenge of balancing the issues of privacy and the appropriate use of information across the system. So it has not been flagged by the provincial commissioner as a concern that there's a reg in there that would allow you to set the fee for what would be acceptable to access health records. The thinking is that that provision is so fundamental that there should be the ability for any government to prescribe that cost. The alternative is that it's not set and the status quo remains and de facto you will hear horror stories. So in that C-6 doesn't contain a provision like that, it doesn't, but it's grappling with a different problem.

Mrs Papatello: So when the commissioner said to us the other day—I think he counted 30-odd opportunities in the bill for various details to be set by regulation. For all of the examples he gave, he suggested that it was completely unacceptable that so much of this detail would be by a stroke of the pen, by order in council etc. Understanding that is something completely unacceptable to the federal Privacy Commissioner, would you not take that—one, I find it hard to believe that there would be so little communication in advance of actually tabling a bill that you wouldn't know before it got here that the federal commissioner would have such a significant level of discomfort with our bill. I'm speaking more to the process of how we operate with other Parliaments. I find it very difficult that if that's very significant, surely you would go back and say, “Well, there are 35 or 37, and if that's a significant concern, which apparently it was, then there would be a number of areas where that ought to be struck out of our bill because it is not in keeping with what they want to see as strikingly similar legislation.” But that process never happened. It's apparent to me that that is one more example of the tweaking—I don't want to call it “tweaking,” because it's more serious than that, but changes you would then make to legislation.

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Given how separate and disparate we are on the issue between one level of government and the other, would

you recommend that you ought to have another hand at drafting this before it goes through and goes into clause-by-clause? It becomes a basic issue of the provincial commissioner, who suggested a major redraft, versus the federal commissioner, who considered tossing it into the pail outright. That's a very far-apart position to have and that leaves you saying, at minimum, that maybe we can take the federal commissioner's comments and come back with some very significant changes to what's only at first reading.

Mr Jackson: To answer that, I'm sure the committee is going to scrutinize every regulation-making power.

Mrs Papatello: In fact, the regulations aren't apparent to members of the House until after they've been—

Interjection: We never see them.

Mr Jackson: I'm talking about the reg-making power in the bill in front of you, where it spells out "can be set by regulation." Certainly that is an area where I anticipate there is going to be a lot of discussion about whether it's appropriate to have a certain reg-making power. I'd suggest that has to balance off. It has to be balanced off between the desire to keep a piece of legislation flexible and up to date, which is the way you would tend to use regs, but providing sufficient assurance, which is when you typically put stuff in the main body of the legislation.

With regard to the comment on the federal Privacy Commissioner, first, it's a relatively new federal Privacy Commissioner who has come in. We have followed the comments of the previous privacy commissioner closely and we followed the comments of our own privacy commissioner closely. I wasn't being dishonest when I said we were quite shocked by the comments. It does raise an important question about the need to keep the lines of communication open with the federal commissioner as we go ahead. The example we just talked through, the issue of setting fees, is a good example where that could have been clarified, and at the committee level you sought and got an undertaking from the federal commissioner to keep lines of communication open.

Mrs Papatello: A final one just before I pass it off. I read about what the federal commissioner's response was going to be before he ever got to this committee because he was quite open about it in various media opportunities that he took. So before we came that day we had a very good sense of what he was going to say in quite a bit of detail. I knew before I got here, and I'm relatively new in the scope of things at Queen's Park, so I'm surprised that you would be that surprised.

Second, it does come down to that jurisdictional argument: are we, the Ontario government, responsible for writing it as we'd like to or are we finally going to be subjected to the federal government telling us that we had better get our house in order and draft this bill appropriately because it's not going to be accepted anyway? That was the question I was trying to ask the federal commissioner, and he couched his answer fairly carefully when he said there is a particular road someone would

have to travel to finally challenge, but that it ultimately would be.

Mr Jackson: It's not for me to determine what Legislatures decide to do. I think the issue before the committee is to craft, within the confines of what we know to be substantially similar and within the confines of what we know to be the rulings that have been made on substantially similar or the determinations that have been made on that, the best possible bill. That, I would say respectfully, is the challenge before you as legislators.

Ms Lankin: I appreciate that and I think we need to be careful in separating out the role of the actual passage of legislation and the work that's being done internally in the ministry. I am fully cognizant of how shocked the ministry was by the federal commissioner's presentation. It does, however, present a very real issue in terms of how we proceed.

Mr Chair, I think the ministry staff are unable to answer this question. At some point I think the committee might have a discussion. I would like to propose that as a committee we think about asking the minister's office, through the parliamentary assistant, to advise the committee whether it is the ministry's intent to do a substantial rewrite on the legislation and whether they would like time to do that before we proceed with hearing depositions or not.

But today, given that we've tried this a couple of times and haven't gotten to it, I'd really like to get through clause-by-clause so that wherever we go from here, even if it's a major rewrite, we will have an understanding of the intent of the bill as it has been written and what changes either we as a committee make or the ministry makes and comes back to us with.

The Chair: Thank you, Ms Lankin. In exactly that same spirit, that wherever we go as a committee in terms of the specifics of the bill, the ministry has told me that it is up to the committee to make the decision about having the hearings, on your behalf I indicated that no one had come to me and suggested that we didn't want to hear from the 95 or 96 people who have expressed an interest in speaking on the issue of health privacy. Presumably that too is important to hear before we make a decision as to whether or not the bill, as is currently before us or as amended, should proceed.

Ms Lankin: With all due respect, Mr Chair, the last time we met, I raised that very issue with you. I did receive a lecture or two from you and told you how much I appreciated that—

The Chair: Freely given; glad they're appreciated.

Ms Lankin: —I say tongue in cheek. I'm sorry.

The very point I raised—which is worthy of a discussion, but I don't want to yet again waste the ministry's time and not get clause-by-clause—I think the committee should discuss.

My own personal point of view is that if we, the collective legislating body, are presented with a view from the federal Privacy Commissioner that there is very little way in hell, to put it bluntly, that this legislation can be made to be substantially similar to the federal bill,

which is the requirement of the law of this land, then I would like to see the ministry take another crack at writing this bill to correct some of those problems and the substantial problems presented by the provincial privacy commissioner and have that bill circulated out so that the views of presenters from the health care community, whose views are incredibly important to this process and to the committee, are actually on a piece of legislation that the ministry intends to proceed with, one which we have a sense that the federal commissioner would find substantially similar, as opposed to a piece that seems to be doomed.

It's not that I don't want to go through listening to people about the bill. I've received many deputations already and have been in discussions with people. It's simply that if the rug's going to be pulled out from underneath us as a result of what we can see, this process of matching federal Bill C-6, then surely it is in the interests of everyone to have a more up-to-date piece of legislation that we are asking the public to comment on. That may not be the majority view of the committee; I understand that. But it is a position that I put on the table asking us to consider the last time around, so I think a representation on our behalf to the ministry that no one has suggested that perhaps we look at this process is not quite accurate.

The Chair: Again, I think it's up to every member of this committee to determine, at the end of the proceedings presumably, whether or not one submission we had from Mr Radwanski is the one on which they'd like to form the basis of their vote.

I appreciate what Mr Radwanski said. I would also draw your attention to the fact that he said very pointedly he would not comment on any proposed amendments and would deal only with bills as faits accomplis. I think that leaves you and all of us as members under the frustrating situation that we don't appear to be in a position of asking for comment on proposed changes to this bill, and that they will be taken in their entirety or not at all.

Ms Lankin: That's not what he said.

The Chair: That was certainly the way I interpreted his comments when offered the question by Mrs McLeod, I think it was.

Ms Lankin: By me. I've got it right here.

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The Chair: And to the question of what in the Quebec, Alberta or Saskatchewan bills he would find attractive or not, he said, "I will comment at some point in the future." In the absence of those standards, I say, with the greatest respect to Mr Radwanski, that it's up to us to do what we think is best for the people we represent. At some point in the future it may very well be a question for Mr Radwanski and the federal Parliament to reconcile what we have done. I think we need to take his comments into account, obviously; I agree with you there without any debate. But at the same time we have about 100 other people who want to comment on the bill before us right now, and then I think it will be appro-

priate for us to determine whether we proceed with this bill as is, as amended or not at all.

Was your hand up, Mrs McLeod?

Mrs McLeod: I understood, in response to my question, that the federal Privacy Commissioner certainly indicated he wasn't prepared to work on the actual drafting of amendments, which I appreciate. But I thought a redrafted bill would be something he could comment on, as he has commented on—

The Chair: I agree. He said bills in their entirety, but I think that's very different than the spirit in which we're trying to undertake these hearings. I must stress that as a first reading bill, nothing is cast in stone. I suspect you will find it frustrating if there is not a process that would allow you to offer up a suggested amendment and see if that passes muster. So I think the question we have to deal with as a committee is, given that this is first reading and given that the bill is as flexible as bills can ever be at this stage, whether it's appropriate to listen to the people who want to comment philosophically as well as to the specifics of this bill and take those views forward, both to our ministry and individually as members of this committee.

Mrs McLeod: Quite frankly, I think it's of value to go through the public hearing process. I think it's of value to hear the concerns that will be raised with the bill. I think we'll hear a lot of concerns that will reflect the concerns raised by the privacy commissioners. I think we'll also hear some views on the other side of the issue, which is perhaps less rigorously protective of privacy as is the role of the privacy commissioners. So I think it's worth hearing.

I guess one of the concerns that may be under the surface of this discussion is whether the government is prepared to bring back an amended bill if the process of public hearings is sufficiently controversial that it looks difficult, and this is a difficult bill. I would hope we could go through public hearings, have the controversy, have the debate and still at the end of the day be prepared to look at whether we can draft a bill that would be compatible with federal legislation.

The Chair: I would only comment that the two precedents we've had before this committee, the Mental Health Act and the franchising act, have both seen just such a result, having gone through public hearings. So I would be confident that any good idea that's brought forward would be reflected unanimously.

Mrs McLeod: I'm less so on this one, but I'm prepared to try.

Mrs Papatello: Given the other examples, I don't think there was such a jurisdictional issue. I'm still not clear in my mind and wonder if we could request a legal opinion through the Chair on jurisdiction.

Should this bill go forward and become law and in the eventuality of its use then go back to the same questions we put to the federal commissioner, where he took a polite way in the end to say that his law essentially prevails and it's so completely different from ours on so many counts, why would any one of us go through the

process only to know we're actually bringing in a bill that is completely unacceptable?

I agree with the hearing process, and we do want to hear that, but it could be that we all have to acknowledge we have to change the lion's share whether we like it or not. It becomes that kind of notion. We either want to go forward and find that out in advance by going through all of this or—I just don't understand why all of us would not want to know in advance that there are some significant changes as to the intent of how it's written, which we have to make. Why would we not do that before we go forward? It just doesn't make sense to me not to do that.

I don't want to get into some kind of contest of wills: "Our bill is more important," and "We are going forward anyway." We are part of a federated nation, and this is something we have to do whether we like it or not. I don't want to be so intransigent on this process as to do something that is really not sensible. It seems so sensible and realistic to me to call him on the phone and say, "If we prepared a draft that incorporated a number of changes as to comments you made, would you look at this and give it some comment?"

He seemed completely prepared to do that when he was here the other day. I did not interpret his comments as saying, "I will only look at a final bill." He didn't indicate that to me whatsoever in his remarks. He seemed quite interested, quite passionate about the fact that we ought to pass a very good bill, is how it seemed to me. I would take on that challenge. If the Chair isn't comfortable calling him, we could do that, we could make that call, do whatever to make sure we're going forward. Gosh, 75% of this bill would be out with the stroke of a pen. I just want to ask, can we go for some legal opinion in terms of jurisdiction?

The Chair: I'd be happy to ask the legal branch for a briefing note outlining the different responsibilities. I think Mr Radwanski made it quite clear, but I'm sure we can get further elaboration.

Mrs Papatello: Could you explain to me, Chair, whose advice we from this committee seek about that huge disparity between this bill and the federal commissioner's opinion? Whose advice do we seek to say what we ought to do?

The Chair: I think it would be up to your judgment as an individual to read that briefing note and reconcile what you will be doing: voting for or against this bill as is, as amended or no bill whatsoever.

Mrs Papatello: Does that mean, then, that as Chair and as a committee member you're not prepared to have some discussion around rewriting before we go further with some of the significant points—

The Chair: I guess I'm a little confused. That's what this process is. We're here to listen to submissions and then possibly prepare amendments to the bill. What is there different about this bill from all the other ones you've sat on in committee?

Mrs Papatello: Because it's practically the whole bill. There's a problem with every section in such an alarming

manner as not to be acceptable by the federal Privacy Commissioner. It was pretty incredible to hear that presentation, and his government takes precedent over the provincial government in the area of privacy law. That's why. It's not that difficult to me.

The federal law is going to take precedence. The federal Privacy Commissioner told us this in no uncertain terms. Although it will take quite a bit of litigation to prove that, that's the way it is. Since so much of it is wrong, I would think we would want to try to redraft, because we could make some immediate changes in not too difficult a manner. I have a suspicion that some of those changes were probably what existed in former drafts of this bill. That's my personal opinion that I'll advance. I believe that to be the case, and I do not think it would take a great deal of work for Ministry of Health officials to do that, and we'd go forward with a pretty good bill in hearings and hear from people.

Chair, I'm really incredulous that we would be that intransigent on this. I just want to ask if the committee members have any opinion on this matter.

The Chair: Ms Papatello, questions go through the Chair. Mr Spina, you're next in the speaking order.

Mr Joseph Spina (Brampton Centre): I have a short question, first, of the ministry staff. Did you come here today prepared to address each of the suggestions by Ms Cavoukian, the provincial commissioner?

Mr Jackson: While we've seen Ms Cavoukian's original submission, we have not seen the new drafted version that has recently come to you—I believe it has come to members. We have seen an older submission.

Mr Spina: Is it fair to say you would not be fully prepared to respond to questions any of us would have on any of the commissioner's amendments?

Mr Jackson: Without having had a chance to go through what looks like a fairly significant file, that's fair to say. We have followed two of the IPC's general submissions. The IPC's last submission was based on a response to a consultation document, which was at a very different level. It wasn't on language that's specific, clause-by-clause. We would be prepared to respond to those or to engage with those; we haven't yet seen them.

Mr Spina: With respect, Chair, I liked some of the comments I heard from the opposition, particularly Ms Lankin. I think it would be a waste of time, to some degree at this stage, to go through all of this. We are anticipating 90-odd other submissions from other members, people from the public and other organizations, which are to be taken into account by this committee. Also, with respect to the concerns that Mrs Papatello and Mrs McLeod have with regard to the consistency, we really don't have a legal ruling as yet as to the consistency between our privacy commissioner, the federal Privacy Commissioner and the jurisdiction of our proposed law versus any federal laws. I think more work has to be done.

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We need the legal counsel, and I think it would be fair, before we start putting amendments into a bill, that all of

the submissions come in. Staff will have had an opportunity to comment and advise not only the ministry but also advise us as members of this committee on the repercussions of any amendments that are being proposed or not. I think then we as members are in a position to make a decision, to debate it in the proper and fair manner so that we can ensure that whatever comes out of this process is the best possible bill we can have that will be functional and acceptable within the federal jurisdiction and yet something that will be workable for the province of Ontario. I think that for us to try to prejudge at this point—we just don't have enough complete information to be able to discuss it and debate it even among ourselves and to make recommendations. I think that to get into this at this point would be partially a waste of time, and I think these people should have a better opportunity to advise us on their perspective.

Ms Lankin: I appreciate those comments, Mr Spina, and I do understand the point you're making, Mr Chair, with respect to this being a first reading bill and an opportunity for a bill that's not written in stone to be worked with by committee and by members of the public in representation to committee. In a sense, it would be ideal if we could actually rename this and say this is a white paper we have in front of us instead of even a first reading bill.

The problem I'm having with the position you've put forward is that I see the comments of the federal Privacy Commissioner—and the provincial privacy commissioner, but in this case the federal Privacy Commissioner—as of such import that they're not just one more opinion among the many that we have heard and will continue to hear. I think it comes down to the issue of jurisdiction having been established through C-6 and the jurisdiction resting with the federal cabinet, on the advice of the federal Privacy Commissioner, to determine the "substantially similar" or not.

I feel that asking considerable numbers of groups and individuals from the public to come forward and comment on a bill that the committee already has some sense needs to be dramatically redrafted in order to reach a chance of being considered substantially similar is almost an unfortunate waste of the time of those individuals. I guess if we viewed this as a white paper exercise, a further extension of the pre-legislation consultation that has been done, and we recognized as a committee that after hearing from these people there is going to be a period of substantial rewrite, working perhaps in a more informal way with the ministry rather than through formal amendments on the table at committee and that we then, with a substantially redrafted bill, are likely to have to go back out for public comment again, I can see my way through to the end of this.

But one of the concerns I would have is that we are asking people to come and comment once, and once only, on a bill—I know that's not predetermined but that would be my concern—and we're asking them to do it at a time when we know in our heart of hearts that in order to meet

federal compliance there's going to have to be a major rewrite of the legislation.

So I guess the question before us is, does it make sense to ask the ministry at this point in time—not this ministry but the minister's office, the ministry in the sense of through cabinet—whether or not they would like the time to make some amendments to the bill, to do the best they can to bring it in compliance with C-6, and then bring that back to us to go out to the public with, or do we as a committee want to proceed with hearing from members of the public and keep in the back of our minds that at the end of the day there's most likely going to have to be a major rewrite and we may well have to ask people to come and comment a second time and the issues may differ greatly from the first time we asked them to comment?

The Chair: Ms Lankin, the only response I would have to your comment is that I did receive feedback from the minister's office that they were quite comfortable with us proceeding with the hearings. It is of course within your purview to make a motion, if you wish, to change what is the schedule the committee has adopted—any member. I won't single you out. I will certainly respect the results of that vote, obviously. At this stage we're in the midst of a process that seems still to have favour at all levels. The ministry has not indicated, at least I've not heard today, that their predisposition would be to pull this bill off the table. If in fact there's any action to be taken, it would be up to a member of the committee.

Ms Lankin: Let me indicate that I won't place such a motion because, if it passed, there's no guarantee the ministry would do a rewrite on the bill at this point in time and bring it back to us while the House was sitting for those public hearings.

I know there are lots of ways this can be communicated to the minister's office: through committee Chair, through notes to the parliamentary assistant, through ministry staff, through the minister's office staff. I would ask that they give consideration to that possibility within the next couple of days. We can always deal through sub-committee and a conference call if there is an alternative that makes more sense.

I think we should be postponing the public deputations. The ministry should be doing a rewrite on the bill and we should be proceeding, when the Legislature comes back, with a rewritten bill to ask people, who've had time to take a look at it, to come in and comment. But given that there's no guarantee, from what you've heard—no offer, let me put it that way—from the minister or what we've heard from ministry staff or through the parliamentary assistant, that there would be such a rewrite, I'm not going to today place that motion, but I ask that people give some consideration to that possibility, that idea over the next couple of days.

Mrs Papatello: I wanted to get a sense of security about having public hearings, because I don't want to entertain any kind of motion that means down the road there's a bill out there and that we collectively have

decided at this time not to go forward with public hearings. But my greater concern is, if at the crux of this may be a piece of legal information that the committee needs to make a good decision about how we proceed—and I don't know what the time frame is of getting that. The most simple way I can understand this issue is that we are subject to federal law, and the bill we're going to have become law needs to fit in within the federal law.

I'll just wait till the Chair is back.

Mr Gilbert Sharpe: Mr Chair, I'm just wondering if it's time for me to get into this.

Mrs Pupatello: My question was actually going to be for the floor.

Ms Lankin: Go for it, then. You're waiting for this.

Mr Sharpe: Well, not really. I was hoping to avoid it. Mr Chair?

The Chair: Please.

Mr Sharpe: When I spoke earlier, I described a bit about my own history with respect to this bill going back many years, and also more recently in terms of going to Ottawa, the House of Commons, Bills C-54 and C-6 in the Senate and so on. Mrs McLeod raised a very important question. She said that if we stepped back, we should look at how possible it would be to make this bill compatible, substantially similar to C-6. That was why the Ministry of Health went to Ottawa twice, and that's why a number of provincial health groups went as well, because C-54 was never designed with health care in mind. In fact, the early discussions over two and a half ago that various people had inside Industry Canada and Health Canada resulted in comments like, "This doesn't apply to health care." We initially went up there alone because some of the groups we talked to indicated they did not think this had any application to the health care system.

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When we were in Ottawa, we asked not that federal and national privacy interests be set aside in terms of application to health care—not that at all—but that if there's going to be a federal privacy bill looking at health care, it might better come out of Health Canada in concert with provincial and territorial ministries and departments of health with input from the health system from the kinds of people who will be coming before this committee, starting next week, to talk about what the very special interests and concerns are of the health system.

Bill 159, in its 20-plus-year history, did not have in mind C-6, e-commerce commercial privacy legislation. Similarly, C-6 did not have in mind provincial health care concerns and the special problems of the provincial health care system.

My view as a lawyer for many years looking at these issues: I believe the issues are not necessarily substantially similar. There are some areas where there can be more compatibility for sure. We've learned a lot in our discussions particularly with our federal Privacy Commissioner. Ms Cavoukian and her office have been very constructive for some years, and particularly over recent months, in assisting us. I think that document that has

just come in will be a further clarification of some of the issues that need to be addressed in Bill 159. But some of the positions taken by the federal commissioner may underscore the fundamental difference in approach from a federal Industry Canada commercial banking kind of statute and the needs of a provincial health care system.

Regardless of whatever legal opinions may be obtained as to whether this is the regulation of provincial health care information, it's constitutionally provincial jurisdiction, or whether there's an overarching federal interest in privacy, ultimately there will be, I'm sure, legal opinions on both sides of the issue. I think the federal commissioner is correct that some years from now it may or may not have to be determined in court. Hopefully not. I think it would be very unfortunate if this became more adversarial, more confrontational, rather than an effort at constructively developing legislation that protects the interests and integrity of patients as consumers in the health system, but at the same time doesn't create problems in continuity of care and doesn't disrupt a system that is struggling through an evolution into a new era of high-tech integration.

When we developed this, we were mindful of the concerns that are the underpinnings of C-6. We came forward to Ottawa to present some of the conflicts in conceptual principles and approach from provincial health care needs to federal commercial Industry Canada views of the world, but ultimately we are hoping to achieve, as I say, a result in this legislation with the many consultations that have gone on over many years with those who are going to come forward next week with ongoing concerns from both sides. As Mrs McLeod said, there will be folks on both sides of the issue continuing to present concerns, a consultation that Industry Canada did not undertake with the health care community, who were unaware that that bill would have application to them or they would have come forward and spoken to the federal government to make sure the bill took into account these kinds of concerns.

Mr Chair, I just wanted to present again, I guess as historian—old man, perhaps—some of the frustrations that some of us have gone through over the many years at the incompatibility and inflexibility perhaps of a different jurisdiction. I mentioned last time out that I had done work on the Criminal Code for the federal Department of Justice and I understand, wearing that other hat, what the national perspective can be in so many of these issues dealing with some many different jurisdictions, but I am not certain that if the ultimate goal is to mould this health legislation into the C-6 principles, as enunciated by the federal Privacy Commissioner, whether that ultimately will be doing a service to consumers and patients in the provincial health system. The effort has been made and will continue to be made, and I would hope to be optimistic. I'm just speaking in support of your comments that it may be instructive to hear from others, as I know the committee is planning to do.

The Chair: Any further comment?

Mrs Pupatello: Could I ask a question?

The Chair: Certainly.

Mrs Pupatello: If there were to be any kind of review like that, where you would take very specific examples of comments from the federal commissioner—like the 30 items made by regulation, which he felt was completely inappropriate—and walk through that bill and see clearly, surely that would not be a huge effort. With your 20-year history, you could probably write this while you were sleeping.

Mr Sharpe: Which isn't very often these days.

Mrs Pupatello: You could likely turn around very quickly some very significant points that were made by the federal Privacy Commissioner that would be a significant change in the legislation. Could you do that quickly?

Mr Sharpe: As I said at the outset of my discussion last time, the specific exceptions to consent—and there are a number of them, two dozen—could probably be grouped in a smaller list. But each is there as the result of input from a number of people over many years. To add them up and say, "There are 24, and there should only be eight or 15 or three"—isn't it more appropriate to have the committee look at the substantive provisions and question, as we're going to, "Why is this here, what is the rationale behind it, who asked for it, and where did it come from?"

The same with the reg-making authority. Why are all these here? Do they make sense when you look at them individually, rather than saying, "There are 30. That's too many. There should only be six"?

Mr Jackson: Frankly, this has been a real challenge in terms of the issue: is the number of directed disclosures too many, or are there too many disclosures without consent? As Gilbert said, the committee could go through and look substantively at the rationale for each one. It may be that the rationale is weak and the committee chooses to strike that.

We could, however, have taken a different approach. For example, we could have had the approach of not putting directed disclosures in the legislation and had them scattered around in other pieces of legislation. There is a certain openness to this that frankly makes the legislation itself probably more vulnerable. It's there in front of you in black and white. It's not necessarily buried in other areas. There are privacy statutes which exist that do not refer to directed disclosure, and the directed disclosures come through other pieces of legislation. Stylistically, we could have taken an alternate stylistic approach. That's for sure.

Mrs McLeod: The third option would have been to amend the other acts to remove directed disclosure, if that was felt to be a problem.

I guess I'm not as convinced that the ministry was as surprised by the substance of Mr Radwanski's criticisms of the bill as it was by the public and strident nature of his criticisms of the bill.

We're aware that you made a presentation on the federal privacy bill. We're also aware that you were aware of the federal government's response to your presentation

and their differences, and those differences are apparent in the bill that's before us today. Those, as the government has proceeded with its legislation, are apparently irreconcilable differences between the two approaches of government, not just in details of the legislation.

What I've heard today is more a defence of what is here than a response to the privacy commissioners. That gives me some concern about the amendment process, and it's one of the reasons I feel we must go through the public hearings, so that it's not just a question of the Ontario government versus Mr Radwanski with Ms Cavoukian somewhere in the middle, which is where we are as we sit today.

I would like to go through the public hearings. Let's hear the views, and let's trust that at the end of this process there is a genuine willingness, which I've not yet heard, to amend this bill in such a way that it is a true privacy bill as well as being compatible with the federal legislation, so we don't have legal chaos. Without going through the public hearings, I'm not sure I'm looking to the ministry to come back with a substantially different bill.

Mr Jackson: To be fair, obviously there is a limit to the role of bureaucrat in terms of being able to commit to changes and non-changes.

Mrs McLeod: I hear you.

Mr Jackson: I would say I've probably signalled a number of areas where alternate approaches could be done, probably more than is healthy for my career.

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Mrs McLeod: Recognizing the fact that it is the politically elected government that will make the decisions about whether and how to proceed with this bill, let me put on the record that I trust that the criticisms that are still going to be raised about this bill will not deter the government from developing what will be truly good privacy legislation, which we all around this committee table agree we need.

Ms Lankin: But you don't trust that they'll bring back an amended bill that will deal with the federal Privacy Commissioner. Anyway, there is no motion before us at this time to defer the public hearings. I am not, for the reasons I stated, going to put that motion forward. I would like to suggest that we move to clause-by-clause, but I have one quick question for Mr Sharpe. Didn't I pay to go to a retirement party for you?

Mr Sharpe: You did.

Ms Lankin: Okay, that's fine.

Mr Sharpe: Maybe I should have stayed away. I liked your speech in the House.

The Chair: With that, perhaps we can get back into looking at each section. As I mentioned earlier, we were at the definitions section. I don't know whether any committee members have any other—Mr Spina?

Mr Spina: I still am of the opinion that this is premature.

The Chair: Mr Spina, only because you're joining us here today for the first time, the original suggestion was

to build on the Ministry of Health's appearance last week, wherein we were hoping to get answered committee members' questions on the bill itself, not Ms Cavoukian's response.

Mr Garfield Dunlop (Simcoe North): Just right on Bill 159.

The Chair: Just on Bill 159.

Mr Jackson: With respect, Chair, could we take a one-minute washroom break?

The Chair: This committee is recessed for five minutes.

The committee recessed from 1521 to 1534.

The Chair: I call the committee back to order. I'm sure Ms Lankin has some questions we can start out with.

Ms Lankin: A preliminary question about the information we were told would be provided this afternoon, which is the copy of the document with respect to registration information: has the clerk been given that? Can we have that?

The Chair: Mr Jackson, what's the status of that?

Mr Jackson: We're just trying to locate it.

The Chair: Perhaps we can have the clerk pass those out.

Ms Lankin: Mr Chair, it would be my understanding, in terms of resuming clause-by-clause analysis, that we would be starting with section 3 at this point in time. I'm not sure if that's what the ministry's intent was. Were there any secondary comments that you wished to make with respect to section 2 in particular, definitions as a result of either the provincial or federal privacy information?

Mr Jackson: Less in terms of the comments of the commissioners and more in terms of registration information.

In terms of registration information, we went back, and I think you'll see in the material that's being submitted that the ministry reviewed what the original criteria in the draft bill or in Bill 159 were for including employment status. As you'll recall, when the PHIPA was originally drafted way back, it was drafted outside of the context of either C-6 being in place or other work being underway, so the definitions were broader. Hence, the registration information definition included employment status because, at the time when it was originally being discussed, it may well have applied to such things as insurance. Now, having reviewed it, we can see no reason to maintain its inclusion.

Ms Lankin: Thank you very much. That makes me happy.

Mr Chair, would we commence with clause-by-clause of section 3, then, and ask the ministry to present the section and then the committee can move to questioning?

The Chair: Perhaps in the interest of time we could get right to questions. By "present," do you mean actually read the entire section or just give some thoughts?

Ms Lankin: No. Just an overview of the intent, and I'm expecting that they will editorialize because some of these sections will have been commented on by the federal commissioner, and Mr Jackson made some com-

ments in his initial response which he said he would elaborate on as we go through the sections.

The Chair: Mrs McLeod?

Mrs McLeod: I just had one question. I agree with Ms Lankin's approach. I think it can be done fairly quickly. I don't think any of us are looking to prolong it.

The Chair: Fair enough.

Mrs McLeod: But I did have one question arising from Mr Radwanski's comments on section 1, if I may ask that before we move directly to section 3.

The Chair: Section 1.

Mrs McLeod: It's the definitions section.

Ms Lankin: Section 2.

Mrs McLeod: Section 2; I'm sorry. I'm not going to get into the whole long list. Mr Radwanski was concerned and, as you've said in your response, there are rules being put in place through this legislation around how health custodians have to regard that health information. But his concern was that there was such a long list of health custodians, that we'd given wide access to health information because of the length of the list.

One that struck me as he spoke was the inclusion of the district health council. I just wondered if you would say why the district health council would be in there, remembering that what we're dealing with is identifiable information. The district health council is made up of appointed people. I have a great deal of regard for the people on the health council in my community, but I don't want them having my personal health information under any circumstances.

Mr Jackson: It's a very good point and it goes to the definition of "personal health information" that's used at the beginning of the bill. "Personal health information" is defined extremely broadly in the bill and it should be read, certainly the intent of the way it's read, that it's identifiable or potentially identifiable, so that in a manner that an individual could put together various components of information in order to obtain a whole picture.

Certainly district health councils work with information—not patient records—that potentially could be identifiable. So for example, for work that's being done in the Metro Toronto area, to look at where to place specific stroke services, a highly developed, unique census for advanced stroke care, the sort of work that staff at a DHC would do would require them to know epidemiological trend, utilize the number of patients going through an individual facility, in order to be able to determine where to appropriately put it. Is that information individually identifiable? No. Is it potentially identifiable when you take the pieces together? Yes. This is the challenge of crafting access to what is essentially data and trends and buried in that is the capacity to link.

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Mrs McLeod: In the course of having what may be a more detailed definition of "personal health information" and not exclude legitimate uses from some users, you've now given such a long list of users that can access much broader information than what they require.

Mr Jackson: That's why basically I draw attention to section 12, the general limiting principles. The general limiting principles basically would spell out, "No more information than is required for the purpose." If you read through the section 12 provisions, if the purpose is for planning and the planning can be achieved without identifiable information, then they will be required to not use identifiable information. One of the challenges of the act is reading section 12 in concert with all of the other sections. In many ways it's the qualifier that applies to all collections, uses and disclosures.

Mrs McLeod: I'll return to section 12 when we get there.

The Chair: Perhaps, Mr Jackson, you can give us a brief overview of section 3.

Mr Jackson: I'm going to be joined by Jutta Auksi.

Ms Jutta Auksi: I'll start with section 3 and touch on the purpose of particular provisions, trying not to get into too much detail so that we can do this in the time available.

Subsection 3(1) deals with a situation where you could have a company that operates a number of facilities; for example, long-term-care facilities. This provision would say that each individual long-term-care facility would be a custodian, as opposed to the company that might operate a whole number of them.

Subsections (2) and (3) deal with the notion that if you have information that is passing control from one person to another, then there is not a time during which it's not in anyone's control. Subsection (2): if you have one custodian transferring information to another custodian, the original custodian remains responsible until the transfer is completed. Subsection (3): if you have a death of a custodian, the estate trustee is the custodian until the information passes on to another health information custodian.

Part II, the application of the act: this clarifies, for example, that the act applies retroactively to records that came into existence prior to the time the act comes into force. With respect to the scope of the act, it expands both public sector and private sector health care entities. If there's a need, for example, to carve out the application of these, the act must be made to apply to information that is currently under the Freedom of Information and Protection of Privacy Act or the Municipal Freedom of Information and Protection of Privacy Act, FIPPA and MFIPPA, as they're sometimes referred to. For example, personal health information under the custody and control of the Ministry of Health, currently under FIPPA and MFIPPA, would be subject to this act instead. To the extent that some other custodians are in that situation as well, this clarifies that personal health information in those cases is governed by this act and not by those acts.

The Chair: Thank you. Any questions on that section?

Mrs McLeod: Just in terms of all the sections and subsections which you've just covered with your explanation, how far along are you?

Ms Auksi: How far? I hoped that this would work. If we did every—

Mrs McLeod: We don't need to.

The Chair: Exactly. That's my concern. We've only got 45 minutes.

Mrs McLeod: We don't need to go over—

The Chair: When I say "brief overview," a sentence or two would be sufficient unless questions arise.

Ms Auksi: All right.

Ms Lankin: You were explaining how you were going through it. I'm assuming you just went through to the end of section 6, essentially, at that point.

Ms Auksi: Pretty much. Yes.

Ms Lankin: In section 6 I had a couple of questions. It's clear that if an individual has made application and received disclosure of information under the freedom of information and the municipal freedom of information, that act continues to apply. Similarly, if someone has made a request, it continues to apply, or if they have appealed a decision, the previous legislation continues to apply. What happens in the case where someone has requested disclosure of personal health information and received a decision which is negative, either a complete no or only partially received what they had asked for? Do FIPPA and MFIPPA continue to apply or do they have an opportunity to reapply for the same information, the same basic set of data, under whatever this PHIPA is?

Ms Auksi: That's a good question. You mean can one—

Ms Lankin: Re-litigate, essentially.

Mr Jackson: It's basically, can an access request be grandfathered?

Ms Auksi: It's not necessarily precluded.

Mr Jackson: Nothing would preclude a new request.

Ms Auksi: No. These are simply transitional provisions for things that are in the system at the time the legislation comes into force. So once the legislation came into force, I guess potentially there could be something that was redone, unless someone can point out why that shouldn't be the case.

Ms Lankin: The only thing I would suggest is that if someone makes a request under freedom of information and receives, let's say, partial disclosure, so their whole request is not granted, because there has been disclosure of health information under freedom of information, 6(1) would apply, which says they continue under that act. It would seem to me we're saying that people would have to go through the whole process of objecting and appealing and getting a final decision under freedom of information, and then you're telling me there would be no reason why they couldn't come back and start over again under this new piece of legislation. Given that there's a section here that says if they're making an appeal they're still governed under this, would it preclude them? I just want to make sure that in fact it doesn't preclude, because at the end of the day we may have broader rights of application of personal health information under this legislation.

Ms Auksi: I think it's one of those things that if someone would make the case that we should look at it again and see whether it should be different than it is—

Ms Lankin: It may be a case where we look at some clause that says, "Nothing in this section prohibits an application under this new legislation."

Ms Auksi: Yes. Either it's by saying nothing that it has that effect, or if it's necessary to say something, it should have that effect.

Ms Lankin: Perhaps the drafters could take a look at that and advise us.

Ms Auksi: Sure.

Mrs McLeod: Is my question on 7 premature then?

The Chair: No.

Mrs McLeod: Did they stop at 6?

Ms Lankin: It is in that they haven't said anything about 7 yet.

Mrs McLeod: That's why I was asking where you stopped in application of the act. Shall I proceed with the question?

The Chair: I'm always impressed with the degree of research members bring to the committee. Ms McLeod, if you're ready with the question.

Mrs McLeod: It takes a lot of work on this bill to do that, Mr Chair.

Ms Lankin: Could we ask the ministry to have their say about section 7 before we ask questions?

The Chair: Sure. A brief overview, please.

Ms Auksi: Section 7, then: this is to exclude some kinds of information from the application of the act, and this includes information about a person who has been dead for more than 30 years or recorded information that's more than 150 years old, because people said that sometimes you don't know when someone died.

The anonymous or statistical information: this is to say that where there is information that is in such a form that it does not, either by itself or when combined with other information, permit an individual to be identified, that is outside the scope of this legislation. This is just current from the information that Phil referred to earlier, where there would be reasonably foreseeable ways of linking information to identify a person. This would be information that doesn't permit that.

1550

Clause (d) is intended in effect to exclude employment-related information. I think I mentioned something in one of the earlier days we were at the committee. The intent is not to have personnel records, employment-related records, be the subject of this act. That is because those records are really—those would apply in whatever kind of organization you were talking about, not just those in the health system. So they would be more properly the subject of broader legislation than this, not just limited to the health sector.

In response to the kinds of issues where people say, "What about the protection of personal health information in personnel records, in employment-related records?" there are a number of ways in which the act actually does speak to that; for example, further on, when

we get to section 24, the so-called recipient rule, where there are restrictions that if someone gets information for one purpose, they can't turn around and use it for another purpose unless with restrictions. But perhaps I can get into that later. But the basic idea is that there wasn't really a logical reason why the records of employees of a hospital, for example, would be dealt with by rules under this act whereas records of employees of a non-health-sector institution would be dealt with by different rules.

The Chair: Thank you, Ms—oh, you have more?

Ms Auksi: I think some of the other things here are more self-evident, so unless there are questions—

Mrs McLeod: Just to note for the record that the Ontario privacy commissioner did have some concerns about anonymous information and felt there should be some safeguards. But my question was around clause 7(d) and the exclusion of health information for employment-related purposes, which Ms Cavoukian felt should be stricken from the bill, that this bill should apply fully to health information related to labour negotiations or to employment. Has the ministry a response to that?

Ms Auksi: I guess that could be discussed, but the explanation that I gave I think is why that is there.

Mr Jackson: I think one of the challenges is, if you place it in this bill, does it raise the fact that hospitals, for example, would be governed under one set of rules for their labour proceedings and for the files that they hold for their employees that wouldn't apply elsewhere, in other—

Ms Auksi: In a department store or in another kind of entity that isn't governed by this act at all. It would put a layer of complexity to the issue of how employee records are dealt with without really a good reason. Why would information that's really dealing with the operation of the health care area deal with that area? It really belongs in more general legislation, like possibly future privacy legislation in a more general way.

Ms McLeod: But the commissioner's perspective was that what this serves to do is deny individuals access to their own health information which is being held by a public health custodian and that that should not be denied. Her focus, as I understand it, was on access.

Ms Jackson: I think we'll need to go back and look at what suggested drafting changes she's made round that. It's a challenge if you want some sort of consistency. If I work for Dunkin' Donuts, in theory I should have the same rights to be able to access the information that's in my file as if I worked for Toronto Western Hospital. In that this is attempting to create rules for the health sector, as it pertains to labour proceedings, we've tried to not get into, basically, legislating employment files wherever they're held, because that would stretch the bounds of this legislation to an enormous degree. But we certainly are interested in seeing if Ms Cavoukian's crafted specific language.

Ms McLeod: Could I just suggest, Mr Chair, that it would be of interest to have some discussion between ministry representatives giving their response and Ms Cavoukian? We're getting a little bit tortured here. I

honestly don't know how to weigh one concern versus another in this situation. I'd be really interested in her response to your concern.

Mr Jackson: Yes, and this is one we'll definitely follow up again. We have had some initial discussions around a number of the clauses, but we'll follow up with her staff.

Ms Lankin: Just on that point, that would be my suggestion as well. Quite frankly, I accept the ministry's explanation and I understand that. As a workers' advocate, I would like to see legislation that guaranteed a worker's right to that information in those circumstances. There are certain pieces of legislation or due-process practices that have been put in place that guarantee that in certain circumstances. I think of the Workers' Compensation Appeals Tribunal, which has a different name now, but the right of due-process access to any information the employer holds that they are using or that the board holds, and the duty to disclose. So there are some areas where that's covered and there are some areas where it's not, particularly in unorganized workplaces, where people are looking at private suit versus before the labour board. There are not clear rights that are set out, at least in preliminary processes.

The question to the privacy commissioner, given her comment that there should not be a prohibition on access to personal health information: is she suggesting, therefore, that this legislation should in fact be broadened with respect to anyone who holds personal health information? That would include employers; it would include insurance companies. I think it's a valid question to ask, if that's what her intent was by the criticism that she raised here.

I also wanted to come back to the issue of anonymized information. You said it's not the intent that this would be information that could reasonably be foreseen to be linked. In fact, I think that's the very concern people have, that you exempt anonymized information.

I think back to some of the debates that went on around public health legislation and communicable diseases and the necessity to report and the concerns of medical officers of health with anonymous HIV testing. I remember the huge wrangle there was around that. Yet if the very significant public policy and public health goal that was thought to be met, and I think successfully met, by the introduction of anonymous testing is jeopardized by the belief that there could be links that are made, as you just told us in your example of why the district health council has been included as a health custodian under that definition, I don't think the language here is sufficient to guarantee that it is anonymized information that couldn't in some other way be linked. I would ask you to address that or to tell us how we might get that assurance stronger in the legislation.

Ms Auksi: The point is taken, but I would point out that in the definition of "personal health information" on page 8 of the bill, it says that it "is information that,

"(i) identifies the individual,

"(ii) can be used or manipulated by a reasonably foreseeable method to identify the individual, or

"(iii) can be linked or matched by a reasonably foreseeable method to other information that identifies the individual or that can be used or manipulated by a reasonably foreseeable method to identify the individual."

So where there can be linkage by a reasonably foreseeable method, that is included as information that would be governed by this act in the hands of a custodian. This is—

Ms Lankin: The rest of it, the stuff that couldn't in any way—

Ms Auksi: —the stuff that couldn't be. If one doesn't make that distinction at all, then the act ends up applying to things that really are not linkable, not identifiable, and creates potentially real difficulties in using things for quite appropriate purposes without risk to individuals.

So, on to section 8?

Ms Lankin: OK.

Ms Auksi: Section 8 deals with some areas of law where there could be some question as to whether the provisions of this act would interfere with or conflict with—not conflict with, but interfere with in particular—other areas of law where people might see an interface. We wanted to make clear here that, for example, the act would not be construed to interfere with certain things like a right of subrogation, anything governed by the Human Tissue Gift Act, which is now the Trillium Gift of Life Network Act, or anything governed by the Occupational Health and Safety Act, not to place new complications in those areas that have other rules attached to them and the area of copyright, which might otherwise be taken in some way to be affected by this act.

1600

Ms Lankin: Could you give us a practical example of where there may be a conflict in purpose and therefore a complication in procedure between this legislation and the Occupational Health and Safety Act?

Ms Auksi: I must say I can't be specific about it but there are certain very specific provisions there about disclosures that may and may not be made. It's simply not intended that there be anything in our provisions allowing disclosure where that act would prohibit it, or prohibiting disclosure without this act would allow it, since that is such a carefully worked out scheme. If there were aspects that anyone thought to draw to our attention that either should or shouldn't be dealt with in another way—

Ms Lankin: I can probably think of some examples and accept that they are separate schemes. I just wondered why certain other pieces of legislation might not also be included. I'm thinking of the scheme in governing workers' compensation, for example, and there are some others. Perhaps you could respond to us with some practical examples of why the inclusion of this and the exclusion of some other similar kinds of legislation.

Ms Auksi: As you probably are aware, the Workplace Safety and Insurance Board in a previous version was a custodian under this act and if by them not being a

custodian under this act there is some impact of that kind, then we certainly look forward to hearing from them.

Ms Lankin: Well, I'm asking you to take a look at that in particular.

Ms Auksi: All right.

Ms Lankin: Thank you.

Ms Auksi: The OHSA. Yes.

We're at section 9, I guess the typical provision not overriding solicitor-client privilege.

Section 10: there certainly are provisions in this act, later on as we'll come to, that do affect the law of evidence, but the intent is not to interfere with such law otherwise than what is specifically set out in this act.

Conflict provision, section 11: "In the event of a conflict between a provision in this act respecting confidentiality and one in any other act, this act prevails unless this act or the other act specifically provides otherwise."

Mr Jackson: This is a piece I would draw attention to where this would place a requirement for new legislation to state explicitly whether it complied or did not with Bill 159.

Ms Auksi: Well, only with respect to confidentiality provisions. If there were something that was otherwise in conflict with this act, in order to apply, it would need to say that notwithstanding—but it does not mean that it applies to the whole scheme of other acts.

The Chair: Mrs McLeod.

Mrs McLeod: Understandably, but my question on section 11 was, "Does this mean any other act that exists now or in the future?" and what I've just heard you say is that any future act of the government could specifically state that it is not in compliance but it's access to health information. Another act, by any other ministry even, could take precedence in terms of access to confidential information over the provisions of this act.

For example, so that we're not dealing with hypothetical things, I come back to Bill 155 and the clause that was taken out of this bill. Bill 155 could contain a clause which is not compliant with Bill 159 in terms of confidentiality provisions, and Bill 155, by the very virtue of its passage, would take precedence over Bill 159—I see Gilbert nodding his head—which is the whole issue we've raised over and over again with the Attorney General's department.

Mr Jackson: This is a challenge insofar as it pertains to privacy, which would be covered under this, specific to health information, in that it will require it to be flagged. It will actually be in the legislation to say, "Notwithstanding section X."

Mrs McLeod: Fine, but it could still pass. So if the Attorney General is bound and determined to get hold of confidential health information despite the fact that the Minister of Health removed the clause from her bill, the Attorney General could access it through his. All he has to do is say "notwithstanding." There's an openness here to a "notwithstanding" clause in every piece of legislation that's passed in the Ontario government. Right?

Mr Jackson: There's a provision that states the onus is on a bill coming forward to explicitly state where it is not in compliance.

Mrs McLeod: But why would the privacy act of the Ministry of Health dealing with confidential health information not have primacy? Under what possible circumstances would you want to allow another ministry of the government to pass legislation that contains a notwithstanding clause that prevails over the privacy of personal health information and the confidentiality of records?

Mr Jackson: It's very hard to anticipate, X years down the line, where another piece of legislation in a very different area, addressing a very specific problem, may run up against one of the provisions in here. It could be a minor provision; it could be a significant provision. It's hard to anticipate that.

Mrs McLeod: That's my problem. Because you can't anticipate all possible uses, you've opened it to everything. That's why there's such a fundamental disagreement with the bill.

Mr Jackson: The requirement, as it's currently stated, does as with FIPPA and MFIPPA. If you're not going to be following the FIPPA and MFIPPA rules, you would introduce a provision saying, "Notwithstanding section X of FIPPA and MFIPPA...." There's a transparency aspect to it. Certainly we would not want to bind every other piece of legislation that ever came through. On the other hand, if there are suggestions of ways this could be strengthened—we certainly hear the point you're making. The thought was that by introducing the transparency provision, which is what this is, you are requiring to bring in front of a legislative process a declaration that you are overriding a certain provision.

Ms Auksi: I'm sorry to interrupt, but this also has the effect of actually maintaining certain confidentiality provisions that are more absolute than those that would apply here. For example, in reference to the Child and Family Services Act, the provision is that "No person shall publish or make public information that has the effect of identifying a child who is a witness at or a participant in a hearing or the subject of a proceeding, or the child's parent or foster parent or a member of the child's family," and it goes on. There are certain provisions that would—

Interjection.

Ms Auksi: Yes, 11(2) gives some examples where confidentiality provisions in other acts would prevail. It can work that way too.

Mrs McLeod: I understand where it's spelled out in (2). I'm concerned about the "unless" provision.

Maybe I could make a specific request for a written legal opinion from the Ministry of Health on the relevance of section 6 and the definition of health information exclusion under FIPPA, which the Attorney General has used as a reason he would not, under Bill 155, have access to confidential health information under section 11. I'd like a written legal opinion as to whether section—

Interjection.

Mrs McLeod: I know I'm asking a lot. It's whether Bill 155, as it's structured, would permit access to confidential health information in the absence of any warrant.

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Mr Sharpe: This was actually seen as a safeguard. It's common to see in statutes provisions that say, "The provisions of this act take paramountcy over any other act to the extent of a conflict." If every act says that, it becomes very confusing when there's an actual conflict. So if there's a provision in some other statute about, say, reporting people who have conditions that may make it dangerous to drive—there's a provision in the Highway Traffic Act—and it doesn't say it overrides this, and a physician is wondering whether or not to report—they have two obligations: one that says they have an obligation to report and the other that says they have an obligation to maintain privacy with respect to their patient's information—what do they do? What this says is that it's not enough to simply get a legal opinion on how you resolve these two conflicts. The act that is intending to override this has to expressly do that.

Mrs McLeod: I don't want to prolong the debate on this. I understand how you've identified some acts, and there are reasons why you've said they are exceptions and their provisions override. What I don't understand is why you would leave an open door, as opposed to, for instance, allow—in any substantive bill that's passed, there are amendments to other acts. You could make this the bill that has primacy, but any future legislation that challenged this would require an amendment to the health privacy act. It couldn't just come in by the back door through other legislation. I really think that's a legitimate—*inaudible*.

Mr Sharpe: I understand what you're saying, though I think that's in drafting. There's still the accountability of the legislative process either way. To have a provision in a bill that's being brought forward saying it expressly overrides this bill, it's going to have to mention that, and that would be open for public debate in the context of that bill. Or you can do it as you've suggested and put in a provision saying this is a complementary amendment to this bill, to add to subsection 11(2) to the list. In either case, whether it's appropriate is going to be up for debate and there will be that accountability there. It's a matter of what is the better drafting mechanism. It will have attention drawn to it in either situation.

Ms Lankin: I personally believe that if the intent is a bill that is to protect privacy, and this is the paramount bill, then it should be drafted in way that any further exceptions to this are done by amendment to this bill. It also has the effect of keeping the list of differences in one place, otherwise you're seeking in other pieces of legislation to determine whether this has got primacy, and you may not even know where to look in a circumstance. So I think that is a substantial problem with the bill as drafted. It's more than stylistic; it's substantive in the expression of intent and force of the bill, I think.

The second question I have with respect to this is with respect to subsection (3). Without having had the opportunity to read through the applicable sections in the Ontario disabilities support program and the Ontario Works Act, because they're not actually identified here, I have significant concerns. Let me tell you, in particular, that currently in the Ontario disabilities support program, determination of disability is done through a bureaucratic mechanism as opposed to a medical assessment. You certainly need medical assessments to be fed into it, but in that process the decision that you are disabled or not is a bureaucratic decision. That's another issue, and it's significant to a lot of people. It's one we will work on with the government in another arena.

But to say that that act has primacy over this legislation, given the bureaucratic gathering of data and information, medical information in particular, gives me great cause for concern; similarly on Ontario Works, because often there's a relationship between the individuals who may begin on Ontario Works and transfer to the Ontario disabilities support program through application and eligibility assessment.

I think it is necessary for the ministry to give us explicit details of what sections of those two acts override this legislation. I think I will object to them in any event, but at the very least they should be spelled out in this legislation, not simply that the whole two pieces of legislation apply.

I have a sense that it's less information-policy-based than it is government-goal-based in terms of two pieces of legislation very important to the government that they don't want anyone to mess with, so that there is an effective working of the goals as set out in those pieces of legislation. This committee needs to understand what it means with respect to privacy rights of individuals under those two pieces of legislation.

Mr Sharpe: It does have to some extent to do with Jutta's earlier comment on the scope of this legislation. Should this be applying to health care information everywhere? If that's the case, then you do bring in quite a broad range of actors who are not really health care custodians in the true sense of providers, or do you leave intact in certain other statutes schemes that incidentally use health and other kinds of information for other purposes?

Ms Lankin: But my problem with it, Gilbert, is not that we're trying to expand the scope here. It is in fact that we're not even identifying particular areas of conflict, and yet we know that health information is collected and used and that it is done by the Ontario government and the Ontario government has access through all sorts of cross-matching. Please don't suggest it's not used, because in fact that's part of the whole new anti-fraud mechanisms that have been put in place that cross-reference other databases within the Ontario government. So there's a real problem here when we don't even know what sections it is that you're suggesting override this piece of legislation.

Mr Sharpe: We'll come back to the specific provisions that were of concern in consultation—

Ms Lankin: Then we'd be able to have a dialogue about what the intent is.

Mr Jackson: Essentially, there are a couple of questions. One that Gilbert alluded to is the boundary question, what is the boundary of PHIPA? Second are the specific provisions.

Ms Auksi: Generally, the intent is not to revisit existing policy, where it exists in statutes elsewhere. There would be some exceptions, I guess, where it was possible, without interfering with another scheme, to clarify or whatever. But it's not really seen as being an act that would really revisit all other—

Ms Lankin: I realize that, but an example was given just moments ago about the Ministry of Transportation and driver licensing legislation and regulation. It's not specifically referenced here and yet Ontario Works and Ontario disability are. So I need to know. It was obviously in the policy consultation process between ministries. It was flagged by the Ministry of Community and Social Services as a problem. It's been included in the bill as a result of that. I'd like to know the rationale behind it and if we can be more specific or not.

Ms Auksi: I guess the question too is whether it is necessary. Again, these programs were in the previous 1997 draft act. They were listed as custodians, and in the narrowing of the scope of the bill in the process of making it more specifically health system legislation, they were removed from the list of custodians. It's possible that this provision may no longer be necessary.

The Chair: With a few minutes left to us, perhaps we'll move into section 12, because I'm sure there will be questions on that.

Ms Auksi: Section 12 is in some respects, I guess, the heart and soul of the legislation, and we like to remind people reading the legislation to always keep in mind that it really applies throughout the act. If you look at subsection 12(1), in regard to general limitations that apply, this section applies to every collection, use and disclosure of personal health information that is governed by this act.

Subsections (2) through (5) deal with what we call the general limiting principles. They speak to, for example, the fact that personal health information cannot be collected, used or disclosed unless other information will not serve the purpose. For registration information, if the more limited information such as name and address will serve the purpose, then information that pertains to someone's health status or health care must not be collected, used or disclosed. The amount of information must be limited to the necessary amount for a particular purpose, so only the necessary amount of personal health information can be collected, used or disclosed.

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Subsection (5) deals with, once having the information as a custodian, how that information must be handled. The rule then would be, "To the extent reasonably possible, a health information custodian who collects, uses

or discloses personal health information" must "do so in a manner that conceals the identity of the individual, that keeps the identifiers of the individual separate from the information or that deletes the identifiers from the information, while still meeting the purpose of the collection, use or disclosure, as the case may be." So using the appropriate methods of protecting the identity of the individual.

Then subsection (6) deals with the fact that standards may be prescribed by regulation for the purposes of subsections (2) to (5), which are the general limiting principles. If there are such standards in regulation, then a health information custodian is required to comply with them. Why is this left to regulation? People have pointed out that the custodians are really quite diverse and the measures that may be appropriate for one may not be appropriate to another. The intent is not to get into a huge amount of detail by regulation but to do so in a selective manner where this would actually have beneficial guidance for custodians.

Subsection (7) is a specific provision, rather similar to subsection (6) but speaking to the issue of registration information, as to when, for example, registration information may be the way to go as opposed a broader range of health information.

Subsection (8) says that this section of the general limiting principles "does not apply to personal health information that a health information custodian is required to disclose under this act or another law." We recognize that this may need a technical fix to clarify that it does not—

Mr Jackson: The intent is to cover directed disclosures. It doesn't come across clearly enough. If you read subsection 12(1), it states that explicitly. Subsection 12(1) basically applies to all. The intent is it applies to all under this act.

Ms Auksi: I guess one example might be that if one is required to make a disclosure, for example, where there may be a requirement to disclose something to fulfill the requirements of the Canada Health Act regarding the settling of a claim that was incurred out of province, you wouldn't want someone to somehow be limited from being able to meet that requirement by someone saying, "I'm looking at what the amount of information is and I don't think that it should be necessary to disclose that amount of information," or somehow making a required disclosure not be workable, because the custodian could be applying a restriction that would nullify the effect of the requirement. I don't know if that came out the right way.

For example, just even with the directed disclosures, if you have a directed disclosure that has gone through whatever processes are in the act for being appropriate, like not more than is necessary and so forth, you wouldn't want to have each individual custodian then second-guessing what that bit of information is, because that would mean that it could really not be put into effect. Once there is a requirement, and it's clear what the

required information is, then you can't have that be challenged in every detail.

The Chair: Since you're on the last section, why don't you just finish that last section. Then Mrs McLeod and Ms Lankin.

Ms Auksi: Subsection (9): inasmuch as the provision of health care is a rather complex matter and it's not always possible to be very precise about what information is or isn't required for the proper health care of an individual, this is intended to give some flexibility for health care providers. For example, when they're taking a history, when they're determining what is necessary to disclose to another provider, while they would be subject to the general limiting principles, it is not intended to be so restrictive on them that they would not be able to have normal latitude. Not that they would be thinking for every little piece of information, "Unless I need it at this minute I cannot ask someone about it or I cannot disclose it to their next provider," but it's certainly not intended to mean that the general limiting principles would not apply at all.

Mrs McLeod: My question is about the directed disclosure, although I note that the federal commissioner did have concerns about subsection (9) as well in the context again of his concern about the breadth of people who had access and who were excluded from the limitations clause. In your response to the federal commissioner you indicated that section 12 was the way of ensuring that that broad list of people who have access to health information would be governed. His concern was that under subsection 12(9) a lot of those providers are exempted from the section 12 limitations clause.

Mr Jackson: That offers an interpretation; it doesn't exempt them. It's an interpretation that it can't be construed by a provider as a barrier to—case conference was the one that was used. They can't use the act, hold it up, to refuse care or to withhold participation in a case conference, as the case may be.

Mrs McLeod: The question is around subsection (8), where the privacy commissioner for Ontario clearly said that this was an inappropriate inclusion in the legislation. Obviously a lot of us do have concerns about the direct disclosure provisions in the bill anyway and the fact that the health custodian would have no ability to even apply these limitations, which are pretty modest. The limitations section itself is pretty broad.

Mr Jackson: Just on 12(8) and its relationship to 12(1), the intent is that the general limiting principles apply to directed disclosures. Insofar as section 8 is poorly worded or doesn't reflect fully the intent that they apply, then it needs clarifying, because the intent is that it applies. That's one area where I think there's agreement between the commissioner and—

Mrs McLeod: The commissioner recommended deleting it.

Mr Jackson: You're on about subsection (9).

Mrs McLeod: No, it's (8).

Ms Lankin: No, subsection (8). She recommended deletion of it.

Mr Jackson: Sub (8) needs work to ensure that it cannot be construed to not be capturing directed disclosures. The intent is that it captures directed disclosures. The challenge in terms of working through it is where there is disclosure that is required under another act, and to the point that was raised earlier, it has to be structured in such a way as to be workable with appropriate privacy protections. But for the directed disclosures in this act, the intent is that 12(1) applies.

Mrs McLeod: It's still a concern.

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Ms Lankin: If I may, I think it's going to take, in my humble view, more than a technical amendment to that provision. When you put that together with the general concern about the breadth of directed disclosures that exist, it strikes me again—let's turn it on its head. If we were to come at this and the general provisions apply here, in this legislation where there is a specific purpose for a directed disclosure, if we are to spell that out, if it requires something above and beyond the general limiting provisions in section 12, then you'd better be clear and say, "Notwithstanding the limitations in section 12, the minister can direct for this purpose," and we can debate that then, but it's clear that's what we're doing. If there are no directed disclosures that fall outside of the general limiting provisions, then we don't have that problem; and if we're talking about directed disclosures in other pieces of legislation, then we come back to spelling it out in terms of the conflict section so that it's really clear. Even if it is not the intent that it be used as a nullifying clause, it has the ability to be used that way and it needs to be structured very differently, outside of this section, I would suggest.

Mr Sharpe: We've discussed with the provincial privacy commissioner the way of restructuring 12(8) to ensure that directed disclosures do meet the minimalist provisions that are there in terms of protecting individual rights and looking at narrowing the scope of information that can be directed, coming up with a different conceptual approach, which we can talk about at a very high level when we get to the directed disclosure provisions.

Ms Lankin: I think that will be really important for us to hear, but I come back again to if a directed disclosure—and hopefully we will narrow them down and make them more specific—falls outside of the purview of these general limitations, then that disclosure should be named and should be in the bill, notwithstanding the general limitations, so that it's really clear that we are giving powers above and beyond the general limitations. I suspect that most of them are not going to fall outside of these general limitations.

Ms Auksi: That's the intent.

Ms Lankin: That's the intent, so let's actually craft the legislation that way.

The Chair: With that, we've gone over our time. Might I invite the members of the committee—I had mentioned to Ms Lankin when you were out, Mrs McLeod, that we reactivate the same sort of sub-committee process that we had in place for the Mental

Health Act, on as frequent a basis as the members of the subcommittee require, and that could be daily if you wish, with the involvement of the Ministry of Health staff directly in that process, that we continue this process via the subcommittee. Should there be questions where you're not satisfied with the answers, we can certainly bring it back to this sort of forum. Again, building on the success of the Mental Health Act debating process, I wonder if that might be acceptable to all the members of committee.

Ms Lankin: I think that would be very helpful. I also find this process very helpful and I'm sure that it's a pipe dream to think that we could reconvene the committee before Monday to continue this. Failing that, I just want to serve notice that at the end of the four days of public deputations I will be requesting that the committee reconvene to continue this process. Our questions may be even more informed in light of what we've heard at that point in time. But I think this is really important. I think it's important for the ministry too so that they get some suggestions as to what the committee members might find as a useful amendment to reach their goals and to satisfy concerns that we've heard.

The Chair: I'm sure all the committee members will welcome the opportunity to have the ministry back after we hear the public deputations. I'm sure such a request will find favour.

Mrs McLeod: Is there a difference between what you suggested and what Ms Lankin suggested? I think Ms Lankin was talking about the full committee resuming.

The Chair: I guess all I'm suggesting is that even before we hear the public deputations, or more to the point, each day during the deputations, if there are

specific questions that arise from the observations of the groups and individuals who come before the committee, if you'd like to have the ministry response in a very timely fashion, literally that day or the next day, we could put in place a mechanism that perhaps meeting over the lunch hour each day we would have an opportunity to have those questions addressed, plus come back after the public hearings and reconvene the committee and invite the ministry back for as long as it takes to answer all your concerns.

Mrs McLeod: I think that would be very helpful. I actually think that's an expansion on the process that's been used before where the subcommittee really met to deal with amendments prior to second reading of the bill. I think what you're suggesting is a much more developmental kind of process.

The Chair: Indeed.

Ms Lankin: I just want to remind the ministry—I know they don't need this—of my request around the information of what standard disclosures are in practice now and what the bill envisions. Given the discussion we just had about 12(8) and about the potential—

Mrs McLeod: Is some of that here?

Ms Lankin: No, we haven't got this yet—restructuring of the directed disclosures section, the discussions you're having with Ms Cavoukian, I think it's critical for us to have that comparison, and it would be helpful if we had that before we started into public deputations, if that is possible.

Mr Jackson: I think that's doable.

The Chair: With that, the committee stands adjourned until 9 o'clock next Monday morning.

The committee adjourned at 1636.

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Standing committee on general government

Personal Health Information
Privacy Act, 2000

Comité permanent des affaires gouvernementales

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ASSEMBLÉE LÉGISLATIVE DE L'ONTARIO

STANDING COMMITTEE ON
GENERAL GOVERNMENTCOMITÉ PERMANENT DES
AFFAIRES GOUVERNEMENTALES

Monday 26 February 2001

Lundi 26 février 2001

*The committee met at 0904 in committee room 1.*PERSONAL HEALTH INFORMATION
PRIVACY ACT, 2000LOI DE 2000 SUR LA CONFIDENTIALITÉ
DES RENSEIGNEMENTS PERSONNELS
SUR LA SANTÉ

Consideration of Bill 159, An Act respecting personal health information and related matters / Projet de loi 159, Loi concernant les renseignements personnels sur la santé et traitant de questions connexes.

The Chair (Mr Steve Gilchrist): Good morning. I call the committee to order for the fourth day of hearings on Bill 159, An Act respecting personal health information and related matters.

HIV AND AIDS LEGAL
CLINIC (ONTARIO)

The Chair: We'll call forward our first group of presenters, the HIV and AIDS Legal Clinic (Ontario), if they'd come forward to the witness table, please. Just a reminder that we have 20 minutes for your presentation for you to divide as you see fit between either a presentation or question-and-answer period.

Mr Matthew Perry: Thank you. Good morning, Mr Chair and members of the committee. My name is Matthew Perry, and I'm a community legal worker with the HIV and AIDS Legal Clinic (Ontario). We are a poverty law clinic serving the legal needs of low-income Ontarians living with HIV or AIDS. We provide representation to individual clients and public legal education and community development for the betterment of the HIV-affected communities. We also participate in law reform activities, which is part of the reason I am here before you today.

We welcome the opportunity to speak to you today and express our concerns with respect to Bill 159. I have brought with me a written submission, which should be before you, and it will provide more detail to my oral comments here this morning. The submission was authored by Ruth Carey, my boss. She unfortunately couldn't be here today, so you get me.

People living with HIV/AIDS have a pressing and substantial interest in any legislation regulating the collection, disclosure and use of personal health infor-

mation. When you live with HIV or AIDS, the accumulation of sensitive health information becomes pervasive. An average month can include multiple doctors' visits, trips to the pharmacy, access to complementary medicine care, interactions with government agencies, including community care access centres and income support programs, to name just a few. Health records with extraordinarily sensitive information are created and transferred at an alarming rate. Bill 159 purports to regulate this accumulation and flow of information. I'm here to tell you once again that we have a bill which fails to accomplish this in a way which respects, protects and upholds the privacy and confidentiality of Ontarians.

I must begin, therefore, by urging this committee to take very seriously the comments of the federal Privacy Commissioner made to you earlier this month. We were extremely pleased to see many of our concerns so clearly stated in Mr Radwanski's presentation, and we are in agreement with him when he told this committee, "I don't believe that a law that is so fundamentally flawed in virtually every provision can readily be fixed." Therefore, our first and fundamental recommendation is that Bill 159 be withdrawn and the Ministry of Health and Long-Term Care be instructed to redraft it. We would further recommend that the model draft legislation entitled Model State Public Health Privacy Act be the template for a new draft, and the cite for this is in your package of information. This model conforms with the Canadian Standards Association standards, which form part of the federal Personal Information Protection and Electronic Documents Act.

That being said, we have also prepared recommendations to try and ameliorate the most egregious harms which will occur if Bill 159 is passed. My comments this morning will address four broad areas: the scope of this legislation; permitted disclosures without consent; accessing one's own health information; and remedies for breaches of confidentiality. These submissions are by no means exhaustive. Instead, we have concentrated on those areas for which our expertise may be most helpful, and which are of most concern to people living with HIV/AIDS that we represent.

With respect to the scope of Bill 159, we submit that you were on a better track last fall. At that time, we participated in consultations with the Ministries of Health and Long-Term Care and Consumer and Commercial Relations with respect to a broader privacy act to which

the regulation of use, disclosure and collection of personal health information would be a schedule. Such a piece of legislation would govern both the private and health care sectors and more readily meet the "substantially similar" requirement in the federal legislation. Unfortunately, that approach was abandoned and Bill 159 has been tabled as independent legislation. We therefore strongly urge that the regulation of personal health information only occur when Ontario is prepared to proceed with general privacy legislation for the entire private sector.

Our other concerns with respect to the scope of the legislation relate to the way Bill 159 contemplates the regulation of information. Repeatedly and consistently over the last four years we have urged you to craft legislation so that privacy measures attach to personal information itself, rather than selected people who have that information. This would ensure that it is the information that is protected and that the protection is in place no matter who has that information. A health information custodian should be anyone who comes into possession of personal health information about an individual as a result of providing services to that individual in circumstances such that a reasonable person would expect that information to be kept confidential.

The concepts of "use," "disclosure" and "person who is employed by or in the service of a health information custodian" in Bill 159 are far too broad. Currently, for example, a disclosure of personal health information by a care provider to a janitor in a hospital would not be a disclosure under the act—they're both employees of the custodian—or even to the volunteer in the gift shop. Because this is not a disclosure, the prohibitions and protections concerning disclosures do not apply. We have been called by a hospital, for example, where the union representing janitorial staff filed a grievance because the janitorial staff had not been warned that a patient was HIV-positive. Management wanted to settle the grievance by agreeing to disclose that information to janitorial staff in the future. We reminded them that the doctor had a obligation under the Medicine Act to keep that information confidential. The janitorial staff had no need to know this information for the purposes of the patient's care. We were able to advise the hospital that they could not agree to disclose the patient's status. That would not necessarily hold true if Bill 159 were passed. The definitions of "disclose," "use" and "person who is employed by or in the service of a health information custodian" need to be significantly narrowed.

In addition, sections 19 and 23, which leave the standards of confidentiality to regulations, need to be amended to list minimal standards required to protect confidentiality right in the act.

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With respect to the area of permitted disclosures without consent, I wish to emphasize how important this is to people living with HIV/AIDS and to underline the importance of informed consent. The CSA standards in the federal legislation state, "when personal health infor-

mation is to be used for a purpose not previously identified, the new purpose shall be identified prior to use. Unless the new purpose is required by law, the consent of the individual is required before information can be used for that purpose."

Bill 159 fails to meet this standard. Section 25 leaves to regulation the circumstances in which a custodian should give me information about anticipated disclosures. For unanticipated disclosures, subsection 25(2), also leaving the circumstances to regulation, says the custodian need merely make a note of the use or disclosure, with the requirements prescribed in regulation. There is no requirement to inform me, let alone to seek my consent.

A significant number of the permitted disclosures without consent in Bill 159 are intended to cover current legislated mandatory reporting requirements or disclosures. They should be redrafted to accurately reflect that intention.

For example, 29(1)(d) allows for disclosure in order to contact a friend or relative if an individual is ill. There are already provisions for this situation under the Health Care Consent Act. The provisions in the HCCA are specific. Clause 29(1)(d) is far broader and therefore jeopardizes the privacy and confidentiality of the individual.

Clause 30(1)(a) is another example, providing for disclosure if it is made for the purpose of public health protection and promotion. Bill 159 allows for much broader disclosures than are currently possible under the Health Protection and Promotion Act. We already hear from health care providers who think they should disclose information because they think a third party might be at risk of transmission, which may or may not be true. They know the rules of their college prohibit this disclosure, but they call us to find out if they can make the disclosure anyway. Under Bill 159, they just might, with 30(1)(a) and the overly broad protections from liability. But the HPPA already provides for such situations, and the net effect of 30(1)(a) may be to keep people away from their providers for fear that their information may be disclosed without their consent.

Section 33 allows for disclosure where the custodian thinks there is a significant risk. I hear routinely that judges, crown attorneys and police officers believe that, for example, being spat upon is a significant risk of transmission for HIV. Many health care providers are equally ignorant of the significance of risks of HIV transmission. It's easy to see how this section might be used to justify the widespread disclosure of information without consent. Section 33 seems to be designed to address the issue of duty to warn. This is a very sensitive area of law, and one which the Supreme Court of Canada has specifically ruled on. Bill 159 seriously erodes the protections against disclosure available to individuals, with the potential for devastating effects. You'll hear examples later on today and throughout the next four days of the ways this can occur. We recommend that clause 33(a) be deleted, or at the very least redrafted to

accord with the three-part test set out by the Supreme Court of Canada.

Turning to the issue of patient access, again I must emphasize what a significant impact this has on PHAs—people with HIV/AIDS. PHAs constantly have to access medical records in order to qualify or maintain eligibility for insurance benefits and income support like ODSP or Canada pension plan. Fees charged to get this information can be completely out of reach for individuals of limited means and compromised health. Bill 159 does nothing to make this situation better, and in fact may make it worse.

Currently, section 36 of the Mental Health Act and the common law, as well as the freedom-of-information and municipal freedom-of-information acts, provide for access to one's records. Under the Mental Health Act, where a request for a record is made, the onus is on the custodian to justify withholding this information if it thinks that is necessary. Bill 159 would repeal section 36 of the Mental Health Act and treat our personal health records as if they were government documents—a fundamentally flawed approach. Access to government records is a policy which promotes democratic values and good government. Access to our health records is a legally enforceable right arising out of the fiduciary relationship between patient and health care provider.

First, there should be no fee for making a request to access one's records. Second, there should be a provision to waive the cost of providing access to one's own records for certain individuals. We recommend that the payment of a fee for copying shall be waived if the individual is in receipt of social assistance or can otherwise demonstrate an inability to pay. Someone on Ontario Works who is applying for ODSP and needs to gather medical information is living on \$520 per month. We see some hospitals charge as much as \$180 for copying 10 pages of a record. While subsection 47(10) provides for a waiver of the cost of copying records, the criteria are left to regulation. It is not sufficient to simply allow the individual to examine the records for free by attending at the facility. A number of people with disabilities would not be able to participate in this means of access.

Limits on the number of times one could access the same information are problematic. Many inmates and homeless individuals have told us they've obtained copies of records which were subsequently stolen, confiscated by prison guards or simply lost. Rather than using subsection 47(6) to permit the custodian to effectively ignore subsequent requests for more information, there should be a mechanism for the custodian who thinks someone is making repeated and vexatious requests without good cause to apply to the commissioner for an order stating that no further requests for that record be allowed without the leave of the commissioner.

Finally, clauses 44(d) and (e), allowing the exclusion from the access provisions of personal health information of a type prescribed by regulation, or information under the control of a class or classes of health information

custodians prescribed by regulation, are overly broad and should be struck. The act provides overly broad powers to exempt significant amounts of information from the access provisions. Similarly, section 48 provides an overly broad and lengthy list of reasons why a custodian might refuse to allow access to one's own record, which are well beyond risks of harm to oneself or to a third party. This is far broader than either the draft Personal Health Information Privacy Act, 1997 or the draft Health Sector Privacy Rules. The only recourse available when denied access is for the individual to complain to the commissioner. Thus the onus is placed on the individual to prove why they should have access to a record and shifted from the custodian to demonstrate why their withholding the information is justified.

We strongly recommend that the ministry be directed to provide a written justification for each subsection of 44 and subsection 48(1), clauses (b) through (i), including what harms to the patient they are designed to address and alternative measures to address those harms, and publish this information as part of a formal public notice and comment process. As well, subsection 89(6) should be deleted, restoring the provisions of section 36 of the Mental Health Act, and thereby placing the onus on custodians to demonstrate to a neutral third party that withholding of access is necessary to prevent serious harm.

Finally, turning to the remedies for breaches, I'll be brief, because there aren't really any effective remedies here. Without Bill 159, individuals have extremely limited remedies: complaints to colleges, and perhaps, for the moneyed few, suits in malpractice, assuming the individual is a regulated health professional. However, Bill 159 only provides for a complaint to the commissioner. This complaint must be in writing and accompanied by a fee.

First of all, there should be no fee. It is unconscionable that an individual whose privacy has been breached must first pass the bar of being able to pay a fee in order to access the beginnings of a remedy. Assuming you're able to make a complaint, the commissioner has the power under section 68 to make comments or recommendations on the privacy protection implications of any matter that is the subject of the complaint or to make an order to stop the collection of information and to dispose of information collected in contravention of the act. Alarming, there is no power to make orders with respect to the disclosure or use of information; just collection and disposal. This is ridiculous. Section 68 must be redrafted to accord the commissioner the power to make orders with respect to disclosure and use, as well as the collection, of personal health information.

Privacy legislation in other provinces includes protections against disclosure with remedies for the individual. Manitoba and British Columbia, for example, have established a tort of privacy, actionable without proof of damages, where a person, wilfully and without claim of right, violates the privacy of another. These provisions value privacy and place paramount importance on

protecting personal information. Importantly, they also create an effective remedy for the individual whose privacy was breached. Bill C-6 specifically provides for this situation in subsection 16(c) by providing that the court may "award damages to the complainant, including damages for any humiliation that the complainant has suffered." Bill 159 only provides for quasi-criminal prosecution for breaches of the act, through the offences listed in section 73. These offences are punishable only by a fine on conviction, which is payable to the government, not the individual. Bill 159 provides no authority to award damages to the individual whose information has been handled in contravention of the act.

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The commissioner must be granted powers to award damages to the individual where a breach has occurred, and the bill should also create a tort of breach of confidence without proof of damage. We told you this three years ago, and we're telling you this again. The commissioner herself told you this a few weeks ago. Without effective powers, there is little actual effect in having the privacy commissioner oversee the legislation if it is passed as is.

As well, the commissioner's discretion with respect to whether or not to review a complaint is too broad. Currently, Bill 159 allows the commissioner to decide not to review a complaint "for whatever reason the commissioner considers proper." The procedure for conducting a review is, like so much of the bill, left to regulation, thereby keeping us in the dark about what the review would be.

Last but not least, I would like to express our grave concerns about the protections from liability outlined in section 75. This allows for protection from liability for anything done, reported or said in "good faith" that was "reasonable in the circumstances." The good faith standard is purely a subjective one—my examples and others you will hear in the days to come will readily show that—and the reasonableness standard can be objective or not. The danger from the perspective of people living with HIV and AIDS is that what our community might think is reasonable will be ignored in spite of its relevance. Improper handling of personal health information should only be excused if a reasonable patient with similar health problems and records would understand and excuse them. Therefore, section 75 should be amended to say that a custodian has a defence to the actionable tort of breach of confidence without proof of damages if no damages arose as a result of the disclosure and it was done in good faith and on reasonable grounds in the circumstances. The custodian should have the onus of that proof.

I can't emphasize enough the negative impact that this legislation would have on people living with HIV and AIDS in Ontario. Bill 159 does not adequately protect personal health information. The federal Privacy Commissioner has told you it fails to meet the "substantially similar" criteria. It fails individuals by focusing on health information custodians rather than focusing on the infor-

mation itself. It permits far too many exceptions to the general rule that personal health information should not be disclosed without informed consent. It unnecessarily complicates an individual's access to their personal health information and makes it too difficult to make changes to that information where there are errors. Finally, it fails to provide the privacy commissioner with the powers she would need to provide real remedies to individuals whose personal health information was improperly handled, or to effectively oversee the legislation.

I thank you for this opportunity.

The Chair: Thank you very much for your presentation. You've timed it perfectly. We appreciate the very detailed recommendations you make in your written brief as well.

CANCER CARE ONTARIO

The Chair: Our next presentation will be from Cancer Care Ontario. Good morning. Welcome to the committee. Again, we have 20 minutes for your presentation.

Dr Ken Shumak: Mr Chair, members of the committee, thank you for the opportunity to appear today before the committee. I'm accompanied by my colleagues, Dr Verna Mai and Dr Eric Holowaty. If there are questions afterwards if there is time, I may call upon them to answer those questions, with your permission. I believe everyone has a copy of my remarks, as well as additional background information related to the presentation I'm going to be making.

Just by way of background, Cancer Care Ontario has the mandate of providing overall cancer system planning and of operating the province's regional cancer centres, the Ontario breast screening program, the Ontario cervical screening program and the Ontario Cancer Registry. Cancer Care Ontario carries out laboratory, clinical, epidemiological and health services research, and we are responsible for establishing provincial treatment guidelines and practice guidelines for cancer. We are also the provincial government's principal adviser on all cancer issues.

Our comprehensive mandate means that there are a number of purposes for which Cancer Care Ontario collects, uses, discloses and stores health information. The protection of personal health information is therefore an issue of significant importance to Cancer Care Ontario. We have a vested interest in ensuring that cancer patients and the public have confidence in the legislative protections that are intended to protect their privacy. If they are confident that adequate safeguards exist, we can then better meet our responsibilities to provide the people of Ontario with timely, high-quality cancer services as close to home as possible.

The Personal Health Information Privacy Act affects a number of Cancer Care Ontario's programs and services. For the purposes of this presentation, however, I'm going to focus on one section of the legislation, section 30 in part VI of the act. This section specifically identifies Cancer Care Ontario as an organization to which health

information custodians can disclose personal health information without informed consent. My purpose in presenting today is to explain why this provision is critical to Cancer Care Ontario's ability to provide the people of Ontario with the best possible cancer control services.

We in Cancer Care Ontario strongly support the principle of informed consent. As an organization that treats cancer patients, I think Cancer Care Ontario is in fact particularly sensitive to the importance of a patient's right to control access to his or her health record. Based on my own experience as a physician who treats cancer patients, I can tell you that the stigma that unfortunately is still associated with a cancer diagnosis causes some patients so much anxiety that they do not even want members of their own family to know about their illness. It is their right to make that decision and, as health care providers, we must respect and uphold it.

However, there are some very important programs and activities that require access to personal health information where it is not practical and/or possible to obtain informed consent. Cancer Care Ontario has the mandate to operate such programs. These programs are the Ontario Cancer Registry, the Ontario breast screening program, and the Ontario cervical screening program. The special status accorded to Cancer Care Ontario under Bill 159 is related to the operations of these programs.

The screening programs require access to identifiable health information in order to monitor the effectiveness and quality of the actual screening and to ensure that women return for regular screening. Also, some women who are screened through the Ontario breast cancer program and ultimately have cancer have their cancer diagnosed through other means. From the perspective of quality assurance, it is important that the program know about these diagnoses made by other organizations. In addition, many women receive mammography screening from facilities that are not affiliated with the Ontario breast screening program, and all women have Pap smears from their primary care practitioner or in the hospital, and therefore it is necessary for Cancer Care Ontario to collect this information from other organizations.

I'm going to use the balance of my time to discuss the Ontario Cancer Registry because I suspect most people are not as familiar with the registry and because the rationale for the exemption from informed consent is actually the same across all three programs. As I mentioned before, if there are questions about any of the screening programs, Dr Verna Mai, who is director of screening for Cancer Care Ontario, is here and will answer any questions you might have about those programs.

The Ontario Cancer Registry is a computerized database of information on all newly diagnosed cases of cancer and on cancer deaths. The Ontario Cancer Registry is the largest patient-specific cancer registry in Canada. Since 1964, over one million new cases of cancer have been registered.

The registry in Ontario meets national and international standards for completeness, timeliness and quality of information. It is estimated that approximately 50,000 new cases of cancer will be diagnosed and registered in Ontario in the year 2001.

The process of cancer registration in Ontario is passive, relying almost completely on records collected for other purposes. Close to 400,000 records are submitted to the registry each year. Since 1979, the registry has relied on the same four major data sources: first, hospital discharge summaries and day surgery reports that include a diagnosis of cancer; next, pathology reports that have any mention of cancer; third, the records of patients who are referred either to Cancer Care Ontario's regional cancer centres or to the Princess Margaret Hospital; and finally, information is obtained from death certificates on which cancer has been recorded as the underlying cause of death.

All records except pathology reports are coded at the source and provided to the registry electronically. A limited number of Cancer Care Ontario staff have access to the identifiable information contained in the Ontario Cancer Registry. We have signed agreements with the organizations that submit data to the registry governing the use and disclosure of this data. These agreements place strict limits on the disclosure of identifiable registry data to third parties. There is a formal process through which third parties must make requests for identifiable registry data. In most cases such requests must be approved by the organization that supplied the data to the registry.

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All research proposals are reviewed and approved by an ethics committee, and research that is undertaken using registry data almost always includes at least one investigator from Cancer Care Ontario itself.

The data from the Ontario Cancer Registry predominantly are used to carry out epidemiological or population health research. There are two points I want to emphasize about this type of research. First, to be meaningful, it requires access to the complete population. Further, epidemiological research requires personal identifiers to ensure completeness of the data and to track trends and occurrences over time. A patient's health record, particularly when we're talking about cancer, includes data related to diagnosis, treatment and follow-up care, and those data come from multiple health care organizations. A complete registered cancer case requires all these data to be linked, and that's only possible through the use of personal identifiers. Secondly, the vast majority of epidemiological studies involve people only through the use of surveys or the study of existing data, documents, records and pathology reports. People who are the subject of epidemiological research are, therefore, generally considered to be at no more than minimal risk of harm.

Research based on data generated by the Ontario Cancer Registry can make invaluable contributions to Ontario's cancer control system. Specifically, data are used to predict future cancer trends, including cancer

incidence, mortality and survival; to determine future needs for cancer services and cancer professionals; to monitor the effectiveness of cancer prevention, early detection, treatment and supportive care programs; to identify genetic, lifestyle, occupational, environmental and other risk factors; and to evaluate the effectiveness of cancer screening programs.

Let me cite some examples of important knowledge that has been gained as a result of the Ontario Cancer Registry: first, the existence of significant variation in patterns of cancer treatment and in the associated outcomes across the province. The ability to identify such differences is the first step in fixing underlying problems. Through record linkage studies, important links between occupational exposures and cancer risk have been identified. These findings have usually led to the development of safer regulatory standards and the institution of more effective preventive practices, such as dust control and personal protective equipment.

Because of the completeness of the registry and the availability of sufficient identifying information, the long-term follow-up of very important clinical trials becomes possible: for example, the national breast screening study started in the early 1980s. To this day we are able to continue to track the occurrence of breast cancer and deaths through periodic linkages with registry data, and that produces clearer estimates of the benefits of breast screening.

As I mentioned previously, complete data on newly diagnosed cases of cancer and on cancer deaths is critical for this type of research, and, in turn, the obtaining of complete data is entirely dependent on having access to identifiable health information.

The privacy commissioner herself acknowledged as much in her presentation to this committee earlier this month. To quote the privacy commissioner, "There is only one subset of research that truly does require personal identifiers, and that's the narrow class of epidemiological research."

Requiring informed consent for identifiable health information submitted to the Ontario Cancer Registry jeopardizes the quality of data contained in the registry for two reasons. First, obtaining informed consent would be the responsibility of health care providers who, in addition to obtaining consent to treat, would have to educate patients about the Ontario Cancer Registry. This would be time-consuming, and it is unlikely that physicians and other clinicians would be willing to routinely obtain consent. Many cancer cases therefore would be lost. Second, if even a small percentage of patients chose to opt out, the registry data would be biased, and in our opinion therefore would be of limited use.

The same two arguments can also be made in support of the requirement for personal identifiable health information by both the Ontario breast screening program and the Ontario cervical screening program. Let me quote an example. In Germany, where informed consent was required in the 1980s and 1990s, cancer registries collapsed and epidemiological research in that country was halted.

I want to give you a few examples of the type of work that will no longer be possible if we didn't have a reliable provincial cancer registry.

We wouldn't be able to evaluate whether the treatment guidelines that helped to ensure that there's a high standard of care throughout the province are rapidly being adopted throughout Ontario, and we hope eventually manifesting as higher Ontario-wide survival rates or better quality of life in patients who have cancer.

We wouldn't be able to determine the prevalence of hereditary cancers in our population or to study the natural history of these cancer patients and their high-risk families, including access to and utilization of effective counselling and treatment services.

We wouldn't be able to study whether living close to sources of environmental pollution increases the risk of cancer.

We wouldn't be able to evaluate whether public health policies on prevention are effective.

We wouldn't be able to estimate whether the costs of cancer care, particularly the length of hospital stay during the initial and the terminal phases of care, varies much by the location where the care is provided. This information is very important in identifying opportunities for conserving the limited cancer care resources we have in this province.

We wouldn't be able to study whether current or future prescription drugs or medical devices inadvertently cause cancer. As an example, Cancer Care Ontario recently completed an assessment of the possible association between antidepressant medication and breast cancer risk.

Given the overall advantages to cancer patients and to the entire population, because all people do have a risk of developing cancer, and the minimal risks that epidemiological research poses to individuals, we believe the benefits that the Ontario Cancer Registry, the Ontario breast screening program and the Ontario cervical screening program provide justify the exemption from informed consent.

It is primarily for this reason that Cancer Care Ontario is afforded special status under section 30 of the Personal Health Information Privacy Act, and it is for this reason that I ask members of the committee and those who are involved in the drafting of the legislation to continue to support the inclusion of such a provision in the final draft of the bill.

Thank you for the opportunity to make these comments.

The Chair: Thank you very much. That leaves us about five minutes for questioning.

Dr Shumak: Can I ask my colleagues to join me should there be questions?

The Chair: Feel free, please. About two minutes per caucus.

Mrs Lyn McLeod (Thunder Bay-Atikokan): I appreciate the concerns you have around the importance of accessing identifiable information. Are you suggesting that what have been considered by some to be fairly

limited restrictions on your access to that information for research purposes are still too restrictive for what you need, or is the act as currently drafted suitable, in your view?

Dr Shumak: I was speaking in support of the provision in the act that allows us to have that privilege.

Mrs McLeod: When you talk about the agreements you currently have in the absence of legislation, the agreements you have with those who provide you with data and those agreements for the disclosure to third parties, what kinds of third parties and what limitations are there on the nature of the third party? Would they be exclusively those who would be considered under this legislation to be health care custodians, for example?

Dr Shumak: I'm going to ask my colleague Dr Holowaty, who has the direct oversight of that, to respond to that question.

Dr Eric Holowaty: This would of course only be for research purposes and only in those situations where disclosure is absolutely necessary for the research purpose and where adequate safeguards in terms of personnel practices, database security and physical security are taken by the third party researcher.

There's a fairly extensive assessment that's necessary when researchers apply for access. We expect a thorough protocol. We expect external peer review to assure us of the quality of the science that's being proposed. We expect proper research ethics board review in approval. We have additional reviews within our own agency.

You have within your package, probably at the back, a list of much of the research that could only be published as a result of the Ontario Cancer Registry. As Dr Shumak had said earlier, almost always CCO staff are co-investigators in this research. For the projects that don't seem to have CCO staff listed—and you'll see that—invariably they're behind the scenes, controlling access to the information.

0940

The Chair: I'm sorry, Ms McLeod, we're well over. Ms Lankin.

Ms Frances Lankin (Beaches-East York): Let me perhaps direct my question to the screening programs first and ask for a bit of an explanation as to why the personal identifier is important. I think it's implicit in what you've said, but it would be good to have it on the record.

Dr Verna Mai: Why don't I take the example of the cervical screening program. One of the benefits of an organized screening program, as opposed to just having Pap testing going on that's unorganized or what we call opportunistic, is that we can actually organize the system so that women do not slip through the cracks. They get reminders through their family doctors when they have missed a Pap test for over three years, which is the way we're looking at this.

Some of the main reasons or the main associations that have been found with cases of invasive cervical cancer have been an inadequate Pap test history or an inadequate follow-up of somebody with an abnormal Pap test. So I

think that kind of points out how having personal identifiers would allow a cervical screening program to make sure that no women slip through the cracks—

Ms Lankin: Could I ask you why we wouldn't take a perspective where, as a woman patient, when I come in and I'm having a Pap smear and speaking with my doctor, the doctor says, "There's a screening program available. It's very advantageous. Why don't we enrol you in that?" Why wouldn't we ask for that informed consent in that sense?

Dr Mai: If you look at the number of Pap tests carried out in the province each year, and it's well over a million, two million, that would actually be something that would be highly impractical to have each and every time a woman going for a Pap test—

Ms Lankin: No. The first time, you enrol in the program.

Dr Mai: OK. The first time, you enrol. What's written in the legislation with the regulated programs actually would accomplish that in that there would, if I understand it correctly, and I guess the regulations would have to spell this out, be information that would have to be given to women that in fact your information would be part of the program, and it would be part unless they chose not to. My concern is, in doing that, in opting out of the program, the onus is there for the health professional to make clear that the woman understands that if she's not in the program, she's not going to get reminder notices; there won't be a chance for the follow-up needed for an abnormal Pap test.

Ms Lankin: But that would be her choice.

The Chair: Ms Lankin, I'm afraid we've got to move along.

Mr Bob Wood (London West): I wonder if you could tell me why you can't get a representative sample of the whole with the consent of the patients.

Dr Shumak: In order to do what?

Mr Wood: In doing research, you have to get a representative sample of the whole. Why can you not get a representative sample of the whole with the consent of the patients? Obviously, some won't consent. Why can you not get a representative sample the same way pollsters do all the time, for example?

Dr Shumak: I think, and Dr Holowaty may wish to comment afterwards, for certain types of research that would be quite acceptable. Indeed, for certain types of research, representative samples are exactly what would be obtained. But there are other kinds of research in which the entire population is necessary.

Mr Wood: You don't have that now. Those treated only by a physician, you don't have those now, do you?

Dr Shumak: It depends on what you're talking about. If we're talking about the cancer registry data, yes, we collect in the registry information on virtually 100% of patients in this province, regardless of whether they're treated in Cancer Care Ontario centres or elsewhere.

Mr Wood: If they're treated only by a physician, you have access to that information?

Dr Shumak: Yes, because if they have cancer, the data will be in some sort of pathological report or hospital final discharge note—

Mr Wood: No, suppose they never go to hospital.

Dr Shumak: There would still have been a pathology report. Otherwise, the diagnosis of cancer wouldn't have been made. In order to make the diagnosis of cancer, a tissue diagnosis is required. It's at that point that we would get that information, from whichever mechanism of making that diagnosis.

Mr Wood: And why can't you get a representative sample by consent?

Dr Shumak: As I say, for certain types of research we could, but for other types of research it's important that we have all patients. Therefore we're back where we started from, which is that in order to get consent from all patients, for the reasons that I've tried to address, that's an extremely difficult problem, and that would compromise the quality of the research we're doing.

The Chair: Thank you for coming and making your presentation.

Mrs McLeod.

Mrs McLeod: I appreciate that we're working under tight timelines and I don't want to hold the committee up, but I'm wondering, if there are significant outstanding questions, whether or not it's appropriate for us to put them on the record for the research officer perhaps to pursue with the witness outside the committee. I'm thinking just in terms of getting some background information for the future amendment process.

The Chair: I'm sure that would be reasonable, but I don't see why that couldn't be done perhaps when we break at lunch or at the end of the day.

Mrs McLeod: All right. I'm happy to do that.

The Chair: I'm sure the clerk and the researchers could contact them. We have contact numbers and addresses for all the groups appearing before us.

Mrs McLeod: That's fine. So submitting those questions at the break to the research officer would be the best way of pursuing other issues?

The Chair: That would be acceptable. Thank you.

ONTARIO COALITION OF PSYCHIATRISTS

The Chair: Our next presentation will be from the Ontario Coalition of Psychiatrists. Good morning and welcome to the committee.

Dr K. Sonu Gaiind: Thank you. We will take half a minute to set up my presentation. Mr Chair, could I just confirm: will we have till 10 past to make a presentation?

The Chair: On my watch I have 9:48, so you'll have till 10:08.

Dr Gaiind: I think I'll start the presentation, but maybe we could get this arranged. There are copies of the slides being handed out as well, so if it doesn't end up working for whatever reason, we'll be able to proceed.

My name is Dr Gaiind. I am a psychiatrist working in Toronto, and accompanying me is Dr Doug Weir. We're

both presenting for the Ontario Coalition of Psychiatrists. The Ontario Coalition of Psychiatrists is a partnership of the Ontario Psychiatric Association and the Ontario Medical Association. It represents approximately 1,500 Ontario psychiatrists.

We're presenting before you today because we obviously have a number of concerns regarding the confidentiality aspects of this bill. We feel that, as drafted, Bill 159 would undermine the ability of Ontario citizens to obtain effective psychiatric care.

We've distilled our concerns down to two main points. The first issue is that psychiatric care and psychotherapy are unique in the provision of any medical services in the requirement for privacy to enable the treatment to occur. The second point is that psychiatric records themselves are unique and separate from other medical records, and recognition should be given in the bill of this issue as well.

We feel the potential for the non-consensual disclosure of personal information, psychiatric records specifically, to the minister, to the minister's delegate, to researchers or to heads of penal institutions would prevent patients from receiving necessary psychiatric care. If you're following along in the handouts, this is on the second page. I'm now at "Uniqueness of Psychiatric Care."

Clearly, patient privacy is important in every aspect of medical care. I believe that's what this committee is meeting on, to hear the different aspects of this. But it is fundamental and necessary to psychiatric treatment in a way that it simply is not for other medical care. Unlike with other medical treatments, healing emotional suffering cannot occur without communication of sensitive, emotional issues. I think this is easy for any of us to imagine. If we put ourselves in the shoes of a psychiatric patient who needs care and we imagine that we are, for example, depressed in the context of a marital breakup or some other issue that comes along in our lives, this is easy to imagine.

We know that at least one in five people in Ontario will experience clinical depression during the course of their lifetime. Looking around this table, that would mean approximately two of us, or more, at some point would be suffering from clinical depression.

The issues we would be struggling with are difficult enough to discuss at the best of times. Who among us would feel comfortable discussing these with our psychiatrist if we realized that our deepest fears, our most private sexual fantasies, any of our other most intimate thoughts could be revealed or shared with a third party outside the therapeutic setting? Trust is required to divulge such intimate fantasies, fears and thoughts and to discuss disturbing emotions or embarrassing information.

This is distinct from any other medical service. I may well have emotional concerns about any medical illness. I may have a stigma associated with it. If I was going to my doctor, concerned I might have HIV or AIDS, there are many emotional issues around that. However, I will

go to my doctor, I will have various investigations performed, I will be diagnosed and I will still be treated. The same simply does not hold true for psychiatric treatment. As the Canadian Psychiatric Association has stated, without confidentiality there can be no trust, and without trust there can be no therapy.

It's important to point out that the trust which is required for therapy to proceed is not simply that disclosure does not take place but that disclosure cannot take place. The potential for non-consensual disclosure is enough to undermine any attempt at psychiatric treatment.

The other issue I'd like to point out is that, as currently stated in Bill 159, the very patients we most need to help will be the ones who are most disadvantaged by the ability of the minister, the minister's delegate or other third party individuals to obtain psychiatric records. For example, patients who have been traumatized through abuse—sexual abuse, psychological abuse, physical abuse—have difficulty trusting individuals at the best of times. Patients who have serious psychiatric illnesses such as schizophrenia or manic depression may also experience symptoms of paranoia or persecutory ideation. These people will not be able to feel comfortable in any setting unless it assures them of confidentiality.

I'll just take one second to catch up with the slides.

In summary, the current provisions for potential non-consensual disclosure particularly disadvantage, ironically, those most in need of psychiatric treatment.

The next issue I'd like to raise regards the uniqueness of psychiatric records. Once again, psychiatric records are very different from medical records, and this needs to be reflected and accounted for in the legislation. Psychiatric records reflect the process of therapy. The process of therapy includes exploring the patient's fantasy world and fears. It is not based in the real world. As a result, the actual records themselves do not reflect the factual information and historical data that are present in other medical records. The psychiatric record is a reflection of the patient's subjective and unconscious world, not of the real world. Such psychiatric records can serve no purpose in managing the health care system. They are simply memories of the patient's mind, if you wish, and no third party has a right to look at that without very good reason.

The other issue is that the nature of the records is highly subjective, impressionistic and very context-sensitive to the situation of therapy. Taking those records outside of therapy and examining them is simply fraught with misinterpretation.

I've tried to summarize the key points here. There is considerably more contained in the brief we've handed out. What I would like to do is also provide you with the views of many other associations and legal bodies, nationally and internationally.

The Canadian Psychiatric Association recently passed a position statement on confidentiality of psychiatric records. This was passed in December 2000 and will be printed in April 2000; it's currently at the press. I'll just

read the first part: "Confidentiality is a prime condition in enabling the establishment of an effective therapeutic relationship. In no other medical specialty is so much private information required for establishing an accurate diagnosis and treatment plan." I'll skip the rest of that quote, but just remind you of the other point of that position statement, which is that without confidentiality there can be no trust, and without trust there can be no therapy.

The World Psychiatric Association in 1977 adopted the declaration of Hawaii, which is, "A therapeutic relationship between patient and psychiatrist is founded on mutual agreement. It requires trust, confidentiality, openness, co-operation and mutual responsibility."

The Supreme Court of Canada in 1999, in the case of *R. v. Mills*, stated: "In cases where a therapeutic relationship is threatened by disclosure of private records"—threatened by disclosure of private records—"security of person and not just privacy is implicated." We're now affecting well-being, and the Supreme Court of Canada has recognized this.

The United States recently passed, in December 2000, a bipartisan act called the Health Insurance Portability and Accountability Act. It's quite a lengthy act, but regarding psychiatric records it specifically identifies the increased need for privacy of patients' psychiatric information. There are more stringent rules in place for psychotherapy notes, requiring patient authorization for disclosure. When the medical director of the American Psychiatric Association went to the White House to hear discussion on this act, the President specifically acknowledged the need for strong privacy protections for psychiatric patients.

Again in the US, the United States Department of Health and Human Services, which was instrumental in drafting the regulations that were in the act I just showed you, wrote, "Psychotherapy notes do not include information that covered entities typically need for treatment, payment or other types of health care operations." In this context, "covered entities" refers to the health plans themselves. The closest analogy we would have here would be the Ministry of Health. Basically, they're saying the payee has no business looking at these notes because they're not relevant to what the payee is doing.

Even prior to the passage of the act which I've showed you, the US Supreme Court, in the *Jaffee-Redmond* case in 1999, specifically acknowledged the extraordinary degree of trust necessary for psychotherapy treatment to proceed, and they ruled that communications between psychotherapists and patients are protected by absolute privilege in federal court. They also noted that in 50 states there are specific issues which protect psychiatrist-patient privilege. They've also accorded psychotherapist-patient relationships the same status as the solicitor-client relationship with respect to privilege.

All those other bodies may add some legitimacy to what we're saying here, but frankly I think the words of real people who may be affected are probably more telling, and we hear them in a different way.

This is from Janna Smith, an author in the States: "The bottom line is clear. If we continually, gratuitously reveal other people's privacies, we harm them and ourselves, we undermine the richness of the personal life and we fuel a social atmosphere of mutual exploitation. Let me put it another way: Little in life is as precious as the freedom to say and do things with people you love that you would not say or do if someone else were present. And few experiences are as fundamental to liberty and autonomy as maintaining control over when, how, to whom and where you disclose personal material."

Ms Smith is talking about people we love. It is routine for patients to come to their psychiatrists and say, "I'm telling you something I've never told anyone in my life, even my closest confidant." Imagine what we're taking away from these patients.

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In managing the health care system we do recognize that certain information may well be required. Once again, this information is based in fact, and the factual information which is required can be obtained already without non-consensual access to the intimate information of psychiatric records. For example, diagnoses can be tracked, services provided can be accounted for and treatment can be tracked. Investigating fraud on the part of the physician or anyone else can also be done currently. In any case, where there are legal proceedings, records can always be subpoenaed. There is no absolute confidentiality of psychiatric records. They can be subpoenaed in legal proceedings. However, that is the test which needs to be passed, even here. We do not need to loosen access to intimate psychiatric records to achieve any of these goals. Please remember that protection of patient privacy and of the psychiatric record is not an issue for the psychiatrist. It's not in our interests to be presenting this to you here. This is an issue in the interests of the patients. There literally is no self-interest in this instance.

If we look at the harm-versus-good equation, if we look at the harm caused by potential access by third parties, there is significant harm which can and will be caused to all Ontario patients and no good will actually be provided. Psychiatric records do not contribute materially to the management of the health care system.

The Canadian Psychiatric Association has recommended that "precautions be taken to ensure release of any information without the express consent of the patient is required by law and judged by an impartial authority...." That is the same test we would ask this Legislature to pass. Subsection 31(3), in which the minister is directed to consider the public interest and privacy interest of the individual prior to issuing a direction requiring disclosure, simply does not afford the same protection to patients' psychiatric records as the legal system does.

Regarding research, the Canadian Psychiatric Association's position, which we share, is that, "Certain anonymous or impersonal data may be used for" various purposes, including "ethical research." There is no need

for patients with identifying data, especially psychiatric records and psychiatric patients, to have their identities revealed to any researcher.

What we are asking for in Bill 159 is explicit recognition of the unique nature of psychiatric records compared to other medical records. We are also asking that release of psychiatric records requires the individual's consent, even for the situations I've listed here: subsections 30(4) and (5), sections 31 and 32, and clause 33(b). Those are the sections allowing the minister or the minister's delegate, the head of a penal institution and researchers access to information without the patient's consent.

Thank you very much, and I believe we have some time for questions.

The Chair: We have about two and a half minutes for questions from one caucus.

Ms Lankin: I appreciate the thrust of what you're saying: that however this bill ends up being drafted, there needs to be unique treatment of psychiatric records, that they're apart and separate and need to be treated differently.

Dr Gaidnd: Yes.

Ms Lankin: Do you have any comment on the bill as it stands in terms of the thrust or the balance that's contained? Much of what we are hearing is the debate between the need for management of the health care system and/or appropriate epidemiological research versus the right of privacy, irrespective of the type of medical records, the right of individual privacy and the premise that any disclosure should be based on informed consent. I understand the particular case you're making, setting out and apart from that psychiatric records. Do you have an overall comment from your perspective on the balance we're seeing in the bill as it's written? Have we got the right balance, or do we need to rethink it?

Dr Gaidnd: I can't comment on that. The reason we didn't focus on it is that I'm aware other organizations are likely presenting their views on that, including medical and other associations. In the brief I've quoted the Hippocratic oath. I'll start my answer by quoting that. In it, every physician has sworn "that what I may see or hear in the course of treatment or even outside of the treatment in regard to the life of men"—admittedly they were sexist back then—"which on no account one must spread abroad, I will keep to myself, holding such things shameful to be spoken about."

Basically it's saying that for any medical interaction we need to respect the privacy of the patient and the information they're giving us, and to respect their decision in order to share that information with others. So I do feel that the ability of third party access is too broad. Again, though, the difference for psychiatric treatment is that the treatment simply can't take place unless privacy is there.

The Chair: Thank you, gentlemen. We appreciate your taking the time to come before the committee this morning and making a presentation.

COLLEGE OF MEDICAL RADIATION TECHNOLOGISTS OF ONTARIO

The Chair: That takes us to our next group of presenters, the College of Medical Radiation Technologists of Ontario. Good morning and welcome to the committee.

Ms Sharon Saberton: Good morning. My name is Sharon Saberton. I'm the registrar with the College of Medical Radiation Technologists of Ontario. With me today is our president, Sheila Robson, and our legal counsel, Debbie Tarshis.

The College of Medical Radiation Technologists of Ontario, or the CMRTO, as we refer to it, is the regulatory body for medical radiation technologists in Ontario. Our mandate is to serve and protect the public interest through self-regulation of the profession of medical radiation technology.

The CMRTO supports the intention and spirit of Bill 159 in its effort to address the lack of consistent rules covering what personal health information can be collected and how that information can be used and disclosed. The CMRTO believes the establishment of duties and mechanisms to protect the confidentiality and security of personal health information and the privacy of the individual to which the information relates will strengthen the public's and the profession's understanding of confidentiality of personal health information.

The agenda we wish to present today for our presentation includes our major conclusions that health regulatory colleges should not be defined as health information custodians, because they are governed by legislation which is intended to be a complete code. To add an additional layer of legislation would interfere with the CMRTO's ability to regulate the profession in the public interest. Our oral presentation will describe why we have come to this conclusion.

In the written submission, we are making some recommendations that specific amendments be made to Bill 159 to maintain the integrity of the regulatory processes established for the colleges under the health professions procedural code, schedule 2 to the Regulated Health Professions Act.

Why health regulatory colleges should not be defined as health information custodians: The CMRTO has been established under the Regulated Health Professions Act, RHPA, and the Medical Radiation Technology Act, MRTA, to regulate the practice of medical radiation technology and to govern medical radiation technologists, with the object of serving and protecting the public interest. In accordance with the provisions of RHPA and MRTA, the CMRTO has the responsibility to investigate complaints, conduct investigations, gather information about a member's professional conduct or capacity, conduct discipline hearings and fitness-to-practise hearings to determine whether a member has committed an act of professional misconduct or is incompetent or incapacitated, and to implement a quality assurance program.

Given that medical radiation technologists are involved in patient care and treatment, many of the activities of the CMRTO which relate to investigating and assessing the practice of members of the CMRTO will involve personal health information of patients. Under many circumstances, the CMRTO collects and uses personal health information with the patient's consent. Under certain circumstances, the CMRTO collects and uses personal health information without the patient's consent; however, it is necessary to do so in order to protect the public from harm caused by a member's incompetence, incapacity or professional misconduct. In other words, the purpose for which the CMRTO has access to personal health information of a patient is to assess and evaluate the practice of its members.

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In light of the confidential nature of all the information received by the CMRTO, including personal health information, the RHPA imposes a duty of secrecy on every person employed, retained or appointed for purposes of the administration of the RHPA and the MRTA, and every member of its council and committees, subject only to certain limited exceptions—section 36 of the RHPA. The health professions procedural code, schedule 2 to the RHPA, provides certain rules for collection and disclosure of information in the context of the proceedings authorized under the code. For example, if the CMRTO receives a complaint, the complaints committee is obliged to conduct an investigation. The investigation will frequently involve the collection, use and disclosure of personal health information from the complainant, the member and others.

The RHPA and the code provide rules for the collection, use and disclosure of information, including personal health information, to permit the regulation of members of the CMRTO. The rules under RHPA have been drafted to protect the public from practitioners who are incompetent, act in a manner that constitutes professional misconduct or are incapacitated. The CMRTO believes the rules governing the college regarding the collection, use and disclosure of information, including personal health information, are appropriate in light of the CMRTO's regulatory role. The CMRTO also believes the secrecy provision of the RHPA ensures that patients' personal health information, as well as other information collected and used by the colleges to further their legislated objectives, is protected from disclosure.

The statutory framework created by the RHPA, the health professions acts and the code is intended to be a complete code to govern the regulation of health professions by regulatory colleges. To add Bill 159, an additional layer of legislation which is inconsistent, and in some cases conflicts, with this statutory framework will interfere with the CMRTO's ability to regulate the profession of medical radiation technology in the public interest.

On page 5 of the written submission, I provide two examples of inconsistency or conflict between the RHPA and Bill 159.

There are provisions of the code which specifically override confidentiality of health records in other legislation. Subsection 76(4) of the code, which relates to the powers of an investigator appointed under the code, provides that section 76, the power of an investigator, applies despite any provision in any act relating to the confidentiality of health records. The purpose of this provision is to permit an investigator to obtain information about a member's practice to determine whether a member has committed an act of professional misconduct or is incompetent.

How will an investigator be able to carry out his or her legislated powers under the code and comply with the rules for collection of personal health information under Bill 159?

A similar problem arises under section 82 of the code, which deals with an assessor appointed by the quality assurance committee and his or her powers to assess a member's practice. Subsection 82(5) provides that section 82 applies despite any provision in any act relating to the confidentiality of health records. The purpose of this provision is to permit quality assurance assessors to have full access to information in respect of the care of patients or of the member's records of the care of patients, so that an assessment of the member's knowledge, skill and judgment can be carried out.

How will an assessor be able to both carry out his or her legislated powers under the code and comply with the rules for the collection of personal health information under Bill 159?

The CMRTO believes the inconsistencies and conflicts between the RHPA, the health profession acts and the code on the one hand and Bill 159 on the other will interfere with the ability of the CMRTO and the other colleges to fulfill their regulatory functions and public protection mandate.

On page 6 of the written submission, we have some recommendations.

The first is that a college, within the meaning of the Regulated Health Professions Act, 1991, be excluded from the definition of "health information custodian."

The second is that section 11 of Bill 159 be amended by adding the following new subsection:

"(4) In the event of a conflict between the Regulated Health Professions Act, a health profession act and the health professions procedural code on the one hand and this act on the other hand, the Regulated Health Professions Act, the applicable health profession act and the health professions procedural code prevail."

Third, to the extent that it is desirable to extend certain principles set out in Bill 159 to the health regulatory colleges, this should be accomplished by amendments to the Regulated Health Professions Act as part of the five-year review of that act.

In summary, there are several provisions of the bill which CMRTO recommends be amended whether or not the regulatory colleges are included as health information custodians. These are outlined on pages 7 to 12 of this submission.

Thank you for this opportunity to make this submission to the standing committee.

The Chair: Thank you very much. That affords us time for questions, approximately three minutes per caucus. We'll start with the government.

Mr Wood: I have a couple. Do you have the powers to subpoena?

Ms Debbie Tarshis: Yes.

Mr Wood: So why do you feel you need powers in addition to that? In other words, why wouldn't you just use the power of subpoena where you're doing an investigation?

Ms Tarshis: Under Bill 159, although there is discretionary disclosure, it would undermine the mandatory obligations with respect to those specific powers.

Mr Wood: Could you explain that a little more simply, please?

Ms Tarshis: Sure, I'll try. Currently, there is a discretionary power under section 36 of Bill 159 to disclose personal health information to an investigator, for example, or to others authorized under other legislation. It is discretionary disclosure to health information custodians.

Under the RHPA, the investigators have mandatory powers or powers with which one is obliged or required to comply. There are other provisions under Bill 159, such as the duty of confidentiality, that would conflict with the powers of an investigator under the RHPA and the health professions procedural code. Since under section 11 of Bill 159, if there's a conflict between a provision of Bill 159 and a provision of any other act, the provisions of Bill 159 override, this would create a conflict between those particular obligations.

Mr Wood: What I'm really coming to is this: if you're going to access my personal health information without my consent, do you think it's reasonable that a third party might have to approve that, other than the college?

Ms Tarshis: I'm sorry, I'm not understanding—

Mr Wood: If the college is going to access my personal health information without my consent, do you think it's reasonable that a third party, other than the college, should decide whether or not you have the right to do that?

Ms Tarshis: Who is the third party that you're—

Mr Wood: Whoever you get your subpoena from, who I presume is the court.

Ms Tarshis: This isn't the only mechanism that is used with respect to investigations and assessments.

Mr Wood: I'd like you to focus in, though, on the situation where you want my records and I'm not consenting; either you can't find me or I have declined my consent. Do you think the college should be able to do that on its own, or do you think it should have to go to a third party to get permission to do that?

Ms Tarshis: Because it has been set up in the public interest with the regulation of health professions, which is in the public interest, I think the response of the college would be that there should be the authority to

proceed on that basis on their own, without necessarily each time obtaining a subpoena for that purpose.

Mr Wood: You see no conflict between being an investigator and an adjudicator at the same time?

Ms Tarshis: The investigator isn't the adjudicator.

Mr Wood: No—you are. You're deciding whether or not, without my consent, you're going to access my health records. You're the investigator and the adjudicator, surely.

Ms Tarshis: Not really, because there is—

Mr Wood: Who's adjudicating the question, then, if you aren't?

Ms Tarshis: There are separate committees that then carry out the adjudication, once an investigation is complete.

Mr Wood: No, but the college is doing both, is it not?

Ms Tarshis: In the overall sense of the term, yes, but there are quite distinct committees that carry out the investigatory functions, as opposed to the decision-making functions, such as there is a discipline committee that has public members and professional members appointed to it that has absolutely nothing to do with the investigatory process. The investigatory process is carried out either by investigators appointed by the college or, more broadly, by a complaints committee, for example, that is quite separate and distinct and where information is not shared between the complaints committee and a discipline committee.

The Chair: Thank you, Mr Wood. Mrs McLeod.

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Mrs McLeod: I appreciate your presentation, because I think you've really raised what has to be a central question for us as we look at this legislation, and that's the consistency or otherwise of this legislation with the operation of all of the regulated colleges.

My first question is, can I assume that, as a college, the investigator's ability to access health information would only be extended under conditions where a complaint has been lodged and only specifically in relation to that complainant?

Ms Tarshis: That is one of the principle situations. In addition, the college receives mandatory reports under certain circumstances which would, or could, trigger an investigation. So if there were mandatory reports filed in connection with sexual abuse, that would be another situation. When employment is terminated as a result of professional misconduct, incompetence or incapacity, that would also lead to a requirement by the employer to file a mandatory report. So it is also possible that in addition to the complaints mechanism of a matter coming to the attention of the college, it could come vis-à-vis a mandatory report.

Mrs McLeod: So those latter two situations would be essentially situations where you would be accessing information without consent of the individual involved.

I have a lot of concerns about Bill 159 as it's drafted, and one of those areas of concern is the limitations on the power of the commissioner to investigate complaints, which I think ties in to one of your concerns about

inconsistency with the colleges' investigatory powers. But I'm also a bit concerned about your recommendation that the colleges simply be excluded from the legislation. If health privacy legislation goes ahead and the colleges are excluded, and they do represent the majority of the health information custodians, don't we have a tremendously confusing situation in terms of the practitioners, who would essentially have two very different sets of rules to operate under?

I guess my question is, wouldn't it be preferable, if we are to have health privacy legislation in Ontario, to make sure that legislation is consistent with the codes the colleges are operating under, rather than exclude the colleges?

Ms Tarshis: By excluding the regulatory colleges, one would not be excluding the health care practitioners from the operation of Bill 159.

Mrs McLeod: But we'd put them under two different sets of rules, wouldn't we?

Ms Tarshis: I don't believe so. I think their collection, use and disclosure of health information would be governed by Bill 159. The extent to which the regulatory colleges were governed by Bill 159 would be excluded. However, health regulatory colleges would not be totally out of the picture, to the extent that there is a provision dealing with recipients of personal health information, and even with excluding the regulatory colleges as health information custodians, they would still be governed by the recipient provision and therefore there would still be those kinds of restrictions that were dealt with in the recipient provision under Bill 159 which would continue to govern the regulatory colleges.

In addition, the RHPA is currently under a five-year review, and to the extent that some of the principles aren't addressed through the secrecy provision in section 36 of the RHPA, there would be an opportunity to make those amendments in a consistent fashion to the RHPA.

Mrs McLeod: That's very helpful.

The Chair: Thank you. Ms Lankin.

Ms Lankin: Can you explain to me how, as a recipient, you would be governed by the recipient provisions, and what protection that would provide to an individual's health information?

Ms Tarshis: If you look at subsection 24(3) of Bill 159, it provides that "a person to whom a health information custodian discloses personal health information relating to an individual ... shall not use or disclose the information for any purpose other than, (a) the purpose for which the custodian was authorized to disclose the information under this act...." There are a number of other exceptions, but "a purpose authorized under some other law" is one other exception.

So, for example, the RHPA colleges, by virtue of that provision, since they do receive most of their health information from other health information custodians such as hospitals and independent health facilities, would be governed by that particular provision and obviously could not use the information other than as permitted by their own legislation.

Ms Lankin: In the situation where someone files a complaint, obviously it would be easy enough to get consent in that circumstance, so it really is the mandatory reports that become problematic. Can you tell me, in a situation where a health practitioner has been terminated and there is a reason of misconduct, why you would need access to an individual's identifiable health information record?

Ms Tarshis: I'd like to backtrack for a minute. In terms of complaints, I'm not sure that assumption of getting consent is always the case, because in some situations it may be that the complainant is desirous of not having the full picture before the college. So there may not be consent to disclosure of certain personal health information that would be relevant to the complaints committee having the full picture of what actually transpired.

But to get to your second question—

Ms Lankin: Presumably, if I'm trying to say, "This person has done me wrong," I want the facts out. Maybe you could be a bit more explicit. We just had a presentation from the psychiatrists in the province. Do you think access to psychiatric records and the detailed records there is necessary in terms of full disclosure of health information to you?

Ms Tarshis: I would think it would be very unlikely for this particular regulatory college, because of what it does, that that would be an issue, in that medical radiation technologists take X-rays and do nuclear medicine procedures. Now, in the context of radiation therapy it may be relevant, but by and large I would think that for this particular college one would not be expecting to see psychiatric records as any relevant part of the investigation.

The Chair: Thank you. We appreciate you coming before us here this morning.

COLLEGE OF NURSES OF ONTARIO

The Chair: Our next presentation will be from the College of Nurses of Ontario. Good morning and welcome to the committee. We have 20 minutes for your presentation.

Ms Mary MacLeod: Good morning, Mr Chairman, honourable members. I am Mary MacLeod, president of the College of Nurses of Ontario. Anne Coghlan, who is the executive director, was to join me this morning, but as she is stuck in Sudbury—her flight can't take off because of the winds—Bill Campbell, who is manager of policy at the College of Nurses, has agreed to join me in this presentation.

The College of Nurses is a regulatory body for nurses in Ontario. We have approximately 140,000 nurses—RNs and RPNs—who are members. I would like to thank you for the opportunity to make a submission to the standing committee on general government on the proposed personal health information legislation.

As you will see in the document that's being circulated, we have some recommendations which we have

bolded throughout the document. I have those recommendations here in front of me this morning, and I'll try to give you some examples and some context around those recommendations as they are put forward.

The College of Nurses supports the general principles of Bill 159. The college applauds the government's efforts to protect the personal health information of the people of Ontario. In general, the proposed legislation supports ethical nursing practice and respect for the confidentiality of personal health information.

However, we have specific recommendations for amendments to this bill that we believe will strengthen the protection of privacy of personal health information as well as balance the need for the protection of privacy of personal health information with the public protection mandate of health regulatory colleges. I will highlight some of these recommendations made in our written submission.

The first is that colleges should not be defined as health information custodians. A college within the meaning of the Regulated Health Professions Act should not be defined as a health information custodian under Bill 159. If Ontario's health regulatory colleges were to be so defined, it would seriously compromise our ability to fulfill our public protection mandate through investigations, discipline, fitness to practice, and quality assurance processes.

In order to carry out the College of Nurses' and the colleges' public protection objectives, the rules respecting personal health information remain contained within the Regulated Health Professions Act and the health professions procedural code. The College of Nurses is bound by and carefully adheres to the confidentiality requirements in the RHPA. Regulatory colleges do not provide client care and they do not create personal health records. The only reason the college collects, uses or discloses personal health information is to use as evidence in quasi-judicial proceedings. This evidence assists the College of Nurses to perform its regulatory functions in order to protect the public from incompetent and incapacitated practitioners.

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The RHPA and the code are a complete legislative framework which regulates the governance of health professionals in Ontario. The RHPA enables the college to effectively carry out its regulatory and public protection mandate while at the same time ensuring the appropriate level of protection of personal health records.

The College of Nurses has worked with numerous pieces of legislation, including the Health Disciplines Act, the RHPA and the Nursing Act. However, we find this legislation to be as cumbersome and difficult to interpret as this bill. From a practical perspective, it is imperative that revisions to the bill reflect an in-depth understanding of what health regulatory colleges do and how we do it.

Let me give you two examples of how being governed by a combination of Bill 159 and the RHPA would put colleges in an impossible position with respect to the

collection, use and disclosure of personal health information and would make unworkable the task of carrying out investigations and hearings responsibilities.

Here's the first example: an employer has reason to believe that a nurse has abused a client and reports the alleged abuse to the College of Nurses. The college would then follow statutorily defined investigations and possibly hearings procedures. Investigation procedures would likely involve following up with the employer and requesting copies of the client's personal health records if they are relevant to the allegation of abuse. Bill 159 allows but does not make it mandatory for a health information custodian to disclose personal health information to a college. If Bill 159 took precedence over the RHPA, which it appears to do, an employer is not obligated to co-operate with an investigation by providing relevant personal health information. In fact, Bill 159 may frustrate any type of investigation with respect to abuse or any other type of professional misconduct, incompetence or incapacity if the health information custodian, in his or her discretion, decided not to share personal health information with the College of Nurses. This bill is so confusing that employers and others who have concerns about incompetent or incapacitated nurses may not co-operate with the College of Nurses' investigation unless the college gets consent from each client involved, thereby severely impacting our effectiveness.

Here's another example: the College of Nurses has received a complaint that a member is incompetent, including inaccurate and fraudulent record-keeping. Bill 159 would make it difficult, if not impossible, for the College of Nurses to disclose personal health information to an expert in order to get an expert opinion. Bill 159 would prevent the College of Nurses from using personal health information it obtained, for example, from a whistle-blower who may have obtained it in contravention of Bill 159, no matter how serious the allegation of professional misconduct or incompetence.

Further, the definitions of "proceedings" in this bill are confusing. It would appear that Bill 159 intended to provide an exception to the general rules of disclosure for proceedings. "Proceedings," as defined, however, do not include meetings of or investigations by college committees such as the complaints and executive committees. In those investigations, they often need to disclose information to third parties such as experts in order to obtain opinions as to whether a member is incapacitated or an act of professional misconduct or incompetence has taken place.

In addition, Bill 159 requires that before using or disclosing personal health information, a health information custodian has to take reasonable steps to ensure that the information in the record is accurate, complete, and not misleading. If, as a health information custodian, the College of Nurses were to take such action, it would supersede the role of the college's statutory decision-making bodies whose tasks include reviewing records in their original format.

For all of these reasons, the college recommends that a college within the meaning of the RHPA not be defined as a health information custodian.

Other suggested amendments to Bill 159 are as follows:

The RHPA should prevail. The College of Nurses recommends that in cases where provisions of Bill 159 and the RHPA respecting confidentiality conflict, the RHPA prevail. Otherwise, the College of Nurses' ability to protect the public against incompetent or incapacitated nurses will be impaired, whether or not the College of Nurses is defined as a health information custodian under this bill. The examples I have highlighted give some indication as to the obstacles that will be created.

Consent on behalf of a child under age 16: Bill 159 intends to give a parent of a child who is under 16 years the right to consent to the collection, use or disclosure of the child's personal health information except where the information relates to treatment to which the child personally consented. CNO does not believe this is the appropriate test. A child may not have been capable of giving consent to treatment when the treatment took place; however, years later that child may be capable of determining whether a third party should be entitled to obtain, use or disclose his or her personal health information. The appropriate test should be whether the child is capable of determining who should have access to his or her record or of consenting to the collection, use or disclosure of his or her record.

The nurse-client relationship cannot be effective unless a client trusts the nurse enough to be forthcoming about concerns, symptoms, habits and lifestyles. This exception to the consent rule is so broad that it would prevent open communication by the client and harm the nurse-client relationship, which is based on trust and the nurse's implicit promise to maintain client confidentiality.

In conclusion, we recommend that a health regulatory college should not be defined as a health information custodian under Bill 159; that in cases where provisions of Bill 159 and the RHPA respecting confidentiality conflict, the RHPA prevail; and that the test regarding who can consent to the use, collection or disclosure of a child's personal health information be amended.

This concludes my presentation. I look forward to answering any of your questions.

The Chair: Thank you. We have about three minutes for questions from each caucus. We'll begin with the Liberals.

Mrs McLeod: We heard earlier about the concerns of the College of Medical Radiation Technologists in terms of the investigative powers and how different they are under the Regulated Health Professions Act from what Bill 159 sets out. I wonder if you could say a little bit about the protection of health information and the kinds of rules that colleges put in place to ensure that confidential health information is not disclosed by health practitioners, in your case obviously by nurses. I know

the colleges do have rules in place. How different would your rules be from what is set out in Bill 159?

Mr Bill Campbell: I'll try and answer a little bit of that. The rules that we have for confidentiality and privacy are spelled out in the RHPA legislation itself, and so the provisions with respect to not sharing information with outside parties are governed by that particular legislation. It is very similar to what's being proposed in the new legislation, but there are some wording amendments that I think need to be made that would make it at least more consistent between the two.

Mrs McLeod: Given the existence of the colleges and their role in taking any disciplinary action against members who are in violation under the act, what's your sense of the need for health privacy legislation in the province of Ontario?

Ms MacLeod: That's probably hard to answer. The colleges use information in order to be able to determine what occurred in a situation, so if a complaint is made for whatever reason—a complaint may come from a fellow nurse who is worried about the practice of another practitioner, it may come from a family member, it may come from a manager. There are various sources where that complaint will occur, but there has to be an ability to quickly get hold of that information about the patients who were involved in the particular incident that's put forward in order that there can quickly be some determination of that by our college committees as re-structured by the RHPA, and to act quickly with respect to what's being alleged, either that there is no action taken because of the investigation or that in fact something needs to proceed on to the disciplines level.

Any kind of slowdown in that process may allow, then, a practitioner to be out practising every day who very well should not be out practising. But the information that the college uses is only information that directly relates to those particular incidents, so it's not like you would actually ask for the entire health chart. You're looking for pieces of information that are circulating around a time period in which particular incidents were alleged to have occurred.

Ms Lankin: There are many jurisdictions where health professionals are self-regulated, so this is not an abnormal situation, and there must be other jurisdictions that have brought in health privacy legislation where this conflict has become apparent. Are you aware of how they have dealt with that? Does other jurisdictions' health privacy legislation treat regulated colleges differently than Bill 159 proposes to do?

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Mr Campbell: I'm actually not aware of other legislation. I know in the western provinces there is some new umbrella legislation that's very similar to the RHPA that has been introduced, but I'm not familiar with the content of that legislation.

Ms Lankin: Perhaps we could put that request to legislative research to look at the relationship between regulated health professions and privacy legislation. It would be helpful.

You've alluded to the need to move quickly to look at relevant portions of health records where there has been a complaint, and that complaint can come from a number of sources. You would have heard the previous college's presentation and my question about why you would not be able to go to the patient and ask for consent. Surely if the patient felt that there had been something wrong and/or even if it was on the advice of another health professional that the complaint came forward, they would want to see that investigated. Why would that not be a reasonable route for the college to go?

Ms MacLeod: If a complaint comes from a public member, then certainly I think they would then give consent for that information because they are making a complaint about a particular situation.

I think what sometimes occurs with regulated colleges is there's a series of incidents and events that lead up to some concern, usually by the employer or the employees who work with that individual regulated practitioner. So it may very well be a series of things that have happened over a series of months. It may be sometimes things that have happened over a series of years. There may have been follow-up with the individual practitioner at the time but no pattern of improvement has occurred. So to try and go back and track each individual patient where there was some incident that happened would cause an incredible amount of time to pass in order to try, even if we could, to contact those particular clients.

One might be medication incidences regarding giving patients medications and maybe not signing off incident records. Certainly, over time a nurse can be re-educated and coached regarding the need to sign off medications as they give them. But if there was, say, a pattern of that and that was brought toward the college, then what we're looking for is the medication records to show whether that nurse has indeed followed the policies and procedures of their particular institution, and when they haven't, what kind of problem that causes.

If we had medications that a nurse gave out on a ward that may be 30 or 40 patients and may have stretched over six months, to find each of those clients to get their approval to use that piece of the health record would certainly allow that nurse to continue to practise probably forever until we actually were able to pull that information. Right now what we're able to do is go to the health institutions, pull those particular pieces of the record, show that case, and then move forward on some action regarding that.

Mr Joseph Spina (Brampton Centre): Thank you for your presentation. I wanted to refer to your final recommendation regarding the intention and practical effects of the subsections listed there, which states, "so that a child who is capable of making the decision respecting the use, collection or disclosure has the right to make that decision...."

I was trying to marry that to your comment earlier in your presentation where you talked about a child giving consent to treatment. There's no question about the age of legal consent, but at some point a parent gives consent

for treatment, and at another point, I'm gathering from your comment, the child must also. I wondered what some of these other criteria would be that would demonstrate capability on the part of the child not just for the treatment itself, but also for the consent to disclosure.

Ms MacLeod: There are various examples of situations that could come up. Right now my other position, although I'm not the president of the college, is the director of emergency services, and one of the things we do is we use the Consent to Treatment Act to try and determine who can give consent for treatment.

A situation that might occur is that a child comes into the emergency department who has been injured and is unconscious. Because of that, the child is unable to give consent even though they may be well able to do that—if they're unconscious, they can't. What might happen then is that a family member, a parent in particular, would give consent for a particular treatment. Six months or a year later, Bill 159 would allow the parents to give consent to that information being given out rather than going back to the particular child, who is now well and capable of deciding whether they want that information disclosed.

Another example would be, depending on how you frame the terminology "treatment record," if a child had been injured because they were at a party and alcohol was involved and they came into the emergency department and needed some type of treatment, and because they were capable were able to give that consent. If at the same time they told the ER physician and nursing staff that there were alcohol and drugs involved in the particular situation that caused that injury, you'd want to make sure the patient's confidentiality that they have with the providers is not open to the parents then coming along and asking for that treatment record. If those incidents that surrounded the actual treatment were disclosed to a parent, then I'm sure that child would say, "Next time, I'm not going to tell you all the stuff that surrounded my injury because you take that information and you don't keep it private and confidential; you in fact give it to my family members. So now I'm going to be very careful when I come for treatment exactly what I tell you." We're only able to treat people if we know all the facts.

The Chair: I'm afraid we've run out of time, but thank you very much for the presentation you made before us here this morning.

TORONTO ACADEMIC HEALTH SCIENCE COUNCIL

The Chair: Our next presentation will be from the Toronto Academic Health Science Council. Good morning and welcome to the committee. We have 20 minutes for your presentation.

Dr Jack Williams: Good morning, Mr Chair, honourable members. Gail Czukar, general counsel from the Centre for Addiction and Mental Health; David Streiner, assistant vice-president, research, from Baycrest; and I

welcome this opportunity to present before you. We come as representatives from the Toronto Academic Health Science Council. The council is made up of the presidents and CEOs of the eight academic and research hospitals affiliated with the University of Toronto, as well as the vice provost, relations with health care institutions, of the University of Toronto, who is also dean. The members of the council are listed in the submission before you.

The vice-presidents of research and the university vice provost meet as a subcommittee of TAHSC to consider research issues of common interest. Scientists on the university campus and at the eight teaching hospitals represent the full range of research supported by the Canadian Institutes of Health Research, from basic medical science and genome research to population health and health systems research. Each year they successfully compete for hundreds of research grants worth millions of dollars. Indeed, 23% of the national research funding provided by CIHR in the last competition went to investigators based at the Toronto academic health science complex.

As defined by Bill 159, virtually all research undertaken in the teaching hospitals requires personal health information and is therefore covered by legislation. We are here today to speak about issues of Bill 159 as they relate to the research programs at our hospitals. There are four specific points we would like to address:

(1) We support Bill 159 insofar as it provides protection for the privacy of individuals and the confidentiality of personal health information, and establishes a framework for the governance and uses of personal health information in research.

(2) Research ethics review bodies may allow hospitals to disclose personal health information to researchers. We support the power of research ethics review bodies, the conditions for approval and requiring consent, and the agreement between the researcher and custodian specifying the conditions or restrictions on the use of personal health information. Of necessity, the research ethics boards will have to tighten procedures for the approval of projects and the uses of databases in research.

(3) We are opposed to disclosure directed by a minister, as stated in section 31. This section implies a direct threat to independent scientific inquiry and the academic freedom of health scientists. We ask that this section be modified to explicitly exclude health research approved by research ethics review bodies.

(4) The legislation stipulates that research ethics review bodies be designated by regulation. Given the importance of their work for health-related research and the number of research studies that must be reviewed each year, we trust that the procedures will be in place for timely designation by regulation. We look forward to discussions with the Ministry of Health and Long-Term Care about the criteria for designation and the terms of reference for research ethics review bodies as the regulations are being considered.

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Bill 159 issues a wake-up call for research ethics boards of teaching hospitals. The University of Toronto and the members of TAHSC acknowledge inconsistencies in policies and procedures of research ethics boards. TAHSC will harmonize research policies of the university and its partners, including the policies and procedures governing the ethical conduct of research. In particular, a common schedule of policies and procedures has passed through governance at most of the hospitals, and every university-affiliated institution will have subscribed to this policy by the end of March. Further, TAHSC is striking a number of university hospital working committees to achieve further enhancements and harmonization of policies.

The university and hospitals have agreed to implement policies and procedures that are consistent with the Tri-Council Policy Statement: Ethical Conduct for Research Involving Humans. The Canadian Institutes of Health Research is tracking the changes in federal and provincial legislation related to the privacy of individuals and the confidentiality of health information. The Tri-Council Policy Statement will be reviewed and modified to meet the requirements of the new legislation. The university and hospital will update their policies and procedures accordingly.

Thank you for your attention. Please call upon us if we can assist you in any way with the bill as it progresses through the legislative process.

The Chair: Thank you very much. You've left us lots of time for questioning. This time we'll start with the NDP. We'll have about four minutes for each caucus.

Ms Lankin: You said in your presentation, "Of necessity the research ethics boards will have to tighten procedures," and you've spoken about the kind of review that's going on within the family of U of T and some of the inconsistencies that have already been found. Could you elaborate on that for us? Why would the ethical bodies now not have procedures that you would think would be tight enough? How has this culture evolved?

Dr Williams: There are two principal areas where tightening is required, and my colleagues may wish to add more. The first is having clear and explicit understandings, agreements with the researchers as to the collection of the data and how it will be used. It is a problem right now with the availability of laptops and with health sciences students and graduate students working in teaching hospitals in collaboration with investigators. I wouldn't want to say that the research was unethical, but sometimes research does take place without the research ethics boards necessarily knowing of it. So tightening up the relationship between researchers, the trainees and the research ethics board I think is required.

Secondly, again because of the availability of technology, we are developing databases to help us understand better how services are being provided, the efficacy of treatment and the cost and effectiveness in the longer run. The databases can be used for research, but again I

think this is another area where research ethics boards may not be entirely on top of the situation in terms of usage of health information for research.

The third area which I will add is the whole area of waiving informed consent for studies or the allowance of proxies for informed consent. They are highly contentious issues that research ethics boards continually struggle with. I think this is one area where harmonization is going to help us greatly.

Ms Lankin: Harmonization is one thing, but the actual minimum standard that's going to be set with respect to that third issue in particular is important in the context of what this bill purports to achieve in protection of privacy.

The federal Privacy Commissioner has told this committee to scrap the bill. He has said that essentially there is no room for disclosure of information without informed consent, for research or any other purpose. Could you give us some practical examples of the kind of research that requires identifiable information and no informed consent participation on the part of the patient?

Dr Williams: Yes. I might start by saying that I was flabbergasted by Radwanski's presentation to this committee. It is almost as if the legislation framed by Manley and the Minister of Health, Allan Rock, live in two different worlds. Allan Rock is very much concerned about the development of population health information systems, building information systems that can be used for accountability, information systems that can be used to ensure access of services, efficiency and effectiveness of care. Indeed, the special funding released through health transition funds by Allan Rock has allowed Statistics Canada and CHR to produce the health reports that we see published in Macleans. Quite frankly, to do the population-based research that Allan Rock is advocating and that is being picked up by Statistics Canada, Health Canada, CIHR and researchers in this province would not be possible if informed consent were required.

Ms Lankin: Can you give us some practical—

The Chair: Ms Lankin, we've gone well over the four minutes. Mr Wood.

Ms Lankin: All I want to ask him is, why do you need the names?

Mr Wood: Perhaps I could pursue that issue. You would agree with me that in order to do valid research what you need is a representative sample of the whole. You don't have to survey the whole. You have to survey a representative sample of the whole. You would agree with that, would you not?

Dr Williams: I think that is true for a number of studies, I won't dispute that point, but if we're talking about population-based research as a type of research that is essential for understanding how our health care system works, a representative sample does not work.

Mr Wood: Why is that the case? This is done all the time by pollsters. Why is that not the case? Why do you say that? Why does a representative sample not give us a proper picture of the whole?

Dr Williams: The biggest problem is that if you want to chase specific events—let us say, for example, outcomes of cardiovascular care—the question would be, how would you start with a representative sample? As events get rarer, your sample size requirements grow. If you start with a random sample of the population you'd have to have a huge random sample. If you start from the persons with the events, you're getting a biased sample to begin with. If you want to study across a number of specific health problems and their conventions, you end up getting repeated random samples. At some point it becomes more efficient and effective to study the population as a whole.

Mr Wood: What I'm not grasping here is, why would you not ask for consent of a representative sample first?

Dr Williams: I think the ideal would be for people to know when they are seeking health care how the health information might be used. The study and the uses of health services would be among those things included.

Mr Wood: But suppose they don't give their consent for that? Suppose they want treatment and don't want that done? Would you deny them the health care?

Dr Williams: Then I guess we get down to the classic problem of the rights of the individual versus the public interest.

Mr Wood: That's a good frame of the question. Perhaps I can go on to one more point, because I'm about to run out of time here.

The other point I want to ask about is this: when you have these ethics bodies doing reviews, do you have a problem with someone like the Information and Privacy Commissioner signing off on those decisions before they're implemented?

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Dr Williams: This is a very important question. In the discussion paper the minister released in September of this past year, there was a specification of an overview body within the ministry that would review the activities of research ethics boards. We found that a bit disconcerting because there was very little by way of terms of reference for this body or any discussion as to how standards criteria, policies and procedures would evolve. That has been removed. Some of the functions of overview have been installed with the privacy commissioner of Ontario, which is fine, but we're still left with, in the final analysis, how are research ethics boards going to govern their business with respect to policies and procedures? That's not clear. It's not clear whether it will be covered under the regulations as they are developed.

Mr Wood: Would you have—

The Chair: Sorry, Mr Wood. We've gone over.

Mrs Sandra Papatello (Windsor West): Using the example that Cancer Care Ontario spoke of earlier today in terms of identifying the names of people involved in research, you could, for example, need to know who the people are, to know where they work, so that you could see that the disease was environmentally based or workplace-based etc. I think I understand why in some research you need to identify who the people actually are.

So in terms of whether you use a representative sample or not, sometimes you need to know who they are, and the incidence of some disease you're researching is such that it's so minimal that you need to know a lot of specifics that would identify individuals. Tell me why it is that you're not doing this now—my understanding is that you have a whole opportunity now to do the research that you want—and why this bill would suddenly change that.

Dr Williams: I don't have a satisfactory answer for your question. Certainly, there are practices and procedures that have evolved in the research community over time. The good thing about Bill C-6 and Bill 159 is that it does call for us to review what we're doing and to think through our policies and procedures. I suppose the reasons for why things might happen would vary from hospital to hospital and research ethics board to research ethics board. I can't answer your question. All I can say is we have to change.

Mrs Papatello: I guess my question is, to put it a different way, are you limited somehow now or is Bill 159 going to limit you in the future, considering your current work? Are you somehow limited and Bill 159 takes those restrictions off, or given 159, you will have restrictions that you can't operate under?

Ms Gail Czukar: Let me take a stab at answering that one. Some of the kinds of things that could not be done under Bill 159, one of the things that concerns people in the mental health and addictions community in particular, is that now a lot of research is done with consent. Say it's a situation where you're not looking at past records but you're collecting information from people on a going-forward basis. They sign consents which say, "You can use this information for the purpose of this research. This is how I understand it's going to be and it's not going to be used for anything else." Under Bill 159, that kind of assurance would not be possible in that form because we have directed disclosures to the ministry, which Dr Williams has addressed directly in his brief. There are other discretionary disclosures that, although they are not mandatory—as we'll be saying more in our presentation later in the week—we believe will exert pressure on the keepers of that information to disclose as time goes on. That's one of the problems we have.

Mrs Papatello: A very quick one: what would be left for you if this bill does not get passed? For you to operate under C-6, I guess if you could shortly answer, how is that going to affect you? Will that stymie you in your operations and in what way?

Ms Czukar: My understanding is that under Bill C-6 we would require consent for research. I don't understand how researchers could link databases. Dr Williams will also be appearing this afternoon with another group and they may speak to this more directly, but in order to link historical data—that kind of data has been collected and those records are held by health providers who have used very different identification systems. Some have used health numbers, some have used names, some have used their own unique identification system. It would not be

possible, most significantly, to compare different kinds of treatment in the health system. If you wanted to compare, for example, drug treatment with community mental health alternatives, you would not be able to do that in most cases because community mental health programs keep their information very differently from the way hospitals do.

So if you're going to do that on a historical basis, you have to have identifiers up front. My understanding is that the institutes that do this kind of research link it and then destroy the linkages and the identifiers so that you have anonymized information or databases that can be very useful. But you can't compare different kinds of treatment in the system without having access to that information.

The Chair: Thank you very much. We appreciate you coming before the committee here this morning.

INSTITUTE FOR WORK AND HEALTH

The Chair: Our next presentation will be from the Institute for Work and Health. Good morning and welcome to the committee. Again, we have 20 minutes for your presentation.

Ms Jane Bartram: We have some handouts for the committee, both slides and a copy of our presentation. Good morning, Mr Chairman and members. My name is Jane Bartram. I'm the interim president at the Institute for Work and Health. With me I have Sheilah Hogg-Johnson, who is a senior scientist with us, and Jennifer Payne, who is a scientist. They may be able to help you on some of the more technical aspects of your questions.

We want to thank you for the opportunity to speak to you today about Bill 159. Our comments on Bill 159 are restricted predominantly to the research area. What we'd like to do this morning is provide you with a bit of an overview about our point of view about the legislation, provide you with support for the legislation, talk to you a little bit about who we are so you understand the nature of the research we do, some of the principles that guide that research, our own practices—and we'll be able to take you through a case study that may respond to some of the questions I heard earlier—and then bring you to the conclusion.

We want to confirm, first of all, about the importance of the right of privacy of individual health information and the balance that you've talked about here at this committee already between that individual right and the public good that can come from research. I want to share with you the commitment of our researchers to finding that right balance.

The Institute for Work and Health is a research-based organization that looks at new ways to prevent workplace disability, improve treatment and look at optimal recovery and safe return to work. We're an independently incorporated, not-for-profit, non-statutory organization established in 1990, originally as part of the WCB's medical rehab strategy. We continue to hold the major contract with that organization, where we receive about

80% of our funding for research, with 20% of it coming from other funding sources.

We have a multipartite board of directors with management, labour, health care, the WSIB and academic leaders. We have an international research advisory committee chaired by Dr Len Syme from the school of public health at the University of California at Berkeley. We look to using research which involves individuals with consent, but we also have access to administrative databases, which I'll talk to you about in a little bit more detail later.

We think this legislation is needed and we welcome the legislation. I think it recognizes some of the important contributions that research makes to the health of individuals and to our society. Researchers share the public's concern about privacy for personal health information, and even though I know there are also concerns, the research community actually has been able to articulate a number of very important principles for protecting individual privacy and has often been an advocate for this. We need to strike that balance between individual privacy and public good.

In the previous presentation you heard about the Tri-Council Policy Statement: Ethical Conduct for Research Involving Humans. This is a standard document for many mature research organizations in the country. The document was put together by the Medical Research Council, the National Sciences and Epidemiological Research Council and Social Sciences and Humanities Research Council in 1998, and is the basis of many research ethics boards in our universities across the country.

The diagram that you'll see underneath the picture of the front of the ethical conduct for research involving humans pulls together the kinds of principles that they feel are important for research. Beginning at the top of that diagram, you see "autonomy," autonomy for the individual being most important in terms of the research ethic. In consideration with that are "privacy" and "confidentiality," in other words, how you access, control and disseminate personal information in relation to research, informed consent certainly being the gold standard for protection; and also consideration and protection of vulnerable individuals; then the balance between the value of the research and the justice that it can achieve. Looking at justice, they look at both the fairness and equity of the research, procedural justice as well as distributive justice, the benefits of that research.

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On the value of the research side, we take a look at beneficence, which is the duty to benefit others and to maximize that duty and that benefit, and also non-maleficence, which is the duty to avoid, prevent or minimize harm. Researchers take these ethics to work when they decide how to do their research, how to engage individuals, and the research ethics board looks at those principles when the research proposals come forward.

We wanted to share with you some of the standards that are in place at our practices at the Institute for Work and Health to try to find that balance. First of all, there's an oath of confidentiality that all the researchers and staff must sign. We've included a copy of that for your information. We take our research to the research ethics board. The tri-council policies are the basis for defining the research. We need to always make sure that we have identified how we'll be collecting that information. The ethics boards then help us make the decision about whether individual consent is necessary or not.

We have access to administrative databases from the WSIB, and I will take you through a case study, for example, where we needed to link it to OHIP data and the kinds of safeguards that we put in place to do that. Identifying information is always stored separately from study information data. It's off-line, it's under lock and key, with very few individuals who have access to it. All our computing facilities are password-protected. We have a second computing environment which is secure and which is not linked to the Internet.

We have research agreements that we put in place through a review by the research ethics board. These will help us if we need to access other databases. For example, we take our research agreements if we need to have access to some limited OHIP data, and we sign an agreement which, in the future, would be a research organization or an information custodian.

We proceed with consent if the consent is the way in which we want to go or is the way in which we're connecting with individuals for the research. If we're looking at administrative or secondary sources where there's no intervention, there are no risks of physical or psychological harm, confidentiality can be maintained by making the data anonymized and the research will benefit society, then we are less likely to proceed with consent. So we're looking for that balance.

I'd like to take you now through a case study. I think it's important to understand that the research mandate often, in a publicly funded health care system, is to make sure that the system is working with equity, efficiency and effectiveness in the delivery of care. We had a research study which looked at injured workers with musculoskeletal injuries. We had comparisons of costs. We wanted to look at the comparisons of cost and effectiveness of treatment provided by different clinical professions. We needed to inform policies in the future surrounding clinical practice and funding of health care services.

We had linked interview information. We had five interviews from 1,500 workers. We had access to Workplace Safety and Insurance Board rehab service data, and we wanted to take a look at having a better understanding of the overall health care utilization by this group. The research protocol was written. It went to the research ethics board at the University of Toronto, where the principal investigator has an appointment. It was approved as not requiring individual consent, but we

also, in order to do the data matching, had to make sure that the data was anonymized and was safeguarded.

We made the request to the Ministry of Health, accompanied by the research ethics board's approval. We had a signed research agreement with the Ministry of Health to have access to the data, and the data were made anonymous.

The diagram I've provided for you on the case study shows the number of steps that we went through to link the data, to keep it anonymized. The data was kept separately on a disk, again, never available through the Internet or electronically. It was kept in a secure place and only very few staff had access to it. At the end of the study, all this data will be destroyed.

We acknowledge the issue raised by the federal Privacy Commissioner that even so-called anonymized data may be identifiable—characteristics of certain people if they're rare enough. As a research organization, our practice is never to display sparse data on small data sets but rather to always group them or aggregate them in the result to decrease the likelihood of identification.

Having provided you with an overview of some of the principles and an example of a case study where we had to do the linking and protect the data, we want to conclude with some strong endorsements of this legislation. We think it clearly puts in place some best practices that all research organizations should be using. There continues to always be the need for balance between the individual right to privacy and the anticipated benefits to society. It's a difficult line to walk sometimes and I think the research ethics boards are a critical component to make sure that line is walked carefully, that the mechanisms for governance of the data are in place within the organizations and that best practices will continue to evolve over time.

With that, I think I will close our verbal presentation and open it for questions.

The Chair: That leaves us about bang-on three minutes per caucus and this time we'll start with the government.

Mr Spina: Please help me understand this better if I haven't got the understanding. I gather that most of the research you're engaged in has to do with physical elements of the research of workplace health and safety, is that correct?

Ms Bartram: Yes. Our research is in three areas. We have the clinical area—and I just described case studies in the clinical area—we have research that looks at the workplace itself and how to prevent injury, and then we have a third area of research that's looking at population health research. So it's looking at the full working population and what kinds of issues emerge in relationship to the nature of injury over time and compensation systems, for example.

Mr Spina: It's my understanding that WSIB, in more recent years, is also looking at compensation for psychological or stress-related injuries. In view of the presentations that were made earlier by the Ontario Coalition of Psychiatrists, for example, with regard to psychological

counselling and those kinds of care issues, do you have an opinion or a position with respect to that and the amount of disclosure that could come out of that?

Ms Bartram: I'm sorry, I did not hear the earlier discussion, so it's difficult. I can't make comments on that. I also should not make comments on WSIB policy. My understanding is that WSIB is fairly silent right now as it relates to stress and compensation. They look at it more on a case-by-case basis.

Mr Wood: Do we have any time left?

The Chair: Probably not enough to get a good question and answer.

Mr Wood: Carry on.

Mrs McLeod: If Ontario does not pass its own health privacy legislation, are you in any way affected by the federal legislation, in your understanding?

Ms Bartram: We haven't looked at the federal legislation in quite the same detail as we have this bill. My understanding is that the federal legislation affects the commercial side, and being a not-for-profit, non-statutory organization—

Mrs McLeod: You are probably exempt from that.

Ms Bartram: —I'm not sure how it will apply to us. We haven't had our lawyer look at it.

Mrs McLeod: If we pass legislation in Ontario and it contains some modified form of lockbox, for example, where somebody could request that certain parts of their health information not be disclosed, does that significantly interfere with the kind of research you need to be able to do?

Ms Bartram: I'm going to turn it over to our senior scientist, who is a methodologist.

Dr Sheilah Hogg-Johnson: It may, depending upon how widely it's used. One of the things we're concerned about in science is the introduction of systematic bias. If we're studying a certain condition and all of the important cases we wish to study have placed a lockbox on that information, we won't find it, so we won't be able to study it. But that's the only scenario under which—

Ms Jennifer Payne: The conclusions you would draw as a result of that are biased, because you don't realize that you've missed the most severe group, for example. They're no longer representative of the entire entity you wish to study.

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Mrs Papatello: You mentioned that you would like to be considered a custodian. I think your outstanding question summarizes what would happen with the bill if you aren't, in terms of being able to access data that may not be billings through OHIP, for example, and some of the studies that seem to be relevant in workplace studies. Because the Minister of Health is considered a custodian and, in the example of the case study you used, you accessed permission from the minister anyway to do the research, why is that necessary? You managed to do what you needed to do in the absence of Bill 159 by receiving consent from the minister.

Ms Payne: That's a case of best practices as put forward by our group. That project was sent to a medical

research council for consideration for funding. We're required to go through an REB review as part of that application, again, in keeping with the tri-council guidelines. As part of that, we have to apply for access to the data via the ministry. We wanted to use that as a case study to show how we would like to see the legislation put in place, to ensure that all researchers are doing things in that manner. That's what we consider best practices for research.

Part of the research agreement and the ethics review board involve a consideration of consent and how the data will be treated. The flow chart tries to show you how certain identifying information is kept separate from the rest of the data. For example, even though we got access to OHIP data, I never wanted to see the OHIP numbers. It wasn't appropriate. It's not required for my work. We had other people do the linkage for us to ensure that we never saw confidential data. In the end, we have an anonymous file, which we treat with the same confidentiality and privacy issues that we treat any data file. The point was to illustrate how the legislation looks exactly like what we do, but what we do isn't necessarily what's done regularly throughout the research community. That's why we endorse the legislation.

Ms Lankin: On that point, what is it in the legislation you would say ensures us of a higher quality of privacy protection in the research community? It simply says that it must be subjected to ethics board review. That's a question of policy. It's a question of how policy gets implemented. I didn't get a chance to ask that earlier of the research councils when they were here but I know that, from hospital to hospital, existing policies that look very good on the books are implemented very differently. I don't see a legislative requirement here. Is that appropriate or do you think there's some protection in the act that I'm missing?

Ms Payne: I guess the naming of the REBs is left to the legislation, so how they're named and the standards they must follow I guess are left to the legislation.

Ms Lankin: To the regulations, you mean?

Ms Payne: Sorry, the regulations. As a matter of practice, the researchers in our group have to go through the research ethics boards at the universities where their investigators are affiliated. We don't deal with hospital ethics review boards; we deal with the universities. We're comfortable with the level of review. But I agree that the standards could be very different.

Ms Lankin: Let me ask you a question about your case study. I may be getting closer to that elusive answer I'm looking for. I don't understand why you needed identifier information in this circumstance. You started off in that case study with individual interviews. Why couldn't you have asked for consent, then, to go on to look at the rehabilitation files and then to go on and look at the OHIP files?

Dr Hogg-Johnson: This was a secondary analysis of data that was collected for another purpose. The data were there. They were also good to answer this second question. We could have tried to go back and get consent.

I think there were good chances that we wouldn't find everybody. If we didn't find everybody, then we don't have a representative sample of the original group.

Ms Lankin: Tell me what the secondary purpose was and why it was so important that it would override the principle of informed consent.

Ms Payne: The second purpose was to bring in the OHIP billing side of things. The workers' compensation insurance system uses OHIP as a third party payer. When the initial study was first designed, it wasn't envisioned that we would go to the physicians' services data, which is contained within the OHIP billing database. The ethics body was very concerned about the lack of informed consent to link with OHIP. They ruled that we didn't require informed consent because somebody who is being treated under a workers' compensation scenario is getting their care from the same provider, regardless of whether that provider bills to workers' compensation or OHIP. So it wasn't necessarily seen as harm to the individual because the administrative division between workers' compensation and OHIP isn't seen by the individual.

Ms Lankin: But you didn't get consent in the first place.

Ms Payne: There was consent to take part in the study, certainly.

Ms Lankin: So it was only the last step of then going to OHIP to look at the other—

Ms Payne: And that's why we had to go to ethics.

Dr Hogg-Johnson: It cost hundreds of thousands of dollars to collect the information. To go back to square one for the second question would again entail hundreds of thousands of dollars. If you can answer the question—

Ms Lankin: I could say, facetiously, "Bad design; not my problem," as an individual patient who deserves to have my information—I'm actually supportive of the need for research but I'm trying to understand it in real, practical ways so that we get all the protections in the legislation that are necessary. I don't feel like I'm getting hard enough information from researchers about the need for this.

The Chair: That exhausts our time. Thank you very much for taking the time to come before us this morning.

REGIONAL MUNICIPALITY OF YORK

The Chair: Our next presentation is from the regional municipality of York. Good morning and welcome to the committee.

Dr Helena Jaczek: Good morning. I'm Dr Helena Jaczek. I'm commissioner of health services and medical officer of health for the regional municipality of York. With me are Manuela Di Re, who is from the corporate and legal services department of the region, and Diane Bladek-Willett, who is our director of policy and planning in the health department.

We have a high-tech PowerPoint presentation, which is probably entirely redundant. Hopefully you have in front of you our presentation in paper format.

We're here in front of you because the regional municipality of York is a major health care provider to the residents of York region. Courtesy of local services realignment, we operate land ambulance directly and have done so since January 1, 2000—and enthusiastically, I might say. We also operate two nursing homes through the Homes for the Aged and Rest Homes Act. As medical officer of health, I am required to ensure the provision of mandatory health programs and services guidelines pursuant to the Health Protection and Promotion Act. We have many other community health programs, not only within the health department but also the community services and housing department.

Therefore, we are concerned about some very practical issues related to Bill 159. As I have described, being the provider of so many different services, one of those is the issue of multiple custodians. We will get to that shortly.

Generally we are in support of Bill 159. In particular, when we received the overview from the government, we felt that the protection of privacy provisions was going to be there. However, as my legal colleagues always warn me, the devil is in the details, and on receipt of the bill itself and looking at it a little more closely, we do have some concerns. However, with the recognition that there is a need for privacy legislation for those groups who are currently governed by codes of conduct and ethics of their profession and so on, I believe as a physician this legislation overall is helpful, and I would say that the recognition that information managers and those in the support area of information technology should also be bound to privacy provisions is an extremely important concern.

However, as it relates to the regional municipality of York, we are currently guided by the Municipal Freedom of Information and Protection of Privacy Act, and we have some nearly 10 years' experience with that act. We believe that we have protected privacy appropriately as it relates to personal health information that is in the possession of the region of York through the very large number of requests we have received over time through the MFIPPA legislation. We believe that Bill 159 will produce an administrative duplication, and we are concerned that perhaps this is an oversight, as we know that the current government in Ontario is particularly averse to any signs of duplication in terms of inefficiency, because we would therefore see, though it is not entirely clear but we believe it to be so, that we would be subject to certain requests for information to be governed by the MFIPPA legislation. If it related to personal health information, then Bill 159 would take over. We feel this will result in some confusion both on the party making the request and perhaps within the region and our own employees as well.

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As an example of how we have used MFIPPA to protect privacy and yet also allow for freedom of information, some of you may be familiar with a situation in King City where we have had numerous requests for individual lot-by-lot information regarding malfunction-

ing of septic tanks. We protected individual homeowners' privacy. We did not release that information. However, we aggregated the data in terms of addressing the public good, which was, in fact, "There is a major problem in King City given the number of failing septic tanks." All that information has been used in aggregate form, I believe to a certain degree of satisfaction of all those concerned.

We have also had numerous contacts with parents concerned about sexual health clinics that we operate within the region and attendance of their children at such clinics. We make it very clear that it is our position that children should always discuss such relevant matters with their parents but that their privacy is protected. When they give us that information and come to our clinics, they sign at the bottom of their history form that they understand and that we understand that this information is collected with a view to protecting their privacy.

Our fundamental recommendation, as it pertains to regional municipalities that provide health care, is that we should be exempt. Knowing that this might be a somewhat simplistic solution, we will provide you with some other alternatives.

Our second recommendation relates to the number of custodians. We have counted at least six separate custodians at the region of York, and apparently I will be a custodian in two separate parts of the act where I would be given different provisions when and where I could provide health information. Believe me, I have enough trouble knowing where I am and being one person let alone wearing two hats or more.

We have looked at the act and we have a specific suggestion regarding the operation of section 3, so we have a specific modification suggested. By being exempt from the operation of section 3, the effect is that the regional corporation would be designated a single custodian, which at the very least means that we would no doubt have one for MFIPPA and we would have one for Bill 159.

I am now going to hand over to my legal colleague for more specifics.

Ms Manuela Di Re: Good morning. My recommendation is recommendation number 3: that Bill 159 provide one consistent standard for disclosure of information in a legal proceeding.

As it currently reads, Bill 159 has two such standards. The standards imposed in subsection 34(4) apply to persons listed in paragraphs 1 to 4 of the definition of "health information custodian," and subsection 34(1) applies to all the other custodians. Practically speaking, for the region this means that one of our custodians, namely, the medical officer of health, would be a custodian and subject to the standards imposed in subsection 34(1), whereas the remaining at least five custodians at the region would be subject to subsection 34(4).

Practically speaking, what are the differences between these two standards? Very simplistically, while the medical officer of health can disclose personal health information for the purpose of a summons, subpoena or court

order, the remaining five custodians at the region are not able to disclose pursuant to a subpoena, summons or order. They have to wait for an order after a judge holds a hearing within a bigger hearing and makes a determination that the disclosure is relevant and important in the interests of justice.

Why is this such a complication for the region? Taken in the bigger context here, not only do our employees, at first instance when they get a request for information, have to determine what act applies, the Municipal Freedom of Information and Protection of Privacy Act or Bill 159, they then have to ask the second question: "Which of the six custodians at the region is the request being made to?" Once you determine which of the at least six custodians we have, then the next question is, "OK, which standard applies to this custodian in a legal proceeding?"

Therefore, we request a modification that has one standard for disclosure in a legal proceeding, either subsection 34(1), which I believe is the most appropriate standard, or subsection 34(4).

Personal health information is very important and its confidentiality should be protected. Therefore, there should be the same standards that apply regardless of the custodian involved in the situation.

Our fourth recommendation is that a definition should be provided for the term "community health program or service." This first comes into play in the definition of a health information custodian. It basically states that any person who operates a community health program or service is a health information custodian. No definition is provided for that term. It is our submission that not only should a definition be provided, but that the definition exclude mandatory public health programs or services. Mandatory public health programs or services are those required to be operated by the medical officer of health and the public health department pursuant to the Health Protection and Promotion Act.

The reason why, practically speaking, is first of all, the medical officer of health is deemed a separate health information custodian from those who operate community health programs or services. Therefore, if mandatory health programs and services are encompassed in the definition of community health program or service, what would happen is the medical officer of health would be deemed one custodian, whereas the people who actually implement and operate the program on behalf of the medical officer of health would be deemed a separate health information custodian.

When you take that even further, based on that whole discussion I had earlier about section 34, about disclosure in a legal proceeding, it would mean that the medical officer of health would be required to disclose under subsection 34(1) and her employees would have to disclose under subsection 34(4). The medical officer of health can disclose pursuant to summons, subpoena or order and her employees who operate and administer mandatory public health programs on her behalf would not be so entitled. They'd have to wait for a judge to

issue an order after he made a determination in the hearing as to whether this disclosure would be valid in the interests or justice.

I'll turn it back to Dr Jaczek for recommendations 5 and 6.

Dr Jaczek: As you will notice in recommendation 5, we feel that clause 34(4)(d) is in fact far too broad. This is where we are concerned about a lack of protection of privacy.

The provision that is currently in Bill 159 allows for disclosure of personal health information in a legal proceeding where the conduct or actions of a person to whom the personal health information relates are at issue. This does worry us considerably. One can postulate a number of situations, but as an example and to follow up on the sexual health clinic example, perhaps a parent might perceive that a child is threatening in some way, might report that, might demand that the personal health information related to that child be fully disclosed. We would have great difficulty with that. We would see that as a situation where attendance, as an example, at a sexual health clinic or at any other clinic would not be relevant necessarily to the situation. We feel there is a potential there for unnecessary, irrelevant disclosure of information.

That's the way we seem to read this particular section and perhaps just some clarification is required. But the way the wording reads now, we feel there is a potential invasion of privacy that could occur.

In terms of our final recommendation, I guess in a sense it does relate somewhat to the previous example where we feel the legislation may be too broad. As an example, we have operated for many years in accordance with the Child and Family Services Act pursuant to cases where a child's safety is potentially an issue. There it is required that there be a court order before we release any information. This is where this is initiated by the children's aid society. Obviously, we have been in many cases on the side of disclosing to the children's aid society that we have concerns. But in this particular case, a court order is issued; our staff are required to release information. We are not aware of any instances where this has proved problematic.

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We feel that this type of protection of privacy, and yet the need for health information in an important situation, is there. This has operated well, and in fact we would require some clarification as to whether Bill 159 will now supersede those provisions of the Child and Family Services Act. It's not entirely clear from our reading.

Having made our six recommendations, we would just like to reiterate that clearly this is an extremely important matter. We feel, as a regional municipality and subject to MFIPPA since I believe 1991, that in fact we have been protecting the privacy of personal health information kept in our corporation, and a fundamental request is that we should be exempt. If not, we have pointed out to you a number of areas where we feel there needs to be clarification, a reworking perhaps of some of the

intentions that are there, and that we believe and are confident you also understand. With that, we'd be happy to entertain any questions you might have.

The Chair: Thank you. We have two minutes so I'll give all the time to the next party up in rotation. That would be the official opposition.

Mrs McLeod: I'm getting increasingly concerned at the number of presenters who say, "Great legislation, we support it, as long as you exclude us," and that seems to be the tenet of your presentation today as well. That leads me to two particular questions I'd like to ask you that are related. The first is, in what way do you feel that in the absence of legislation you are either prohibited or limited in accessing information that you need to do your work, or secondly, that you feel unable to protect personal health information?

Dr Jaczek: I have no worries in terms of protecting personal health information currently within the framework we're using, which is MFIPPA. I have no hesitation there. I would say that having heard some of the researchers from the institute of health in the workplace—I'm sorry, I'm not familiar with the exact title—there clearly are major issues. We have come across this in terms of identifiers, different organizations using different identifiers, linking-delinking data. Perhaps it does relate somewhat to design of the study. We have certainly run across that kind of problem.

It is one of the duties of the medical officer of health, in fact, to produce a health status report for the residents of the health unit. As an example, we're finding it extremely difficult to get at what I think would be very useful statistics in relation to injury. Sometimes the police have details of an injury and the emergency room does not; the OHIP data, which is obviously a billing system, has a different diagnosis. So we're left at the end of the day not exactly knowing how many children received injuries from falling in playgrounds, to take it to that level. There are all sorts of obviously research-related situations where collection of data and being able to link it, while protecting privacy, is a major issue. Of course, we simply say the data is not available; that's the end result for us as a health unit.

The Chair: Thank you very much for bringing this presentation before us here today. I'm sure if Mrs McLeod has another question she will forward it through research.

ONTARIO LONG TERM CARE ASSOCIATION

The Chair: That takes us to our final presentation of the morning. It will be from the Ontario Long Term Care Association. Good morning and welcome to the committee.

Ms Vida Vaitonis: My name is Vida Vaitonis and I'm executive director of the Ontario Long Term Care Association. With me is Lois Cormack, the director of resident care policy with the association.

The Ontario Long Term Care Association represents 330 long-term-care facilities throughout the province of Ontario. OLTCA's mission is to empower long-term-care facility operators to provide quality and cost-effective health care and accommodation services.

Our comments in response to Bill 159, An Act respecting personal health information and related matters, reflect the nature of this mission statement and the role we play within the broader health care delivery system.

There is no area where privacy and confidentiality of information is of greater concern than that pertaining to personal health information. Let me therefore begin by saying that OLTCA supports the need for legislation to protect the privacy of personal health information and is particularly supportive of the development of specific legislation that recognizes the special requirements of the health sector.

Bill 159 is a comprehensive and complex piece of legislation. Many of the issues included in the bill have been reviewed by OLTCA in response to the discussion paper released by the Ministry of Health and Long-Term Care last October. We are pleased to confirm that many of the concerns expressed by OLTCA in response to that paper have been addressed in the draft bill.

We would also like to acknowledge that there are specific parts of the bill that we strongly support. One in particular is the provision dealing with individuals who are unable to give their own consent. Over half of our resident population suffers some form of dementia. This fact alone adds an additional layer of complexity to our responsibility to ensure that the principle of informed consent is upheld.

As anyone familiar with the health care sector knows, issues around capacity are always difficult. Therefore, OLTCA is pleased that the same protocols that apply under the Substitute Decisions Act of 1992 and the Consent to Treatment Act of 1992 will be applied under Bill 159.

I would now like to take a few minutes to address specific aspects of the bill that are of concern to our members.

As previously noted, OLTCA works on behalf of 330 facilities that provide long-term-care services to approximately 32,000 residents throughout Ontario. Today, the average age of residents in our homes is 82 years. Approximately 53% of them have dementia and/or suffer from Alzheimer's disease, 30% have some form of depression and 20% have a diagnosis of stroke.

The nature of our role and the services we provide to our residents has changed significantly in recent years. Over the past decade the overall acuity of our resident population has increased dramatically. This increase in acuity has resulted in an increase in the level of care provided to our residents. Since 1993, the level of resident care complexity has increased by 12.5%, based on the case-mix measure, which the Ontario Ministry of Health and Long-Term Care uses as an annual measure of acuity.

It is generally accepted that the resources available to long-term-care facilities have not, however, kept pace with these growing acuity levels. This has placed increasing strain on our existing staffing and resource levels. Given current demographic, policy and funding trends, it is not likely that present circumstances will improve. Rather, we anticipate that pressures will continue to grow as the number of heavy-care residents in our facilities increases.

It is within this context that the long-term-care facility sector is concerned about the workload implications that will be required to comply with the proposed legislation. The policies and procedures to be put in place with respect to the collection, use and disclosure of personal health information will place increased responsibilities on directors of care and other senior staff who manage resident and staff information within our facilities.

In particular, subsection 3(1) makes it clear that each individual facility will require a "separate custodian with respect to personal information of which it has custody or control." The responsibilities of the custodian are extensive and will, at least at the outset, require intensive effort to develop policies, procedures and safeguards to ensure compliance with the legislation.

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Beyond the initial introduction of the legislation, OLTCA is concerned about the ongoing burden that will be placed on staff to meet the expectations outlined within the act, including: proper collection, use and disclosure of personal health information; education of employees of their duties under the act; responding to inquiries from the public about the custodian's information practices; and receiving and responding to complaints from the public about alleged contraventions with respect to the act.

Therefore, OLTCA recommends that the Ministry of Health and Long-Term Care confirm its intention to provide adequate resources to enable our facilities to fulfill their responsibilities associated with implementation of Bill 159. In particular, we believe that the ministry should support an initial training program for long-term-care staff, develop clear administrative guidelines to ensure consistent application of the legislation and provide adequate funding to cover costs that will be incurred by facilities to implement this legislation.

Failure to address the issue of upfront costs will impact on resident care. Reviewing personal health information files and making decisions about disclosure or amendments to resident records requires professional judgment and discretion. It is a job that will need to be performed by senior levels of staff. Time spent developing administrative policies, procedures and forms to comply with privacy legislation will translate into less time for staff to manage and provide resident care.

Long-term-care facilities are not unique in this regard. Health facilities, individual health practitioners and health organizations impacted by this legislation will be presented with the same challenge. Therefore, OLTCA recommends that the ministry, working with the privacy

commissioner and the assistant commissioner, assume responsibility for developing policy and procedure manuals, including generic templates regarding collection, use and disclosure of information for use in health care facilities and organizations. Standardizing these materials will help reduce the time and costs that would otherwise need to be incurred by individual facilities and organizations. It will also support a consistent level of quality and control across the health care system. In the absence of this consistency, there will be diversity within the health sector and, based on our experience in other areas, greater diversity between individual facilities and regions. This diversity poses a threat to the spirit of the legislation, the integrity of the system, and the public's acceptance and support for the intent of the bill.

OLTCA recommends that further clarification be provided on the implications regarding transfer of information between different physical sites of the same organization. This is an important issue for our members, given that many of them manage several separate facilities. The need for greater clarification on this issue is also critical for the broader health sector, given the increased focus being placed on coordination and integration within the system.

Section 30(4) of the bill indicates that the Minister of Health and Long-Term Care and, by extension, the ministry, would be permitted to receive personal health information for a number of purposes, including management of the health system, "including the delivery of services, the evaluation and monitoring of the system or part of it, the allocation of resources, future planning and the detection, monitoring and prevention of fraud." OLTCA does not believe that these purposes, with the exception of detection, monitoring and prevention of fraud, require the use of personally identifiable health information.

OLTCA recommends that future drafts of the bill be amended to reflect the fact that the use of information for system planning, management, delivery, and evaluation purposes is fundamentally different from purposes relating to fraud. We believe it is inappropriate for personal health information to be made available to government in any form other than when aggregated or otherwise anonymized. In the case of fraud detection, access to personally identifiable health information should be expressly limited in the legislation for purposes related to the Ontario health insurance plan.

OLTCA has reservations about the practicality of the new directions relating to the disclosure of personal health information for research. Bill 159 now states, "A health information custodian may disclose personal health information to a researcher ... only if a research ethics review body designated by regulation has approved the project or program." That's subsection 32(1). We believe that the phrase "designated by regulation" could have significant implications for practical and effective implementation.

Who will be represented on the ethics review body? Will safeguards be put in place to ensure that decisions made will be for the common good and not personal

gain? These are some of the key questions that remain unanswered at this time.

Therefore, OLTCA recommends that the ministry give careful consideration to the issue of the practicality of the new directions relating to the disclosure of personal health information for research. This issue has strong implications for all aspects of health sector research, including how it is conducted, who does it and for what purposes. Further consultation with stakeholders is essential to clarify when and how information will be used to support research projects or programs and to ensure that the regulations developed in this regard are effective, practical and consistent with the spirit of the legislation.

This brings me to my final point. OLTCA believes that special attention must be paid to the process put in place to develop the regulations that will enable implementation of Bill 159. The broad level of consultation that has brought us to this point should form the precedent for where we go from here. Continued input from stakeholders is needed to clarify the details that need to be worked out if this legislation is to be consistently and fairly applied across the health care sector. We need to be part of the dialogue that will clarify such issues as: the safeguards that will be required to meet the storage and retention of personal health information expectations; the costs of reproducing health records and other requirements—these will need to be reflective of the increased administrative responsibilities assumed by health information custodians; and the development of guidelines regarding retention and destruction of personal health information records. To facilitate this process, OLTCA urges the ministry to work with a broad coalition of health care providers to make this dialogue happen.

I want to conclude by saying that OLTCA believes that the government has an opportunity, and indeed an obligation, to provide Ontarians with strong privacy rights with respect to health information. At the same time, there is a vital interest to protect the ability to transfer data for legitimate health care purposes and promote better management and greater integration of our health care system.

Bill 159 is an important and necessary piece of legislation that we believe could be improved further by addressing the concerns we have raised.

Thank you for the opportunity to provide you with our comments. We look forward to continued dialogue with the ministry and our partners in the health care sector to ensure that we have a legislative and operational framework that meets the needs of all Ontarians with respect to the privacy of their health information.

The Chair: That leaves us with about a minute and a half per caucus, so I would ask each caucus to keep it to one or two relatively brief questions. We'll start with the NDP.

Ms Lankin: There are a number of areas I'd like to pursue, but let me pick up on the point of the integrated health care system and services and the ability to transfer information for legitimate health care purposes, particularly with the client population that you deal with. That's

critically important. I'm thinking of someone who is in their home, who has home care services coming in, who accesses respite care services in one of your long-term-care facilities, who goes in periodically for episodes of acute treatment in an acute care hospital, who has medication handled by a pharmacist someplace. All of that information is so critical if you're not just treating the disease but treating the whole person, which is so much about what we need to do in long-term care. Does this act prevent barriers in any way? Are the restrictions reasonable? I would think in most cases there would be a desire on the part of the patient or, if they're not capable, their family member, to have that information shared in order to ensure the best quality of care. Have you looked at it from that perspective and can you share with us your views of the provisions in the legislation with respect to that?

Ms Lois Cormack: That is the question and that's what we're alluding to in the regulation, that providers need to be very much involved in that consultation, and the devil truly will be in the detail as to how that plays out. It could be extremely onerous to get consent between providers. The intent of this, particularly as we move to more electronic exchange of information, should be that that burden be removed so that information can be shared, that the client or individual is OK with that and that's established upfront. Hopefully that will be worked out in the regulation.

Mr Wood: You've made some comments with respect to the ethics committees that are proposed for research. What would your reaction be to having the Information and Privacy Commissioner sign off on each authorization for disclosure?

Ms Cormack: I think that's what we were alluding to in terms of that designated by regulation. Our concern is, is that just adding another barrier to research and is there a way of working with the current ethics bodies, the current processes, for research?

Mr Wood: Someone, though, has to ultimately sign off. What would you think about making that the Information and Privacy Commissioner? Right now I think it's contemplated that this committee would sign off. What do you think about the Information and Privacy Commissioner as the person signing off?

Ms Cormack: We probably wouldn't have an issue with that other than in terms of timeliness and the bureaucracy that sets up—and is that necessary—as long as it can be timely and so on.

Mrs McLeod: I share some of the concerns you've expressed in one section of the bill about the broad access of government to health information, but your recommendation seems to go very strongly in the opposite direction. You say, "We believe it's inappropriate for personal health information to be made available to government in any form other than when aggregated or otherwise anonymized." Would that not put some fairly serious limitations on the ability of the Ministry of Health and Long-Term Care to carry out its investigatory role in relationship to long-term-care facilities?

Ms Vaitonis: Under its normal mandate it has that particular duty and obligation, so we're not looking at it interfering with that. We would not be opposing that piece of work that they currently have responsibility and obligation to perform.

The Chair: Thank you for coming before us here this morning. We appreciate your presentation.

With that, we stand recessed until 1 o'clock.

The committee recessed from 1202 to 1300.

THE MURRAY GROUP

The Chair: I'll call the committee back to order. We continue our hearings on Bill 159, An Act respecting personal health information and related matters.

We're joined, as our first group, by the Murray Group. Good afternoon. I wonder if you might introduce yourselves for the purpose of Hansard, please.

Mr Ian Murray: Mr Chair, ladies and gentlemen, I'm Ian Murray from Amherst Island.

Mr Stanley Burke: Stanley Burke, a neighbour from Amherst Island.

Mr Murray: My lawyer, David Baker, Peter True-man, my son Jacob, and Peggy Coulter.

It was about three weeks ago that Ann Cavoukian, the Information and Privacy Commissioner of Ontario, spoke to this committee. I am here to support one of her requests, that the right of a citizen to appeal to the commissioner should be put into the legislation when a citizen wants to have a health claim record corrected, not to leave it solely up to Ministry of Health to do so. That's outlined in my brief.

Rather than going through the brief point by point, perhaps I can put a bit of a human face on the problem as it has affected my life. About two years ago, I was phoned by an OPP sergeant asking me if I was aware that there had been \$6,000 to \$7,000 worth of claims on my OHIP record by Dr Alex Scott, who was a neighbour and reasonable friend. I said, "No, I don't think that's true." Dr Scott pled guilty to almost \$600,000 of false billing to OHIP.

The Chair: Mr Murray, I wonder if I might interrupt just for second, please. It's something we do as a matter of form whenever individuals come before us. I won't take this away from your time, but we have to caution witnesses in committee and just go through the formality of it.

While the members of the three political parties enjoy parliamentary privileges and certain protections pursuant to the Legislative Assembly Act, it is unclear whether or not those privileges and protections extend to witnesses who appear before committees. For example, it may very well be that the testimony you have given or are about to give could be used against you in a legal proceeding, so I caution you to take this into consideration when making your comments.

I'm saying that only to make sure it's on the record, given that you do mention names in your presentation.

Mr Murray: Reading me my rights. OK, thank you.

I was then alerted that I had some false claims on my record. About a year ago I decided I'd find out what was on my file and in April, I received a decoded claims record from OHIP. I was somewhat disturbed to find that there were two billings for "malignant neoplasms-brain," which meant brain tumour, 29 psychotherapy sessions for alcoholism and five psychotherapy sessions to treat my hysteria, neurasthenia, nervous exhaustion and something else that I forgot about. I didn't want those on my record and I thought it would just be a matter of requesting that they be removed. So I wrote a letter and said, "Please remove these," explaining the situation, that the doctor had been charged with fraud etc.

A month later I received a letter back from OHIP saying that I would be contacted in the near future. That was May. In August, I received another letter from OHIP saying that they were unable to action my request due to technical constraints. However, they were willing to put on a disclaimer. I was allowed to say I disputed the record. I didn't think that was anywhere close to good enough. I hired a lawyer and made an appeal to the commissioner. The commissioner appointed a mediator. Some time later the mediator basically told the commissioner she wasn't getting any responses from the Ministry of Health.

The Ministry of Health made a response to my appeal but asked that it be kept confidential, which dragged the proceedings out to the point that my lawyer and myself did not see the Ministry of Health's response to our appeal until early January. We responded to that response at the end of January. The Ministry of Health responded again. We did a follow-up just recently and it is now, as I understand it, totally in the hands of the commissioner to make a ruling for or against. I understand from the media, she has promised to make a ruling before Bill 159 goes back to the Legislature.

Why should I care, other than just stubbornness and a bit of pride in my record? I'm not an alcoholic, I'm not hysterical. I can be a little bit angry at times. I thought that was a blot on my record. I have since learned that it could also be a significant hindrance to getting life insurance, to getting a mortgage, if I want to have a mortgage. An employer would be very interested in a record of that nature.

I'm a sheep farmer. I have had some predation. I use a gun occasionally when I have to. As with everybody else in the province who has firearms, I have to have a firearms acquisition certificate. I understand that Bill 159 will make it much easier for law enforcement officers to have access to my medical records, along with everybody else's. At some point, this may get married up and I'm going to have some really interesting questions asked of me by the police when I go to register one of my guns or to renew my certificate to have a gun.

I am not an isolated case. The doctor pled guilty to almost \$600,000 of fraudulent records; mine is about 1%. I think there's a significant number of other fraud investigations going on through the fraud programs branch of the Ministry of Health. There are also just plain

mistakes made. It's not that hard for a stenographer to enter the wrong number or the wrong billing record. You go in and you think you're being treated for bursitis and maybe your records show you had a heart attack. A citizen should have a right to have incorrect records corrected. I think that's pretty common sense.

Are there any questions?

The Chair: We normally go in rotation. You've left us about three and a half minutes per caucus.

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Mr Wood: That was a very clear presentation. I have no questions. Thank you very much. We appreciate your coming by and giving us the benefit of your views.

Mrs McLeod: In our technical briefings a week and a half or so ago, the Ministry of Health indicated that Bill 159 would allow an individual who wanted to make a correction to the health record to appeal a refusal from OHIP to the privacy commissioner. I want to read subsection 50(9):

"The individual is entitled to make a complaint to the commissioner ... if the custodian does not make the amendment requested by the individual and does not comply with clause (3)(b)"—which is the provision for the attachment of a statement of disagreement—"but is not entitled to make a complaint to the commissioner ... if the custodian does not make the amendment requested by the individual but complies with clause (3)(b)."

I read that very clearly as saying that your ability to appeal to the privacy commissioner to get your record corrected, as time-consuming a process as it has been for you, is lost under that clause of Bill 159, because all the government would have to do would be to attach your statement of disagreement. Can I ask whether that is also your reading? Is it one of the reasons why you have come forward?

Mr Murray: That's exactly my reading. That's my lawyer's reading and that's my reading.

Mrs McLeod: I'm not sure if it's fair to ask you to speculate, but in your situation the government itself has established fraud in this case. There is clear evidence produced by the government that there were fraudulent billings and therefore your medical record is, of necessity, by their own evidence, incorrect.

Mr Murray: Yes.

Mrs McLeod: Why? What reasons have you been given as to why the government would not simply make the correction, when it's so obvious by their evidence that your record is incorrect?

Mr Murray: I honestly don't know. It's been suggested that maybe it's a cost-saving thing. As far as the dragging out of my case, it could be that there's a hope that Bill 159 will be passed as is and there won't be any more unpleasant people like myself coming forward wanting to have their records corrected.

Mrs McLeod: What concerns me is that there are not many people who, first of all, find out how inaccurate their record is and, second, are prepared to come forward to highlight what I think is a very real concern. The fact that the legislation takes away even the right you have

now to have that appeal to the privacy commissioner is certainly something that needs to be changed if this bill goes forward in any form.

Mr Murray: May I say that if I had it to do again, I wouldn't have done it. My legal bill is outstanding. It's large. It significantly exceeds my annual income. So I wouldn't do it again. I wouldn't recommend anybody else do it again. It's got to be a more streamlined procedure. I'm sorry, that's a little bit off the topic.

Mrs McLeod: Not at all.

Mrs Pupatello: Can you explain the implications of C-6 to your case? For example, we heard from the federal commissioner that this law is not in parallel to C-6 and if it were taken through a court proceeding, it may be struck down or whatever. This implies to me that there is some level of protection under C-6. Is that some angle that you're considering, or how do you see its implication in this case?

Mr David Baker: Ian has passed that one over to me. Our understanding is that under C-6 there is a power to correct, but that legislation is held in abeyance while provinces decide whether to occupy the field or to bring forward legislation that is comparable to the federal legislation. So there will be two questions. One is, will there be legislation which is comparable? I guess there are discussions about whether 159, without a right to correct, is comparable to C-6, and then, if there is no provincial legislation, C-6 would prevail. So essentially what 159 would potentially do is prevent people from benefiting from the right to have your record corrected under C-6, as well as removing the right that exists now under FIPPA, or the Freedom of Information and Protection of Privacy Act.

Ms Lankin: I'd like to pursue that issue. I'm thinking, in addition to an amendment which eliminates this out for the health care custodian, their duty to correct, perhaps the committee should be looking at something more explicit in terms of the absolute right of a person to have their health record corrected, and a procedure for that.

In particular, I'm also thinking of a responsibility on the part of health information custodians, where they become aware there may be problems with an individual's records, to actually advise the individual and to seek out the correct information.

As I understand it, a number of your neighbours who were treated by this same doctor were not called by fraud investigators or detectives. They only needed to review a certain number of cases and a certain number of files to have enough evidence to take to a criminal proceeding. So many people have not been informed, yet their files could be as wildly inaccurate as yours. Is my understanding of that correct?

Mr Murray: Yes.

Ms Lankin: Would you see this legislation perhaps going a step further as being of assistance to people?

Mr Murray: Yes, that would be nice. I can't speak about legislation. I was in municipal government. I had trouble enough with simple municipal bylaws, to get a bylaw right. It must be very difficult to write meaningful,

effective legislation. I will say I was quite surprised, in thinking of it, why the Ministry of Health, when they realized these records were fraudulent, didn't just make the corrections without being asked. I'm really astounded that they seem unwilling to make the corrections even when asked.

Ms Lankin: One of the things we're hearing over and over again from those who argue that there has to be an ability to track individuals' private health information across systems with identifiers, for research purposes or other sorts of things—it surely has to hit you right in the head when you hear a case like this—if the information they're relying on is OHIP-based information and there isn't an absolute duty to correct the record, let alone a right to appeal, it compromises many other aspects of health care research and data amalgamation and other sorts of things.

You have raised some circumstances of how it can affect the individual. I don't know if you want to elaborate on that, but I think in one of your documents you referred to an article about a company called Second Opinion. That might be interesting for the committee to hear about.

Mr Murray: The company that Frances Lankin is referring to, written up in the Star, is offering a service to employers: "If you want somebody's health records, we'll get them for you. We'll go to friendly doctors or maybe friendly doctors' stenographers and get the information." It's not just me, Ian Murray, saying to a prospective employer, "Yes, check into my records." They can get that information another way if they want to. As the databases get more and more effective, let's say, it's just going to be easier to get information. I just hope that in most cases it's correct information. What use is false information to anybody?

The Chair: Thank you very much, Mr Murray, and your colleagues, for coming down here today. Unlike you, I am covered by parliamentary privilege and I hope you have a satisfactory resolution to your matter.

Mr Burke: Mr Chairman, I look at the clock. Can I ask for one minute?

The Chair: You certainly can have one minute.

Mr Burke: Just simply to say that I'm here to support this very brave man who has done what ought to be done in the public interest.

I have been refused insurance myself. The claims against me are about \$8,000, comparable with my wife's, similar to his: alcoholism, hysteria, mental problems and so on. I have been refused insurance by Liberty, with whom I had done business for 12 years, ever since we came to Ontario. I was not given renewal coverage and I was not given any explanation. It may well be that they had a look at my records. This affects my children, as you know. "Do you have the following illnesses etc; any history in your family?" If they say no, they may be accused of lying. If they say yes, they're refused etc.

I would just like to make one comment to wind up, and that is, my wife and I voted for this common sense government, the Common Sense Revolution, and if

there's anybody here in this room who can tell us where the common sense is in this—where is the logic? Why is this being done? Why are we put at risk? Why would a government undermine itself? And finally, this throws into question the integrity of the medical profession, to which we all entrust our lives. Why? To support some bureaucrat? Surely not. Is there a hidden agenda here? Where is the common sense? If you could tell us, we'd appreciate it very much. Thank you.

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The Chair: Again, I think we all look forward to Ms Cavoukian's ruling. My sentiments apply to you and your wife as well and anyone else on Amherst Island who's been similarly afflicted. I wish you all the best. But thank you very much for coming and bringing your perspective before the committee here today. We appreciate it.

Ms Lankin: Briefly, Mr Chair, there was a reference to an article in the Toronto Star about a company by the name of The Second Opinion. That article appeared on Monday, January 8, 2001. It was authored by Tyler Hamilton. Also in that same edition of the Toronto Star, in section E there was a special report on privacy that contained three or four or five specific articles around this issue of privacy. I was wondering if we might ask that copies of all of those articles be produced for the committee for our reference.

The Chair: I'm sure we can get those for you very quickly.

ALGOMA AIDS NETWORK

The Chair: Our next presentation will be from the Algoma AIDS Network. Good afternoon and welcome to the committee. Please proceed.

Ms Kate Adams: Thank you. Everyone has the submission from me in front of them. I am with the Algoma AIDS Network. We are a non-profit AIDS service organization serving the needs of people infected and affected by HIV/AIDS in the Algoma district, which is 44 communities, 12,000 square kilometres, to be exact.

The staff and board of the AAN works hard every day to ensure our clients' privacy rights with their health issues are adhered to. As indicated in the original request to attend the hearings today, the Algoma AIDS Network endorses a bill that protects the most sensitive of information for the people of Ontario, that being health records, but we cannot support Bill 159 as it reads.

Prompted by a call from a client voicing concern with the bill, I have come here today to speak about the importance of keeping health records confidential and the right to privacy for people having HIV/AIDS. My colleagues from HALCO have made strong recommendations today, recommendations which my agency endorses. Therefore, I will not go over them once again. Instead, I would like to share with you two stories as an example of when a person's status is disclosed without permission.

I bring to your attention the highlighted area on attachment A-1, which is at the back of the presentation.

This is an excerpt from a page of a life story written by a young client of my agency. She writes:

"Now that I was becoming healthier, I decided to return to school. I was so afraid of what my friends were going to say. Little did I know that no one knew what was going on. They were very excited that I was back. When two months had slowly passed, a nurse came to my school to talk to my friends about it. They were all given papers and pamphlets to bring home for their parents. Receiving this news, you would think that the parents would have felt sorry for me. But no, they immediately attempted to have me removed from school in order to keep their children safe. So out of school I went and the huge arguments began. Yet again, my mom fought day in and day out for my freedom and rights. Even though the ignorant and intolerant adults did not want me to come back, my mother had won the battle and I was back"—in school—"where I belonged, with my friends."

The client was nine years old when faced with the struggle of rights and freedoms. Now 16 years old, several years have passed and this client is trying to lead a normal teenage life, wanting all the things that teenagers want: a job, a boyfriend and good grades. But with everyone knowing their HIV status, this proves to be difficult. You live your life under a microscope and you are open to persecution.

My second example took place a few weeks ago, on February 8, 2001, to be exact. On this day, my agency had two clients in the hospital on the same floor and in the same ward. After watching client A leaving client B's room, the nurse working the afternoon shift approached client A. The nurse asked client A to speak to client B because client B was not eating and client A might be of help as they were both going through the same things, that meaning HIV and AIDS. The nurse was completely out of line, to say the least, as it was unknown as to how the two clients had come to know each other. For all anyone knew, they could have been old family friends, not aware of each other's HIV status. The situation was a potentially dangerous one as clearly client B's health status was disclosed without consent. I'd like to add that client A refused to talk to client B for that very reason.

Our clients have good cause for concern when they read Bill 159 based on the examples given. The ripple that occurs when too many people have access to private health information is truly frightening, and our PHAs fear that incidents just like the examples used will occur time and again as health professionals begin to interpret Bill 159 as is.

Therefore, I have one recommendation to make to the committee today, and it is that Bill 159 be withdrawn and the Ministry of Health and Long-Term Care be instructed to redraft the bill, where the bill truly embraces a public health privacy model and meets CSA standards.

In conclusion, I would like to thank you for the time today. I urge this committee to send this bill back to be redrafted.

The Chair: We have just over four minutes per caucus for questions. This time, we'll start with Ms McLeod.

Mrs McLeod: Just to start off, I appreciate your examples. I think in both examples the health care professional was out of line according to what we would expect in terms of the protection of confidential information.

Ms Adams: Absolutely.

Mrs McLeod: We heard the earlier presentation this morning, obviously, saying that Bill 159 does not have satisfactory answers as to how to protect the client's privacy.

Can you suggest what needs to be in place, though? One of our concerns is, if we just say let's not proceed with Bill 159, and we don't have anything else in its place—because it's very difficult legislation to draft—what are we left with? Based on your examples, I'm concerned that what we're left with are inadequate ways of protecting the privacy of that health information. The people from the regulatory colleges, the College of Nurses, might suggest that we have that framework for ethical standards and protection of health information now through the colleges. Do you think, for example, that a complaint to the College of Nurses could have been a way of dealing with the breach of confidentiality in these two cases or is that just not strong enough now?

Ms Adams: It is one way of addressing the situation. Client A feels very strongly about it and is going to proceed. However, the damage is done. The person breached the confidentiality, and although the guidelines by the college are there and put into place, this person still acted outside those confines.

My interpretation of Bill 159 in terms of protection is that this was what could have been considered in good faith, which it was not. Therefore, I think we have to go back and look at it and make it that much more clear in terms of how a health custodian acts. I don't know that I am comfortable with "in good faith." This was done in good faith—

Mrs McLeod: The definition of "reasonable"—

Ms Adams: So was the explanation as to the children in school with my client when she was younger, that this was done in good faith. Yes, it was done in good faith. These children were going to be protected within the confines of the classroom. It was when the children returned home that the parents overreacted and my client's status was released to the rest of the community. It was a hardship on that family and has been to this day. That client still faces situations. The other day, outside of the schoolyard, one of her friends was not happy or pleased with her, and she said, "Oh, don't touch me. I don't want to catch what you've got." That is what she has to live with, and that is on a larger scope because it was disclosed by a health professional.

Mrs McLeod: Your examples really bring to life the importance of that excuse on the basis of what is considered to be reasonable, which was raised earlier this morning.

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Ms Adams: In answering you, it needs to be clearer and it needs to be more defined, and black and white,

absolutely, so that there isn't a situation such as that again.

Ms Lankin: If I understand the plea you're making to the committee, it's not to do away with the bill and not bring it back. In fact, you believe there's a need for greater privacy protection than exists now.

Ms Adams: Absolutely.

Ms Lankin: But this bill falls short of the mark of what's required; is that correct?

Ms Adams: Exactly. Our interpretation is that it can pass. Bill 159 just leaves it open to pass through so many hands that it does not garner confidentiality.

Ms Lankin: I think when we have real-life examples, it makes it much easier for us to understand. This morning, in the presentation from the HIV/AIDS Legal Clinic, we heard reference to studies that have been done on the anonymous testing program in place in Ontario. I remember at that point in time there was a big controversy about whether this was the right way to go. I heard compelling evidence from people that without that protection of privacy, and in fact anonymity, it would have an incredible chilling effect on individuals' willingness to seek treatment and to seek help. In so many aspects of our lives, and particularly if we suffer from a disease or some disability that has a stigma attached to it—and there are many different kinds that have stigma—that's a reality for people to live with if that information is disclosed. I wonder if you have any more information on the studies around the anonymous testing, on what any of the numbers were. Did it in fact increase the number of people proceeding with testing and getting help?

Ms Adams: I'm not sure in terms of the numbers on the Ontario scale. I will speak to you about what happens in my agency when I answer the phone and somebody says, "I think I need to have a test." When I'm speaking with them, I give them the three options: nominal, non-nominal and anonymous testing. The only person who has ever taken me up on a nominal test, which is your name test, was because they were going to work in the States and they needed to have it. All of the tests I have made referrals to for the health unit to do testing have been anonymous, except for one, in a two-year span. People are very closed when it comes to the thought of "What happens if I'm HIV-positive and what does this mean to my life?" It's not enough just to fight the disease. The stigma attached is so severe it can ruin your life.

I have a client who lived on St Joseph's Island who received a piece of mail that had a red ribbon on it from an AIDS service organization sending them a newsletter. Within a day, Richards Landing knew this person was infected, and that was only through speculation and that was only through one piece of mail. It ruined his life and he had to move from Richards Landing. Therefore, privacy is essential for people living with HIV because the stigma is so harsh.

Mrs Tina R. Molinari (Thornhill): Thank you very much for your presentation. Just a question on the

example you gave about the nine-year-old in school. You indicated—quoting the individual—that a nurse went into the school to talk to the friends about it and they were given papers and pamphlets. As you were reading, I thought that was just an education session for the students in the school, but what I gather from this is that the student was actually identified among all the friends.

Ms Adams: Absolutely. The education was meant to enlighten the children, and yet it was pointed out that it was very much the student who was sitting there. That was the reason she was there.

Mrs Molinari: Was that done directly or was it implied? This seems to me a very disturbing situation, if that in fact happened in a school where students are getting an education on an issue and yet there's one who's being specifically identified.

Ms Adams: It was. You're going back a certain portion of time. That's why the HIV education module is in the Ontario education system now. It was born out of that case in point right there. The education system has changed and has been worked so that children are educated on HIV, but very little was known when this happened to this child in particular.

Mrs Molinari: How long ago was this?

Ms Adams: About seven years ago. I'd like to point out that that accounting is her accounting. It made it much more personal than even the newsreels I have watched in the past because it was what she went through, what she was bearing. It makes it all the more emotional than watching the newsreels as to when that actually occurred.

The Chair: Thank you very much for taking the time to come before us here today. I know it's a long trip and we appreciate your perspective.

COLLEGE OF PSYCHOLOGISTS OF ONTARIO

The Chair: Our next presentation will be from the College of Psychologists of Ontario. Good afternoon and welcome to the committee.

Dr Catherine Yarrow: Good afternoon, Mr Chair, committee members. Thank you very much. I'm Catherine Yarrow. I'm the registrar for the college, and with me is Mr Gordon Rimmer. He's a public member on the council of the college.

I'd like to outline briefly the things I'll be talking about and then I'll just summarize them at the end. First of all, I'd like to say that the college believes this legislation to be very important and comprehensive. We hope that this time it sees its way through the House. There's certainly been considerable discussion about this type of legislation now for the past two decades. We believe the legislation has a number of positive features, one of which is the inclusion of unregulated providers and researchers in the definition of health information custodians. We think it's important that these groups are included.

We also think the section on the quality-of-care provisions is very important. The consent concerning personal health information is a strongly written section and important. The sections which provide for disclosure where there's a potential risk of serious harm and which preclude access where there's a risk of harm are certainly provisions we've been advocating for and strongly support. Sections allowing for disclosure of college proceedings are also sections that we consider important to our functioning.

There are areas I'll speak to that we have concerns or would like to see clarification on. We have a concern that private insurers do not appear to be covered by this legislation. It's not clear whether the Ministry of Consumer and Commercial Relations will be promulgating legislation which will cover that off or whether the federal legislation, Bill C-6, will cover that off.

The other area I'll speak about is some possible ambiguity around school boards and how they fit in, whether or not they're custodians within the meaning of this act. We think there's still some ambiguity remaining possibly respecting the functions of committees of the regulatory colleges.

Finally, we'll speak to an issue relating to the health colleges as custodians, particularly where it relates to issues of amendment of records.

As I mentioned at the outset, we do have a concern that insurers don't appear to be covered under this legislation. There are certainly many protections for providers within the health sector and there are opportunities under this legislation for custodians to release information to other persons who may be covered under other acts. The restrictions on those persons who receive that disclosure we're not sure are sufficient to protect the clients of the insurers, both disability insurers and automobile insurers. We also have some concerns that the provisions for use of information outside of Ontario are, at this point, fairly non-specific and in collecting information it appears as though it may be quite difficult for a health information custodian who's collecting information to provide sufficient information about potential disclosures to an individual, to have that individual give informed consent to the collection of that information.

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With respect to school boards, the school boards are covered under the freedom of information and protection of privacy legislation. There are health professionals who do work for school boards. Psychologists—I guess the other professions, nurses, can speak for themselves—provide both educational services and health-related services. Some of the educational services are covered under the Education Act and information is required to be on the Ontario school record and is accessible to parents under certain conditions. But the health professionals such as psychologists and psychological associates also provide health services of a confidential nature relating to adjustment difficulties a child might be having, anxiety, depression, family difficulties. It appears under this legislation that the psychologist or psychological associate

would be a health information custodian with the appropriate obligations, but it's not quite clear how those records and the provisions of this legislation would interact with any requirements under the freedom of information and protection of privacy legislation, which talks about personal information, mentions psychological information. But I think it's a little bit confusing right now and perhaps some more clarification around that application would be helpful.

With respect to the section in part II of the legislation that speaks to non-application of the act, it's not clear that it specifically excludes health information collected or created for the purpose of proceedings of health regulatory college committees, whether it covers all college committee functions. Quality assurance committee seems to be quite well covered. It's not clear whether other committee functions, including registration, fitness to practise, complaints and discipline are adequately covered in this legislation or whether the RHPA provisions would prevail. We would recommend that the RHPA provisions do prevail in any cases where there's any ambiguity or apparent conflict.

Under part III, it's not clear whether section 16 will allow college employees, agents or investigators to obtain health records relevant to an investigation or an inquiry under the RHPA or whether this is dealt with sufficiently elsewhere in the legislation.

Under part IV, consent concerning personal health information is a very important section, quite thoroughly written. As I say, our only concern is whether or not the consent for collection is sufficiently informed when it comes to possible disclosures where no further consent will be sought.

We're very pleased to see that if a health information custodian believes that there's an imminent, significant risk to someone's safety, whether it be the individual about whom the health information relates or to another individual, that disclosure is permitted under this legislation. That's consistent with other legislation and our own standards of practice.

We're also very pleased that health information custodians may disclose personal health information for proceedings that are dealing with the competency or the conduct of members of health professions because we rely very heavily on this type of information. Similarly, any assessment of a member of the college where there's an issue of fitness to practise, we're pleased that this legislation appears to allow for disclosure of that information to the college.

We're also pleased with the protection for the quality assurance provisions. While most of the quality-of-care provisions appear to relate to risk management in facilities, it appears that this will cover the college's quality assurance program and we hope that proves to be true when it actually comes to the application, because it's quite important that this information be collected in a way that members can be candid with the college about their developmental needs, their professional development plans, and not have any fear that that information

would be introduced into a civil proceeding. It appears that this legislation protects that.

Finally, with respect to the college as an information custodian, this legislation would require the college to amend a health record that was held by the college, as it now stands, if the individual about whom the information pertains requests an amendment, or else the college would be required to write a note of disagreement and append it to the record. The college, as a regulatory body, does not collect health information for the purpose of providing a health service, but rather for the purpose of regulating the profession in the public interest. The college would not be in a position to evaluate the appropriateness of any request to amend a health record, as the college is not creating the original health record in the first place. It would also, in addition to placing an unrealistic expectation on the college, add the administrative burden of having to notify others to whom we have provided this information in the context of one of our proceedings of the request for an amendment and the college's either amending or refusing to amend it. I would suggest to you that in every case the college is likely to refuse to amend a health record because we would not be in a position to evaluate the appropriateness of making such an amendment and would much rather see that be carried out by the originator of the health record than by the college. It would be unfortunate if this then resulted in reviews being sought by the privacy commissioner and tying up that system unnecessarily for an amendment and a provision which may not really have been intended to capture the colleges, but has done, as the legislation currently stands.

When it comes to the regulation-making authority, we would like to suggest that consideration be given to exempting the colleges from the provision for health information custodians, provided that you're satisfied that the Regulated Health Professions Act covers all of these same duties of privacy and duties around consent and disclosure that this legislation would cover.

To summarize, then, this is important legislation, it has a number of positive features which we hope will be maintained, but we do have some areas of concern and areas where we think there may need to be some clarification.

I'd like to ask Mr Rimmer, as a public member, to recount for you one or two situations which he has actually been acquainted with which suggest some further cautions around how information is managed by health information custodians.

Mr Gordon Rimmer: My main concern has been that with many of the cutbacks in funding, the small agencies have done what they can to economize on office staff and so forth. In many cases you don't have a secretary or a receptionist. If you go into an office, as I have had the experience to do, a small psychiatric clinic—I was there to set up an appointment with a counsellor. I found the outer door of the office open but there was no one at the reception desk. The door to the counsellor's office was closed and muffled voices could be heard, so obviously

someone was there. I decided to wait until they were finished their session. The phone rang, and I guess the counsellor decided that they were going to just let the answering machine answer the phone call. That was fine, except the answering device was in the outer office and I could hear the person who was making the call identify themselves, identify their problems, and any confidentiality went out the window. I didn't see anything in these regulations that covered the answering devices.

The other thing that I would be concerned about, these answering devices have tapes and they save some of this information. I just wondered, does this tape become a part of the client's confidential file?

Dr Yarrow: Mr Chair, we'd be happy to entertain any questions of the committee if there is time.

The Chair: We've got approximately a minute and a half per caucus.

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Ms Lankin: You're the third college that has come forward and expressed a desire not to be a health information custodian, so I think we're getting that message loud and clear.

One of the other things you've said which echoed the other colleges' presentations was that where there is a conflict between the RHPA and this legislation, the RHPA provisions should prevail. I really worry about that kind of blanket provision. I would like you to tell me where the conflicts are that you see, what the problems are, and why the RHPA provision is superior. We already have some general concerns about parts of the legislation which allow legislation like the Ontarians with Disabilities Act and the Ontario Works program to be exempted completely, and about the minister being able to exempt anything else that he or she wants at some point in time. Do you have specifics that you can give us about what provisions you're worried about and why the RHPA provisions are superior to the Bill 159 provisions?

Dr Yarrow: The main thing is that it's more a question of whether the legislation here is sufficiently clear so that it might be accomplished either way. For instance, under this legislation, section 16 allows for "the collection, use, disclosure, retention or disposal of information ... in the course of the person's duties for or on behalf of the custodian." We're wondering whether this is sufficient to cover college investigators who are sent out by the college to gather information in the course of conducting a complaints investigation, or whether that needs to be covered elsewhere. Elsewhere, custodians are allowed to disclose to a college.

We just want to be sure that nothing restricts in any way the investigative authority we have when we appoint an investigator under the Regulated Health Professions Act. The reason for that investigative authority is to ensure that, wherever a health record is relevant to our protecting the public interest, we're able to obtain that without undue invasion of anyone's privacy, but to ensure that it is possible and that there is no opportunity for someone to hide behind any legislative provision and argue that they shouldn't be accountable to the college

for those services, or that as a facility they shouldn't provide those.

Mr Wood: If I might take it back to the question of correction of the record, you explained the difficulties you had with respect to correcting the record. What do you think the answer is? Should we say that you have to go to the person who originated the record to correct it?

Dr Yarrow: I think where that person is still living and available, that would be preferable, inasmuch as I think that person would be in a better position to judge the appropriateness of making that correction. We are essentially secondary or tertiary custodians by the time the information gets to us and not in a position to give a clinical opinion. If it's a matter of a client or a patient or a person wanting an amendment to a matter of fact about their health status, for instance, we would not be in a position to properly evaluate that. So I think, where feasible, it would be preferable that that correction be made by the originator, the creator of the record.

Mrs McLeod: I think this is an appropriate question to the college as opposed to the field practitioners. I wanted to ask somebody about the changes in the age of consent to disclosure of health information—so you're it—because the Mental Health Act is quite different now than what Bill 159 proposes. You also touched on school boards in your presentation, and of course the Education Act is very different as well in terms of disclosure of information. The question would be, have there been any problems, from your experience, with the fact that children under the age of 16 can bind the practitioner to non-disclosure?

Dr Yarrow: Yes, you're right, the provisions have been very different in various pieces of legislation, and quite confusing. This legislation now parallels the Health Care Consent Act in respect of whether or not a child has the capability of understanding a decision respecting his or her own personal health information. I think there's a question of a literal interpretation of the law and good professional practice. There certainly have been situations where, for instance, school boards have been very nervous about following along the Health Care Consent Act provisions which would allow the child to make treatment decisions and, by extension under common law, decisions about personal health information, and have adhered to the stricter requirements for parental involvement in those decisions around treatment or disclosure.

In actual practice, that has put the health professionals in some difficulty. It has put members of our college in some difficulty, where a student may be wishing to seek counselling for something that student does not wish the parent to know about. It may discourage the student from seeking that assistance if there is a fear that the parent will automatically be involved. What we typically expect, as a matter of good practice—and it's more typical to the procedure under the Child and Family Services Act—is that if the child initiates a desire for assistance and is capable of understanding the nature of the assistance, the consequences of getting assistance and the consequences

relating to release of personal information, that child's wish be respected; that the professional discuss early on with the child the possible desirability of involving the parents in either disclosure of that information or participation in treatment decisions; and that it ultimately be the child's wishes that prevail, unless there is a clear risk of harm, in which case, then, the professional would override the child's wishes and disclose or involve the parents, if the child was clearly at risk or the child was about to put someone else at risk.

The Chair: Thank you both for coming before us this afternoon.

ONTARIO DENTAL ASSOCIATION

The Chair: Our next presentation will be from the Ontario Dental Association. Good afternoon and welcome to the committee.

Dr Ralph Brooke: Good afternoon. My name is Ralph Brooke and I chair the health policy and government relations core committee of the Ontario Dental Association, the ODA. With me today is our director of professional affairs, Linda Samek, and our director of government relations, Frank Bevilacqua.

The Ontario Dental Association is the voluntary professional organization which represents the dentists of Ontario. We are pleased to have this opportunity to meet with you today to discuss Bill 159, the Personal Health Information Privacy Act.

We want to comment on four aspects of the proposed legislation: (1) the need to include additional categories of health information custodians; (2) consent, as it relates to the legislation; (3) consistent standards for ethical review committees; and (4) the need for a single piece of legislation that deals with health information across all sectors.

First, custodians: As regulated health care providers who collect, manage and use personal health information on a daily basis, we are wondering why insurers and other third parties that routinely undertake similar activities do not appear to be captured under the legislation. We recognize that provisions exist in the legislation that permit other persons or classes to be designated as custodians by regulations. However, we suggest that known classes of custodians like insurers should be clearly designated within the legislation as health information custodians.

Insurers have "custody or control of personal health information as a result of or in connection with performing the person's powers or duties or the work described ..." in the introduction to this section. There is no category which identifies insurers as custodians, nor is there an exemption for insurers. It is the silence of the legislation on this matter that concerns the dental community.

The Ontario Dental Association supports the stated purposes of the act. It is because of our interest in protecting the confidentiality and security of personal health information and the privacy of the individual, as

outlined in section 2 of the proposed legislation, that we recommend that insurers be named as health information custodians.

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Second, consent: the legislative proposals list four elements of consent: (1) it must relate to the information; (2) must be informed; (3) be given voluntarily; and, (4) it must not be obtained through misrepresentation or fraud. The ODA supports this approach to consent which is reflective of the Health Care Consent Act. With respect to the release and use of information, we also believe that the consent for collection, use or disclosure of personal health information must be timely and current.

There are circumstances where individuals enter into a contract for services and the mere signing of the contract includes clauses which permit the continuous disclosure and use of personal health information to third parties. We recognize that it is necessary to enter into contracts for services, but we are concerned that the protection of personal health information is seldom a central focus of the contract and that there may not be a comprehensive understanding of how agreeing to accept employee or other benefits may affect the sharing of one's personal health information in the future.

Simple acts, such as agreeing and signing to receive benefits from an employer as part of a compensation package, often mean that an insurer will be authorized to receive and use personal health information without further confirmation or agreement from the individual. In these instances consent is not always informed and it certainly does not reflect the circumstances which surround future collection, disclosures and uses that flow from such a "consent."

The Ontario Dental Association recognizes that the right to privacy of personal health information is not absolute, yet in the spirit of the legislation designed to protect personal health information, it is essential to keep to a bare minimum those instances where disclosures can occur without informed consent. In an effort to address at least the timeliness of the consent, we recommend that third party payers or employers be required to inform the individual of what personal health information is to be collected and how the information will be used, including how it may be shared with any other individual, group or organization.

Further, we recommend that related consents provided to third party insurers be reviewed and renewed on an annual basis so that individuals are continuously aware of who has been granted access to their personal health information and how this information will be used.

We understand the importance of introducing administrative ease into the billing process for health care providers, however the need for administrative ease should not be permitted to negate requirements for informed consent. Clause 29(1)(c) places no limit on the personal health information that a custodian may disclose "for the purpose of obtaining payment for health care provided to the individual." The Ontario Dental Association appreciates the good intentions of this clause but believes that

patients should be informed of and consent to the sharing of personal health information to third party payers.

The next point is ethical review committees. There are many institutions, organizations, individuals and for-profit companies with an interest in research involving personal health information. The diverse nature of research and researchers highlights the need to develop clear rules to guide the release of personal information for research purpose. The Ontario Dental Association believes that research proposals, projects and programs that propose to collect and/or use personal health information should be reviewed and approved by an appropriate ethical review committee.

While we support the general approach regarding the use of ethical committees outlined in the legislation, we wish to ensure that the legislation does not dismiss the good work already being undertaken by existing ethical review committees within institutions throughout the province, nor would we want to see the creation of unnecessary bureaucracy that may have a negative impact upon research initiatives. We believe that the proposed legislation provides a framework that will enable careful evaluation of existing ethical review committees to ensure that a common standard for the protection of all personal health information is applied for all research that proposes to use the personal health information of Ontarians.

And lastly, the need for a single piece of legislation dealing with health information in all sectors: as we stated earlier, the ODA was puzzled that some third parties that collect, store and use personal health information are not included in Bill 159. In the interests of establishing a common framework to protect the confidentiality and security of personal health information and the privacy of the individual to which the information relates, we encourage the introduction of a single piece of privacy legislation that will take into consideration the potential for linking and re-linking data by third parties in a manner that may allow for personal health information to be used in a way that is inconsistent with the original collection of the data.

To sum up, the Ontario Dental Association recommends that the following provisions be included in the bill:

- (1) Additional categories of health information custodians such as insurers;
- (2) Consent as it relates to the legislation;
- (3) Consistent standards for ethical review committees; and,
- (4) The need for a single piece of privacy legislation that addresses health information across all sectors.

In conclusion, the ODA supports the spirit of the legislation. We commend the government for bringing forward a bill that is vitally important to all Ontarians and we thank you for providing us with the opportunity to address the committee.

The Chair: Thank you very much. That give us about three and a half minutes per caucus. Ms Lankin has in-

dicated she had no questions, so we will start this time with the government.

Mr Wood: I wonder if I might ask you about your point as it relates to the ethical review committees. Ultimately, somebody has to have the final sign-off. Do you think that should be a public official, for example, like the Information and Privacy Commissioner, or do you think that should be someone who is, so to speak, further down the system? Who would you recommend as having the ultimate sign-off?

Dr Brooke: I have a bias here, because when I was vice-provost of health sciences at the University of Western Ontario, the ethics committee reported to me. But I was responsible to the senate and I was quite satisfied that the senate of the university, as the final place where these things would go, was satisfactory. Within the hospital, the overall medical advisory committee would have the final say. I think that most of our public organizations such as universities, hospitals etc, are responsible enough to be the final arbiters.

Mr Wood: Why would you say that rather than someone who is chosen by the Legislature?

Dr Brooke: I think it's important that there is an overall knowledge that these ethics committees are working appropriately and I have no problem with someone chosen by the Legislature overseeing that, but these committees work well, by and large. We know that because half the people who submit documents to us complain that we're being too strict, so I think that's one measure of the ethics of those ethics committees.

Mr Wood: Those complete my questions, unless there are other questions, which there don't seem to be. Thank you very much. You've been very helpful.

Mrs Pupatello: In the scope of a dentist working on his patient, what are the protections for all of the people who work in a dentist's office in terms of right to information, their duty to seek consent and their disclosure—the protections for those patients?

Dr Brooke: It's absolute. Anyone working in a dental office has to know that every single piece of information that comes their way is to be regarded as absolutely confidential, the same way it would be in a medical office.

Mrs Pupatello: Is each one of those positions within the office subject to a particular college that outlines that?

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Dr Brooke: Yes, they are, the hygienists to their college and the dental assistants to their college. A secretary would not be, but secretaries act as confidential agents.

Mrs Pupatello: Because they are mandated by some colleges?

Dr Brooke: Because they are informed that this is confidential information.

Mrs Pupatello: Why would the ODA focus on third party insurers in the discussion of this bill?

Dr Brooke: Where we see what we feel is something that is missing, we have the right to point this out to the committee.

Mrs Pupatello: Your example was interesting about how people don't realize, when they're signing on, what they are signing on to, and I agree with that. What I want to get is your opinion. When signing a contract to take on a job, you need to sign the contract, and then by signing the contract you also happen to be agreeing to pass on all your personal health information. If you don't sign the form, you likely don't get the job. There's a whole world of discrimination that goes on there that is very difficult to fight and gives insurance companies—

Dr Brooke: That is in fact coercion.

Mrs Pupatello: There is no protection, at least none that is obvious, that doesn't discriminate against you. In the meantime, you don't get the job. That seems to be the reality out there.

Are you aware of what insurance companies might do with personal information in addition to reviewing what level of benefits that person might have?

Dr Brooke: I'm not fully aware of that. I don't know whether Ms Samek or Frank—

Mr Frank Bevilacqua: The principal concern relates to the fact that dentistry is largely outside of the public sector in terms of payment, so by and large we deal with third parties. The issues revolve around the nature of the consent and whether or not it's informed and whether a general consent for allowing a practitioner to transmit a claim to an insurance company electronically gives that insurance company the right to request all sorts of supplementary information beyond what's required for payment of a particular claim or for assessing liability in terms of whatever contract they administer.

With respect to dentistry, a lot of it is transmitted through EDI, and the consent that generally is signed and which a practitioner holds on record in the patient file allows the dentist to transmit the information that's in that claim. So a lot of our issues revolve around additional requests for information where in fact the patient has not provided a consent to release specific pieces of the record which the insurance carrier or dental consultant may be requesting.

Mrs Pupatello: So then the dentist is put in the centre of passing on information to meet the needs of the insurer—the patient needing to pass it along in order to be insured—and you are just along for the ride, passing along information that as a professional you would never do without appropriate consent.

Mr Bevilacqua: I think the major concern we expressed related to the clause in the legislation that allows a practitioner to disclose any information that's required to receive payment. We certainly are concerned about that provision in the legislation.

The Chair: Ms Lankin, you do in fact have a question?

Ms Lankin: I do. The third party who is receiving that information, is it your reading that they would not be covered by the recipient clause within the legislation?

Dr Brooke: Yes, as far as I can tell.

Ms Lankin: I just wanted that clarified. Thank you.

The Chair: Thank you all for coming before us here this afternoon. We appreciate your presentation.

ALEXANDER FRANKLIN

The Chair: Our next presentation will be from Alexander Franklin. Welcome to the committee. Just a reminder that you have 10 minutes for your presentation.

Dr Alexander Franklin: Mr Chairman, Past Minister Lankin, members of the standing committee on general government, I speak as a PC Party member and physician. Bill 159 may cost the PC Party lost votes. It will certainly cost MDs lots of money and time. There is also the \$50,000 fine as an extra worry. If this bill is passed as it stands, it will make clinical practice even less attractive as compared to non-clinical medical careers.

What are the advantages to the taxpayer? The legal right to see their chart. Few do. Why not? I suggest that most do not want to be burdened with the uncertainty that is part of medicine. It has always been the case that clients who take responsibility for their health will take copies of their specialist reports when they travel.

The client is mainly worried about details of sexually transmitted disease, unwanted pregnancy, psychiatric conditions and genetic disease being used against them, with possible monetary loss and social ridicule. Even with maximum paper security, one's presence at a specific hospital clinic or at a special hospital such as Princess Margaret gives a good clue as to the diagnosis. Mailing information is not secure unless signed for. There is the risk that the post could be opened by third parties. The chart may also be seen by different agencies: the College of Physician and Surgeons, MD assessors, review committees, appeal boards. Lawyers can, of course, demand reproduction copies of the whole chart. Insurance companies, like credit agencies, have central records of medical information. OHIP has diagnostic and treatment codes which can be matched to a name and address. No government in the world has ever been able to prevent secrets leaking. Medical secrecy is only possible if one's face is not known internationally and one receives attention in a different continent using an assumed name and paying with cash.

To put this bill into practice will cost a lot of tax money in material and time. Hospital records will have to be protected with metal grilles or kept in locked cabinets. Levels of security clearance would be established on a need-to-know basis. The present uncontrolled access to hospitals would have to change, with proper identification of visitors. The \$500,000 corporate fine would make this necessary. MDs would also have to buy locked storage facilities and a burglar alarm system to prevent a Watergate. The Ministry of Health should reimburse MDs for the extra expense, similar to a business development grant.

I suggest that voters be told of the taxpayers' cost of this bill: commission expenses, medical administrative costs, legal expenses. They can decide whether all this is

worth the price at a time when the Ministry of Health is short of money for essentials. Thank you.

The Chair: Thank you. You've left us about two minutes per caucus for questioning and we'll start this time with the official opposition.

Mrs McLeod: I hear some of the concerns you've expressed about the cost of implementation of the bill, but it leaves me with a concern about your sense of the level of security of patient records now. Are you suggesting that there is a fair bit of access in physicians' offices to patient records now beyond what is absolutely required for health purposes?

Dr Franklin: I don't quite understand the exact nature of the question. Can you make it slightly more cogent?

Mrs McLeod: Sure. You're suggesting there's a great deal of cost involved in having to meet the privacy provisions of this bill, and I'm just wondering how those costs are greater than the current privacy positions that any physician would take. If there is a lot more cost involved in implementing this bill, that gives me some concern about how perhaps lax the privacy provisions are in physicians' offices.

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Dr Franklin: May I ask whether your physician is a solo physician or one of a group?

Mrs McLeod: Let's say a group, as opposed to my spouse, yes.

Dr Franklin: I think you can go to most groups and you'll see as you come in a whole wall of charts and they are open, vertical stacks. That I think speaks for itself.

Mrs McLeod: The physicians are governed, as we've been hearing all morning with other colleges, by a fairly rigorous set of rules about the protection of the privacy of those files. Are you suggesting that those rules either are inadequate or that they're not being followed?

Dr Franklin: The rules are being followed, but things speak for themselves. I'm sure in your group practice you visit, you see the other charts behind the receptionist's desk. When you go in you see the receptionist and usually the charts are filed right up to the ceiling. There's no metal grille, usually. The reason I asked whether it's solo or group is that a solo practitioner can afford to have steel cabinets—I have had them for a quarter of a century—but in a group there are so many doctors that they just don't have the room; the space is very expensive. As I say, you can see for yourself when you go in what security there is, and there's as much security as one can have in that situation. I think that answers the question.

Ms Lankin: My question was on the same point. It's nice to see you again, Dr Franklin. Many people who are criticizing this bill from a very opposite point of view to yours are saying that this bill actually is about enabling access to private health information in a whole range of circumstances: the mandated disclosure, discretionary disclosure, on and on. Often we've been told that the Hippocratic oath that physicians swear to, along with the provisions under the self-regulatory scheme in their college, is a stricter standard of privacy than what is

actually being proposed in this bill. You obviously have a different opinion, and I'm wondering if you could spell out for the committee what it is in the nature of the bill that you believe would require a physician to take greater privacy protection measures than the Hippocratic oath and the College of Physicians and Surgeons currently do?

Dr Franklin: The situation actually, as an aside—it doesn't really make all that much difference—is that not all universities require the Hippocratic oath. The University of London doesn't, and when I took my Canadian qualifying examination they didn't and in the USA one doesn't. However, \$50,000 does make one more alert to the question of security. It's a question that medical practitioners couldn't practise if people thought that information was going elsewhere. They simply would be out of business. The second thing is common sense: who is going to confide in you once your reputation has gone? It only takes once to happen.

Apart from the legal side, there's the professional obligation that you don't disclose. In fact it's very sad when the courts force disclosure. The power that the lawyers have to actually have a photocopy of the whole chart, cover to cover, is quite frightening.

The answer to your question I think is \$50,000.

Mr John O'Toole (Durham): Thank you very much, Dr Franklin. On a lighter note, I think what you said earlier gives me serious question to re-examine this bill. I hope you take that in the right line.

Ms Lankin: It may cause the rest of us to support it, Mr O'Toole.

Mr O'Toole: More on the same tone, you mentioned in your second-last paragraph that there would be a burden for alarm systems and security measures similar to Watergate, you call it. Watergate wasn't a computer issue; it was a hard file issue. My point to you today is, what security do we really have outside of unlocking the door and walking in and getting whatever you need? The public today think that all these records that are in paper format are somehow more secure than something in a data format. I question whether there is the security that patients would like to be assured of in today's format.

Dr Franklin: Mr O'Toole, you're quite right. The security depends to some degree on how the physician wants to protect their property. I personally for the last 30 years have always used a burglar alarm system, which interestingly enough has not prevented me being burgled twice. However, there it is. Once it was through a small opening which a child could get through, but that's an aside. A burglar alarm system does help, and as a solo practitioner I can afford to have steel cabinets. In a group practice, as I mentioned before, it's much more difficult. One would really have to go into a major investment for large steel cabinets or some grille which could be moved across and locked at night. Of course, a determined burglar can get through that, but it's a reasonable protection.

I didn't want to elaborate in the text, but there's also the problem—and a dental colleague mentioned it—of part-time workers. The summer program for students is

an excellent program and certainly a great help to the student and to the practitioner. They can't really be held to oaths of any secrecy. So there is always the human weakness which comes into this. I think that's generally understood. But then most charts don't really have all that much which is of interest to anybody. Most charts are really quite dull, and really why would anyone particularly want to look into them? It would be rather a waste of time.

The Chair: Doctor, I'm afraid I'm going to have to cut you off there; we've gone over time. Thank you very much for coming before us here today. We appreciate it.

ALLIANCE FOR LIFE ONTARIO

The Chair: Our next presentation will be from Alliance for Life Ontario. Good afternoon and welcome to the committee.

Mrs Jakki Jeffs: Firstly, I would like to thank you for the opportunity to appear before you today. My name is Jakki Jeffs and I'm executive director of Alliance for Life Ontario. We are the provincial coordinating body for all of the local educational pro-life groups in Ontario. Joining me today is Mr Geoff Cauchi, a lawyer by profession and a volunteer member of our board of directors. He is also our volunteer legal counsel. Mr Cauchi has given presentations to a number of our local groups since 1995 on the lack of respect for parental rights in the Health Care Consent Act and the Substitute Decisions Act.

Almost exactly five years ago, in February 1996, we made a detailed presentation to the standing committee on the administration of justice on Bill 19, which was the bill that became what is now the Health Care Consent Act. We have included with our written materials distributed to you today a copy of the Hansard record of our presentation then. We also have a history of involvement in the consultation process of previous efforts of the government to legislate in the area of personal health information. We have made three previous written submissions on this subject, all included in the material that has been handed out to you: a letter dated August 20, 1996; a letter dated February 27, 1998; and a most recent letter dated October 9, 2000, in response to the Ministry of Health's consultation paper dated September 2000.

The members of the committee might be interested to know why an organization like ours is so concerned about the parental rights aspects of Bill 159. We were first alerted to these issues when we received a copy of a letter issued by the Association of Sexual Health Professionals of Ontario to its members in 1991, calling on them to lobby the Rae government to change the bill that eventually became the Consent to Treatment Act. The bill contained a presumption that children under the age of 16 were "incapable" with respect to medical treatment decisions, the implication being that health practitioners would normally have to have the consent of a child's parent before proceeding with a medical treatment. The association was up in arms that this pre-

sumption would greatly hinder the ability of abortionists and other family planning professionals to continue to provide confidential services to teens. Within a matter of months the bill was radically changed. The presumption of incapacity was replaced by a presumption of capacity at any age, and all health practitioners were given the sole authority to determine whether or not a child was capable with respect to a proposed treatment.

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We don't think these two events were a mere coincidence. In fact, we believe that (a) this radical social policy change that now affects how all forms of medical treatment are provided to children would not have come about but for the lobbying efforts of the abortion and family planning industries and (b) the reliance by legislators on a supposed need to respect the confidentiality of children as a justification for negating parental rights in legislation like the Health Care Consent Act and Bill 159 is disingenuous. The whole process has been akin to a group of foxes lobbying the town council for a law prohibiting chicken farmers from putting wire fences around their chickens on grounds that the fences unduly restricted their freedom of association with the foxes.

Of course, the Consent to Treatment Act became the Health Care Consent Act under the Harris government and, despite our voice of warning, the Harris government missed an opportunity to correct the anti-parent aspects of the legislation. From a public policy point of view, the legislation has been a disaster. Secret abortions and chemical contraceptives for teen girls have not resulted in true autonomy for children. Instead, confidentiality has been used as a cloak to protect the family planning industry from being held accountable for the devastating injuries these girls often suffer and for its systemic abuse of the concept of informed consent. At the same time, parents who later find out their daughters had these secret abortions now have to help them pick up their shattered lives and wonder how it came to be that the school health nurse or their own family doctor could deceptively arrange the abortion behind their backs and then claim this was all legal and none of their business.

We have our own Rosa Hartford and William Saturday cases. They just don't seem to get reported in the Toronto Star. It is because our organization does get wind of these tragedies that we have been moved to come before you here today.

Bill 159 is infused with the same extreme vision of child autonomy in medical matters that guides the Health Care Consent Act. It is our faint hope that someone in the Legislature will finally step forward and stop this madness. We draw your attention to an important article, in the appendix of our written materials, by Bruce C. Hafen and Jonathan O. Hafen, entitled *Abandoning Children to Their Rights*, originally published in *First Things*, August/September 1995. The authors warn legislators against incorporating into statutes "an autonomous view" of children's rights that is "more based on choice than needs" of children. They conclude with the following words: "Despite increasing autonomy rhetoric, the

American legal system limits children's autonomy in the short run in order to maximize their development of actual autonomy in the long run. This approach also encourages development of the personal competence needed to produce an ongoing democratic society composed of persons capable of autonomous and responsible action. To short-circuit this process by legally granting, rather than actually teaching, autonomy to children ignores the realities of education and child development to the point of abandoning children to a mere illusion of genuine autonomy."

Keeping the personal health information of dependent children from their custodial parents will only give the abortion and family planning industries further protection from accountability. These industries seem to know better than most people that intensive parental involvement in the lives of their children is not good for their businesses and, conversely, anything that frustrates that intensive involvement is good for their business.

I now turn the balance of our time over to Mr Cauchi.

Mr Geoff Cauchi: In analyzing the bill, what I have tried to do is reduce to its most basic terms what it means for parents of dependent children. Let me use the little time I have to list the messages the Legislature is giving to all the parents of Ontario with Bill 159. We have developed specific recommendations on certain provisions of the bill, and they are detailed in our written presentation, but I will leave any discussion of them to the question period and save my time for more general comments.

I have identified four basic messages this bill sends. The first message is, we as the government can no longer trust you parents to make good decisions for your children, and our distrust is so deep that we must, by statute, no longer permit any parent in Ontario to decide when their child is ready to make adult decisions about the collection, use and disclosure of their personal health information on their own. Instead, we will appoint a government agent who works in our state health care system as a health information custodian to decide whether or not your child is capable of making the decision herself. We will let this person make this decision (1) without your knowledge, consent and input and without giving you an opportunity to challenge that decision in a court of law; (2) even though he may have a conflict of interest in the outcome of the decision, that is, he may have a dogmatic position that no parent should know about their child's health care or he may personally benefit from a decision not to involve the parents in the sense that it can help insulate him from liability for injuries he may have caused the child in his capacity as a health practitioner; and (3) he may be a stranger to your family and have known your child only briefly and, therefore, not have had any reasonable basis on which to decide that your child is capable of making her own decision.

The second message is, you as a parent will no longer have the right to know your child's health record. We will now decide when it is appropriate for you to know it.

If the health practitioner, who could be the same person as the information custodian who performed the treatment that is the subject matter of the health record, had decided your child had the capacity to give her own consent for the treatment, we have now decided the records of that treatment are none of your business.

The third message is, we will henceforth let your child have free access to her own personal health information, regardless of your wishes. We don't care that you may think there is some very sensitive information in her records that you think she may be too young to handle at this time. Again, we can't trust you to responsibly make that decision on her behalf.

The fourth message is, if in the rare circumstance one of our state health practitioners does find your child is incapable with respect to a proposed treatment, we will henceforth let you have access to her personal health records, but only if we think you need it to make the treatment decision or to prepare plans for her continuing care, otherwise we will give you access to her records only if your child says it's OK. And if she says it's OK, we will also dictate to you the limited purposes for which you can use the records.

All in all, Bill 159 is an incredible insult to the parents of Ontario.

Mrs Jeffs was quite accurate when she spoke of the disastrous impact the Health Care Consent Act has had on parent-child relationships and the health of children. We predicted in our presentation in 1996 that the presumption of capacity at any age, the legal right of the health practitioner to rely upon it and the relief from liability clauses would combine to give family planning practitioners something akin to diplomatic immunity from liability for injuries that result from their so-called treatments, and this has come to pass.

At that time, we also provided legislators with empirical evidence of the positive impact on the incidence of teen pregnancy in several American jurisdictions of parental notification and/or consent statutes for abortion. We can now also point to a 1998 study published in the *Journal of the American Medical Association* that indicates that opposition by parents to contraception for their teenage children is protective and effective in reducing rates of teen pregnancy. That's a study by Michael Resnick and others, entitled *Protecting Adolescents from Harm: Findings from the National Longitudinal Study on Adolescent Health*, JAMA, September 1998.

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Who knows whether Ontario's policy of secrecy between children and parents is actually encouraging more teenagers to engage in risky sexual behaviour, thereby contributing to higher associated social costs? I invite you to spend some time going through the case histories we have included in our appendix to illustrate the fruit of such a policy in other jurisdictions.

Consider the case of the high school teacher from Illinois, William Saturday. He carried on an illicit affair with a minor female student for 18 months and during

that time got the school's own clinic to put the student on the chemical contraceptive Depo-Provera. The school clinic, relying on its policy of confidentiality, kept the affair and the treatment secret from the girl's parents during the whole time.

Consider the Pennsylvania case of Rosa Hartford. Her son, an adult, had impregnated his girlfriend, a minor child. Unknown to the girl's parents, Rosa took it upon herself to take the girl out of state to have an abortion. Her parents thought she was in school. The boy was convicted of statutory rape and Rosa was convicted of the statutory criminal offence of interference with custodial rights. There is no such statutory offence in Ontario.

These cases happen in Ontario, too, but they don't receive much media attention. In my own home region, a high school counsellor told a girl's parents that she needed their daughter to babysit for her late into the evening and on that ruse obtained their consent to the girl staying overnight. In fact, the counsellor had arranged an abortion for the girl at a Toronto abortuary the next day and spent the prior evening helping to prepare the girl for the ordeal.

The parents knew nothing of the pregnancy and were obviously deceived by the school health officials. I spent an afternoon speaking with these parents. They were not pro-life. They might have even concurred with the abortion, but you should have seen the look on their faces. Their home, their lives had been violated by agents of their own government. I sympathized with them, but had to tell them that although what had happened to them was intolerable and probably unconstitutional, it was perfectly legal under Ontario statute law.

The Health Care Consent Act and Bill 159 share a fundamental constitutional flaw: they both fail to make a simple and basic distinction between adults and un-emancipated minor children. We maintain the position we pressed in 1996: to be constitutional, any statute dealing with important decisions that arise during the developing years of a child's life must recognize a *prima facie* parental right to make those decisions for the child, and that right should end when the parent's support obligations under the Family Law Act end. This would mean an absolute outside limit of 18 years, but parental rights could terminate after the child attains the age of 16 and has either married or withdrawn from parental care and control.

Recognition of this threshold would be consistent with the social truism that whoever has the responsibility must have the power. It is also a threshold of adulthood on which we believe there is wide societal consensus. This distinction needs to apply in virtually every area covered by this bill, including the following: (1) the child's access to her own records; (2) the parent's access to the child's records; (3) consent to the collection, use or disclosure of the child's health information by parties outside of the family; and (4) substitute decision-making in respect of all of the above.

For the sake of those parents who feel that their otherwise dependent children have earned the right to

autonomy in respect of health information decisions, we would not oppose an exception whereby children over the age of 16 who have the written authorization of their parents would be treated the same as adult individuals under the statute, in other words, those children possessing a written waiver of the parents' right to veto their decisions. We would also not, of course, oppose an exception in the case of an emergency, where the custodial parent is not available.

Back in 1996, I took a legislative committee through an analysis of the Supreme Court of Canada's 1995 decision in *B.R. versus the Children's Aid Society of Metropolitan Toronto*, coming to the conclusion that the bill that became the Health Care Consent Act would not likely pass a Charter of Rights challenge. If you review the Hansard record of that 1996 presentation, you'll see the committee accepted the very dubious notions put forward by the Attorney General's lawyers that (1) everything the judges said in that case about parental rights was obiter dicta, or mere comments in passing; and (2) the decision could be ignored in drafting the legislation.

Since 1995, that decision, particularly the judgment of Justice LaForest, which was highly supportive of parental rights, has received much positive judicial comment in subsequent cases. In addition, the court has recognized a new source for parental rights in the charter, the section 7 security-of-the-person right. I have detailed these comments and the new cases in the end notes to our written presentation. Suffice it to say that we remain more convinced than ever that neither the Health Care Consent Act nor Bill 159 could survive a charter challenge based on parental rights.

To sum up the legal and social principles at stake here, I don't think I could be more eloquent or profound than Judge Luttig. In the recent case of *Planned Parenthood versus Camblos*, the US fourth district Court of Appeals upheld the constitutionality of a statute that requires a teen girl who seeks an abortion to either give notice of this intent to her parent or seek a court order to bypass the parent. The judge said parents "are obliged to know, and they are entitled to know, the life-defining decisions their children face. To hold otherwise, we are convinced, would be to turn child from parent and parent from child at the very moment in life when each is most in need of the other. Such a plenary violation of family the Constitution cannot be construed to require. Were it so, right would be they who said that with arrogance implacable we had our foundation rent asunder." Thank you.

The Chair: Thank you both. You've timed it perfectly. That exhausts our 20 minutes, but we appreciate your taking the time to make a presentation and specific recommendations to the committee.

Ms Lankin: Mr Chair, the presenters made reference to appendices, which I don't see attached.

The Chair: You should have a big packet that was on your desk when we came back from lunch.

Ms Lankin: I don't appear to have it.

The Chair: The clerk will bring you another copy.

Ms Lankin: Thank you.

CLAUDETTE GRIEB

The Chair: Our next presentation will be from Ms Claudette Grieb. Good afternoon and welcome to the committee. Just a reminder that you have 10 minutes for your presentation.

Ms Claudette Grieb: I would like to present these pictures. They are of my dead children and I need them here with me in spirit.

The Chair: I guess I should ask, Ms Grieb, if you were here earlier when I read the notice to one of the other groups about parliamentary privilege.

Ms Grieb: No.

The Chair: This is not in any way to influence your presentation except to point out to you that from time to time in the past we have had individuals in particular making presentations who might not be as familiar with this as some of the groups that appear before us regularly. While the MPPs enjoy parliamentary privileges and certain protections pursuant to the Legislative Assembly Act, it's unclear whether these privileges and protections extend to witnesses who appear before committees. For example, it may very well be that the testimony you've given or are about to give could be used against you in a legal proceeding. I caution you to take this into consideration when making your comments. I just raise that. A previous presenter actually mentioned specific doctors, so I just wanted that to be before you.

Ms Grieb: All right.

My name is Claudette Grieb. I am here today to speak for two people who have died as a result of malpractice, my daughter and my granddaughter. An uncertified therapist allowed to practise in Ontario is responsible for their deaths. The therapist is still in practice, protected by our existing federal and provincial laws and guidelines. Her colleagues at the Community Justice Initiatives on Stirling Avenue in Kitchener are also still operating, aided by government funds, using deadly therapy—the bogus therapy of recovering hidden memories of incest. I know, because I am in possession of the counsellor's receipts and the group therapist recommendations and questionnaires given to my deceased daughter. In the questionnaires, my mentally ill and suicidal daughter repeatedly reported that she was "hatin' and suicidal." Neither the unqualified counsellor nor the group therapist got proper medical care for my seriously ill daughter. Instead, the therapist kept probing her confused mind about incest that never took place. They insisted that this was the cause of her mental condition and that she had to confront the perpetrators to get better.

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Meanwhile, these delusions drove her to suicide and the murder of her infant daughter, my dear grandchild. Following suggestive therapy, my daughter came home to me with the most horrible false accusations. She came to believe that she had been sexually abused at the age of two. That was the age of her own infant at the time. Memory experts, as well as plain common sense, tell us that it is impossible to have any reliable memories from

age two. My daughter's unqualified therapist working in an Ontario government-supported clinic did not know that.

Instead, without contacting us, without corroborating any of my daughter's delusions, without checking the medical history of my daughter, this therapist recommended that my suicidal daughter divorce herself from her family and deny us access to our granddaughter, Dagmar. This dangerous advice cut my daughter, and especially little Dagmar, off from the most valuable lifeline for support—her loving parents and our son. Instead of recommending solid medical treatment, my mentally ill daughter was instructed to sit in a closet with a teddy bear so she could get in touch with the "little one inside." Meanwhile, little Dagmar was left in mortal danger.

When we were confronted with our daughter's bizarre recovered memories, the counsellor in question determined that if we denied her findings then we were in deep denial. Two weeks after the murder-suicide of my granddaughter and daughter, I phoned the counsellor in question. She then lied to me, saying she "had little knowledge of my daughter." It was her turn to be in deep denial.

What are the facts? I then confronted her with the fact that, according to the homicide detectives, she was indeed Jackie's counsellor. She then owned up to knowing my daughter after all. She refused to discuss my deceased daughter with me, stating, "I cannot disclose any information of the therapy because it is confidential."

I am the estate trustee to my daughter, without a will. I've got all the medical notes from all the doctors and all the clinics, and I even have the pathology reports, the post-mortem reports. Yet I am not allowed to have the notes of this criminal, this quack. This counsellor had also slandered my family to the homicide detectives as well, informing them of my daughter's beliefs acquired in therapy. Those records are also sealed. I want all these records made available. I am here representing my dead children. They no longer have a voice. It is more than clear to me that our laws and regulations are protecting the fraudulent activities of quacks, in this case, a quack who milks the money of single welfare moms. That's all our tax dollars, folks. I know because I have the receipts. They're in front of you.

Moreover, our provincial government, as well as the federal government, still funds this unscientific and obviously dangerous type of quackery, now proven worldwide to be destructive. It is called recovered memory therapy. In clinics in this province one can still obtain the out-of-date books and pamphlets from Health Canada. They were written between 1988 and 1992 at the height of the recovered memory fad. Yet anyone can still download them from the Web site, advocating—still in 2001—this totally discredited therapy.

The major professional mental health groups in Canada, the United Kingdom and the USA have condemned this kind of suggestive trauma search therapy. No warnings of the sort are to be found about it on our

provincial and federal health Web sites. The most blatant example of caustic material—my daughter had it—is still approved by Health Canada. The distributed literature is the 1988 book *The Courage to Heal*. This book, according to all mainstream professionals, has caused the destruction of thousands of innocent families. In Canada alone, I know of over 2,000 families who were suddenly confronted by a son or daughter after therapies convinced them, “You have the symptoms, now find the memories.”

I know, because I have met over 100 of these parents. I am one myself. I will present to you later a study to show that this bogus therapy is responsible for a very serious decline in the health and functioning of those who fall victim to it and that it has led to numerous iatrogenic suicides. Remember that word, folks. That is death caused by the healer. Ever since the first warning about recovered memory therapy appeared in the *Toronto Star* in 1992, the provincial government of Ontario has failed to act. By excluding Bill 155 from the contents of Bill 159, you not only remove accountability that mental health practitioners should have to face, but the provincial government also removes itself from being responsible and accountable.

Child sexual abuse is a very serious issue. Therapists should support their clients who report such abuse. It is clear that government concern over this issue has totally blinded our elected officials to the fact that false accusations arising out of suggestive therapies do occur. A false accusation of child abuse is also a very serious issue. Many judges, at a meeting in Windsor some years ago, were originally told by Ontario's former Attorney General, Marion Boyd, “False memory syndrome is the invention of criminal lawyers.” The judges disagreed because they had seen cases based on false recovered memories go through their courts. Meanwhile, federal laws closed the avenue to people having access to the records of malpractising therapists and people falsely accused were thereby denied to make full answer and defence in these so-called recovered—that is, false memory—cases.

There have been many cases where judges tried to open records. The most recent is the one by Justice Oliphant of the Manitoba Court of Appeal who said this month: “[The complainant's] references to flashbacks, repressed memory and recovered memory are all matters of a serious and abiding concern on my part in terms of her credibility.” He wants to see those records made available to him. A man's liberty is at stake. I also want to see my daughter's therapy records. I want what my daughter's therapist said to the police made available to me as well. I want them because they will show malpractice. I want to know what pressures were put on my daughter to come up with an explanation for her mental condition.

She was already bipolar, she was already suicidal, and paranoid schizophrenia runs in the family. There was also drug abuse in my daughter's past. What did those drugs do to her brain? Did the therapy help her? She answered

that most dramatically. She killed her daughter and herself by hanging. And you knew, you all knew.

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The citizens of Ontario should be warned about these suggestive practices. The Canadian Psychological Association, the Canadian Psychiatry Association and most forcefully the Royal College of Psychiatrists have spoken out against these stupid practices in 1996, 1997, and the year of my children's death, 1998. I will show you their statements on the issue. You have them before you. Yet we are still waiting for the federal and Ontario governments to act by withdrawing financial support to the clinics that still engage in this kind of quackery. We still allow unqualified and unlicensed therapists to engage in it.

The government of Ontario has neglected to warn the public about the following, namely that recovered memory therapy is based on the nonsensical belief that many people do not remember that they are victims of incest and that suggestive therapy will make them remember. Recovered memory therapy is the mental health equivalent to the tainted blood and thalidomide scandals. No protectionism. My MPP, Mr Martiniuk, and my MP, Mr Peric, have ignored my pleas for help and have engaged in buck-passing. Today, I am here before you representing so many of those who have no voice and I demand action. My fight will continue, because innocent lives will have to be saved. This matter will be also presented to the Minister of Justice.

My daughter and my grandchild will not have died in vain.

If you would like to have the recommendations, they are here as well.

The Chair: Thank you very much, Ms Grieb. In fact, I've let you go well over the 10 minutes. It's a very serious issue, and I'm sure I speak on behalf of all the committee members. We feel very badly for the circumstance you find yourself in here. We appreciate the courage you've shown in coming forward and bringing us this issue.

Ms Grieb: I accept your apology and I plead with you to do something before the deaths of other mentally ill people.

The Chair: If you want to call that an apology, that's fine. I thought I was expressing commiseration, but thank you again.

RICHARD SPEERS

The Chair: Our next presenter will be Dr Richard Speers. Good afternoon. Welcome to the committee.

Dr Richard Speers: Thank you very much. Mr Chairman and members of the committee, I'd like to thank you for allowing me to speak to you today. In the past I have served on the CSA privacy committee's implementation committee and as the chair of the ethics committee of the Canadian Dental Association. Today I'm before you representing no organization whatsoever, but speaking from my experience on these issues.

Personal health information about us constitutes a collection of probably the most intimate details of our existence. In order to seek relief from a condition, patients will reveal highly sensitive details of their lives to health care workers, with an understanding that their secrets will be maintained. Without such a mechanism, it is well known that patients may withhold information that may be vital to their care.

Although the Minister of Health has acknowledged that "no information about the individual is more sensitive than their personal health information," the bill before us opts for administrative convenience and efficiency over the human rights issues and the internationally accepted protections awarded patients and their information. It remains to be seen if the recommendations of Justice Krevier in 1980 will become hurdles to overcome or goals to achieve.

In looking at this bill, I think we have to consider some of the human rights that have already been awarded.

As a basic human right, article 12 of the UN Declaration on Human Rights states, "No one shall be subjected to arbitrary interference with his privacy."

We're all familiar, I think, with sections 7 and 8 of the Canadian Charter of Rights, which have awarded "everyone the right to liberty and security of person" as well as protection "against unreasonable search and seizure," which the courts are more and more interpreting as privacy-protective rights.

In 1992, the Supreme Court of Canada in the case of *McInerney v MacDonald* opined that "confiding information to the physician.... gives rise to the expectation that the patient's interest and control of the information will continue." As well, it acknowledged that "information revealed to a doctor.... remains, in a fundamental sense, one's own."

Bill 159 lays the groundwork for conducting research on identifiable patient information without the knowledge or consent of the individual. This mechanism is in direct conflict with the Declaration of Helsinki, which is the international research code that governs human experimentation. This declaration also applies to identifiable patient information. It places a burden of consent on the researcher and puts the interests of the individual above that of science or society. By virtue of Bill 159 we would be protected only by an ethics review board that would be only as good as its membership.

If I can quote the past Privacy Commissioner of Canada, Mr Bruce Phillips, he stated that, "Allowing health bureaucrats and researchers to represent the patients' interests risks putting Colonel Sanders in charge of the chicken coop."

Secondary use of patient information by groups such as insurers, employers and financial institutions poses serious risks to patient care itself. I believe that any group that routinely collects and assesses personal health information should be captured by this act.

In passing the Medical Checks Act of the Netherlands, the Dutch concluded that the collection of information

for secondary purposes primarily benefited the collecting agency. I've appended that as a separate copy. I couldn't get it to all of you. This act places burdens and limitations on the secondary collection of health information by these groups. As well, the Dutch have followed the Declaration of Helsinki in drafting guidance for medical research on human subjects and identifiable information.

Given the real protections offered Europeans of their health information, I question whether the bill before us would survive the scrutiny of the European Union or the OECD. By virtue of the OECD guidelines, which will "prohibit the sharing of personal information to states that do not offer similar or superior privacy protection," we could be shutting Canadian business out of world markets unless we enact a bill that offers substantially better privacy protection.

I would encourage the committee to recognize the pressing need for a health information bill to be passed, but not at the expense of human rights. I believe that an amending process can be successful, but it will require a philosophical change. The bill is more than just defining the mechanics of information sharing; it represents the future of how we will interact with each other and respect our right to personal security and self-determination.

I would suggest the committee carefully consider amendments that would include awarding primacy to this bill; that Bill 159 be expanded in scope to include the standards applied to all health information protection, including secondary use by insurers, employers and financial institutions; recognize the threat to health care and autonomy by unrestricted secondary use; and to impose the Declaration of Helsinki as the minimum standard for human experimentation in Ontario. I have appended Helsinki for everyone here. Helsinki also claims primacy over local legislations and ethical codes.

We should also recognize the right of the patient to control the disclosure of personally identifiable information. We should recognize as well that patients won't always make "the right choice." We should implore the minister to develop higher standards for protecting patient information within the bureaucracy, because at this time there's no mechanism to separate your photograph from your health care utilization.

If anyone was to go back to Krevier and read the evidence of the venereal disease fun run, you can appreciate the importance of that.

If we are insistent that patients are to have no control over the direction of their health information, we will have rendered each patient as nothing more than an information package. We will succeed in turning each medical encounter into a research opportunity and we may well evolve a mechanism of conscripted care—all in the name of efficiency.

Without the protections to which I allude above, we will open the innermost secrets of the individual to scrutiny. Surely, if the state does not belong in the nation's bedrooms, we should not subrogate one of the most basic human rights to the elixir of efficiency and convenience. I thank you for listening to me.

The Chair: Thank you very much. You've left us a couple of minutes for questions, and I'll give the time to Ms Lankin.

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Ms Lankin: Thank you, and it's nice to meet you in person. I appreciate the comments that you raised in our earlier conversation and here today.

Two things: you've provided a copy of the Medical Checks Act to the clerk, and we will all be receiving a copy of that. Could you give us some detail about how it differs in thrust from this bill? Secondly, the Helsinki document which we have a copy of here, again in terms of research and privacy, how is the balance different than what's being proposed here?

Dr Speers: Here there's a mechanism. The default is not to privacy protection, the default is to the benefits of the community at large, where Helsinki specifically says the patient is primary to science and society. So right away we're defaulting backwards in my estimation.

With respect to the Medical Checks Act, they've pointed out that the sharing of your health information for such things as insurance and employment are hardly voluntary activities, since you need an occupation and you probably need to borrow money to have a house to live in, so these become less than voluntary disclosures. There are limitations on the scope of information and how it's collected.

Ms Lankin: What you're proposing then—this act proposes to regulate the health sector.

Dr Speers: Yes.

Ms Lankin: What you're saying is we need an act that regulates the privacy of health information irrespective of what sector it is in.

Dr Speers: It's how we deal with health information, because what you're doing is taking, I guess, a hodge-podge and replacing it with a patchwork.

Ms Lankin: OK. Thank you.

Dr Speers: Sorry to be so blunt, but that was one of the motivations for this bill.

The Chair: Thank you very much, Doctor, for coming before us here this afternoon.

Dr Speers: You were easier than the federal government.

Interjection.

Dr Speers: No, they had more time. Thank you.

The Chair: I'd argue we'd rather listen to the proponents speak than ourselves.

INSTITUTE FOR CLINICAL EVALUATIVE SCIENCES

The Chair: The next presentation will be the Institute for Clinical Evaluative Sciences. Welcome to the committee.

Dr Andreas Laupacis: Thanks very much for the opportunity to present to you today. I believe you're receiving some material. My name is Andreas Laupacis. I'm the CEO and president of ICES. I was planning a PowerPoint presentation today, but the material isn't

working. In the material you have in front of you are the slides that I am going to be speaking to.

First of all, ICES would like to start by stressing that we believe in the importance of the confidentiality of health information and in the need for privacy legislation. At the same time, we believe that research about the delivery and outcomes of health care improves the well-being of Ontarians. In our view those two beliefs are compatible.

ICES was established in 1992 and is physically on the campus of Sunnybrook and Women's College hospital in Toronto. Our mandate is to evaluate the effectiveness, quality, equity and efficiency of health care in this province. We receive arm's-length funding from the Ministry of Health and Long-Term Care and other granting agencies, and we work with many other stakeholders such as the Heart and Stroke Foundation of Ontario.

I'd like to give you one example of the kind of research that we do so you'll have a sense of what our work is about, and this relates to bypass surgery waiting lists. In the late 1980s, it came to attention that people were dying on cardiac bypass surgery waiting lists and the question was raised as to whether Ontario had enough capacity for bypass surgery and whether high-risk individuals were being treated quickly enough. A study was organized that attempted to delineate the extent of the problem and to develop an urgency rating system. Out of this study came the decision to increase the capacity for bypass surgery in this province—the Ministry of Health provided increased funding to do so—and a triage system was put into place, which is still in place today and ensures that patients who are at particularly high risk of dying while on the bypass surgery waiting list will receive priority. Benchmarks were established which established a maximum acceptable waiting time for these individuals. This research led to a decrease in the deaths on the waiting list.

The same group then looked at the outcomes of bypass surgery in this province and developed what we called hospital report cards, which provide for all Ontarians information about the outcomes of bypass surgery at all hospitals that perform bypass surgery in this province. We're pleased that Ontario now has among the best outcomes after cardiac bypass in the world. So I present this to you as an example of the kind of research that really does lead to improvement in the outcomes of patients in this province because of the change in the way in which health care is delivered.

In terms of what we do, what kind of data ICES holds, we hold a large amount of data that varies from administrative through to clinical studies. By "administrative data" we mean those data that are routinely collected to monitor the performance of our health care system: for example, data on admissions and discharges that are collected by the Canadian Institute of Health Information. By "clinical studies" we mean those studies that are collected on individual patients or that information that's collected on individual patients in a particular study. We collect information that crosses that whole boundary.

We're very proud of the fact that since 1992 there have been no breaches in confidentiality related to the data that ICES holds, and we believe this attests to the importance in which we consider the issues of confidentiality and privacy.

First of all, we have a number of policies and procedures in place. We have strict employee confidentiality agreements, with dismissal being sanctioned for breaking those agreements. We have multiple internal privacy policies and procedures. I have to approve each project, and we have a privacy impact assessment that's filled out on each project, which is in the material that was handed out to you. We have internal and external information access and confidentiality committees. We've developed a privacy code with the help of David Flaherty, the former privacy commissioner in British Columbia, that's based upon federal Bill C-6 and Willison's Principles, and we have our own privacy officer.

We also have very strict regulations about how our data are used. Our data are used only for research purposes. All data that we receive are anonymized by two senior staff and replaced with a unique ICES identifier. What we mean by that, for example, is the health care number that may be attached to an administrative data set that is sent to us is stripped and replaced by an ICES number that has no meaning whatsoever in terms of identifying an individual patient.

The research that we do is about the health care that Ontarians receive as a population, not individually, and therefore our data and our results are always presented in a summary fashion. We do not disclose individual data under any circumstances. We require ethics review board approval of all our projects involving patients or their records, and personal information that is collected from clinical studies is not used for other purposes without permission. Without exception, all health data are considered to be sensitive.

We also have physical security measures in place. We have a locked facility with tracked coded-key access and video monitoring 24 hours a day.

I'd like to highlight the fact that the computer upon which our data is housed is moated, which makes it completely inaccessible from the outside. So if someone were to hack into my computer and have access to my network and my e-mail, that individual would still not have access to the computer that houses the database, because it has no physical connection with the outside world.

I'd like to address the difficult issue of why individual consent is not always possible in epidemiological and population-based studies, and I'd like you to think back to the example of the cardiac bypass waiting list that I presented to you before. Individuals who die, unfortunately, often provide the most crucial information in an epidemiological study. In the example that I used about individuals dying on bypass waiting lists, if one didn't have any information about those individuals it would be very difficult to make changes to the way in which those patients were being managed. Many individuals move or cannot be contacted and this isn't a random event. It may

be that individuals of lower socio-economic status actually move more frequently and therefore are more difficult to be contacted. We look at trends over time. For example, the bypass waiting list study evaluated what had happened over three to four years, and you can imagine going back three to four years and attempting to contact individuals who had been on the waiting list four to five years ago. This becomes a very difficult and insurmountable task and indeed raises issues ethically, I would submit, about contacting individuals so long after the fact. In our view, it is very difficult, if not impossible, to do some of these very important epidemiological studies and obtain individual consent for all of these studies.

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Finally, I'd like to make some specific comments about Bill 159. We're concurrently named as a health information custodian and we would anticipate that we would be so named in Bill 159. We support the important role of privacy evaluation by independent research ethics boards that is outlined in the bill. We would, however, suggest that projects that are approved by research ethics boards should not be disclosed directly to the minister or others. That would be one exception we would take to the bill as currently written.

In summary, our key messages are: the research that ICES does is important. Without it, the health of Ontarians would suffer. Good research requires good information. We take data privacy and confidentiality extremely seriously and we are always re-evaluating our policies. Now we'd be delighted to answer any questions that you have.

The Acting Chair (Mr Joseph Spina): We have 12 minutes. That's about four minutes per caucus. I think we begin with government members.

Mr Wood: I gather some of your research could be done with consent in the sense you could get a representative sample and simply use that to do your research. Would that be correct? You don't have to have the whole universe to do all your research, I wouldn't think.

Dr Laupacis: For some studies, yes, to have a representative sample would be sufficient. In other studies—I would submit the example of bypass surgery—one would want to have all individuals who were treated at all hospitals in the province because we have no sense whether practice and outcomes would vary from hospital to hospital. In that example, I think you'd need information from all individuals treated at all hospitals.

Mr Wood: You would agree that you should not have access to information without consent where you could do it by way of seeking consent from a representative sample?

Dr Laupacis: Absolutely.

Mr Wood: The question of who decides, in other words, the ethics committee, would you have a problem if, say, the Information and Privacy Commissioner would have the ultimate signoff on that?

Dr Laupacis: To be honest with you, I don't know an enormous amount about the Information and Privacy Commissioner, but—

Mr Wood: This is an officer of the Legislature. Her appointment's confirmed by all the members of the Legislature.

Dr Laupacis: I think there would be real issues around the ability of one office to handle the potentially thousands of studies that would be done not only by ICES but by other groups. My view—and I've certainly interacted with research ethics boards in Ottawa, Toronto and Western—is that those groups represent society and do an excellent job in reviewing the proposals. Dr Williams, who's a former CEO, may want to comment.

Dr Jack Williams: The research agreement under which we presently operate for access to the administrative data was struck in 1997. That was done so that it was in accord with the framework and principles set forth in the discussion paper at that time, which was a prelude to the current legislation. That agreement was in fact reviewed and approved by the privacy commissioner of Ontario.

Mr Wood: Would you have a problem if that went into the legislation? In other words, she would set the policy. Obviously, as you rightly point out, there would have to be delegation of the work.

Dr Laupacis: My response to that would be if we could get timely access and turnaround in her response, as we do with ethics committees, on a monthly basis.

Mr Wood: One issue we have to consider here is whether or not we want to pass a law that's substantially similar to the federal law. Do you have problems with the federal law?

Dr Laupacis: I'm not a lawyer. I just wanted to present to you how we handle data at ICES and the kind of research we do. To be honest with you, I wouldn't want to comment upon the federal law from a legal point of view.

Mrs McLeod: Can I assume that a limited lockbox provision, where a patient could indicate on their record that they didn't want information shared, parts of their record shared—how would that limit the work you do now?

Dr Laupacis: I guess it would depend on how many individuals indicated they did not want to have their information looked at. If those individuals selected themselves randomly, if it was a random process, I don't think it would make a huge difference. On the other hand, if it was random it would obviously potentially bias the results of the information that we're looking at. That would be my response. Jack, any comments?

Mrs McLeod: If it were a significant take-up in terms of people blocking access to records, would you be able to function with anonymized information if the health care custodian was the provider? You say you anonymize all of your information anyway. Could you use data from the health care custodian that was already anonymous data?

Dr Laupacis: Our data is anonymized but we are able to link different records within the same person. I would have a particular ICES number in our computer now and one could link the information about my admission with my visits to a physician, so it would be important to be able to link records in an anonymized fashion. I don't know enough about the lockbox as to whether you'd be able to do that or not.

Mrs Papatello: Just a quick question. Given all of the information we saw, it seems that you do very well without Bill 159. You do quite well. You anonymize where you have to. You have access where you have to. My question is fairly general. You're doing very well on your own in the absence of this law. Why do you need it?

Dr Laupacis: We're really responding to the law. I would agree with you. I think long before a lot of individuals or groups were looking at privacy this carefully, we have done so.

Mrs Papatello: Is that because you're not mandated to do this, you've taken it upon yourself to do so, and because of the group currently running ICES you've done this well, but you ought to be governed under law to do this?

Dr Laupacis: No. There are clear agreements that we have with the Ministry of Health about how we utilize our data. I've only been the CEO for five months. Jack was the previous CEO so he might want to comment about the details of those agreements.

Dr Williams: Again, I would emphasize that we spent about six months working with the legal branch of the ministry, with the privacy commissioner and other interested parties because all parties wanted to make sure that we had it right. This was being done at the time of the 1996-97 discussion papers, anticipating the bill, which finally came before the House in December. We were working with the ministry to figure out how it might be, should such legislation be in place.

Mrs Papatello: But did your work change dramatically post-1997 or post these consultations? Had you been collecting and analyzing in a whole different manner and after these consultations you changed dramatically how ICES does its business then?

Dr Williams: Basically, yes. Before, we worked on a project-by-project basis. The research agreements that we reached allowed for general use of data.

Mrs Papatello: Allowed for general use of data by whom?

Dr Williams: By ICES as a research organization. We became essentially a designated health information custodian.

Ms Lankin: I want to follow up on that because earlier, Dr Williams, you indicated to us that there was a need for ethical review committees in universities and in teaching hospitals to tighten up their procedures. It sounds like you've just said that in 1997 or so, when the memorandum of understanding was negotiated, ICES in fact tightened up its procedures as well. In a sense, that probably does speak to the need to have some legislation and perhaps some provincial guideline that's established

among the various parties with public input as to what are appropriate standards and a way of monitoring the mechanism in the legislation which allows for ethical review committees to be designated. Against what standards should they be judged would be my question.

Dr Williams: This is a very important question. As I indicated earlier, we're trying to resolve this problem at the University of Toronto. That still leaves open the issue as to what would happen with respect to other research ethics boards. Again it becomes an important issue as we're now seeing private research ethics boards coming into play in terms of review of research projects of various kinds.

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Ms Lankin: That leads me personally to assume that we actually need to have something more in terms of the framework inside the legislation than what is currently here.

In the example that you gave us, looking at the cardiac bypass registry and some of the other excellent work that ICES has done, I still want someone to explain to me why you need the actual identification and consent for following someone through in the cardiac bypass registry. If someone goes on the registry, surely they're going to offer that, "Yes, you can use this information because it's going to help make the system better if I need another bypass down the road." Why would you have to go back to get information four or five years later, like you said, and why couldn't that be covered off in the initial consent when someone goes on to the registry?

Dr Laupacis: A couple of comments. With the registries that we at ICES ourselves are developing, and we're developing one now for patients who have stroke, as part of the registry we are requesting consent to link with the administrative databases. Obviously, if individuals deny that consent, that won't happen. So I think there's been a change over the last eight to nine years in the way this has been thought about.

If one would like to know, and I submit that most people in Ontario would, whether the quality of bypass surgery in each of the institutions that perform that procedure in this province is similar, one would want to have information on all of the individuals who are operated on in that institution. The way we could do that at ICES is to take the CIHI data, which would identify individuals who have had bypass surgery, and link that with the vital statistics data which would identify those individuals who died, for example. We could therefore tell Ontarians the quality of care, if you will, in all those institutions.

We're not identifying any individual patients whatsoever, and that information is not being used to effect the care of those individual people, but it does provide us with reliable information about the outcomes in those centres, which I think is important. As one has more and more missing information one is always worried that the reasons that information is now missing may be non-random. We know that outcomes are affected by some of those non-random things.

The Acting Chair: Thank you, Dr Laupacis and Dr Williams. We appreciate your time today and your presentation.

BAYCREST CENTRE FOR GERIATRIC CARE

The Acting Chair: Our next group is the Baycrest Centre for Geriatric Care. I believe they are here. Please state your name for the purposes of Hansard and familiarity of the committee members.

Ms Gwen Yacht: Good morning. My name is Gwen Yacht and, as the director of health records and quality management for Baycrest Centre for Geriatric Care in Toronto, I'd like to thank you for allowing us to present.

By way of introduction, Baycrest Centre is an academic centre affiliated with the University of Toronto. We operate a charitable home for the aged, a hospital providing complex continuing care, rehabilitation and geriatric psychiatry services, and a seniors' residence, which taken together constitute over 1,000 beds. Baycrest also operates an adult daycare centre for seniors, a senior persons' community centre and a host of other community programs for the elderly. In total, we serve over 5,000 seniors every day. In addition, Baycrest is home to both a pure and applied research centre focusing on aging. Our Rotman Research Institute is one of the top five neuroscience research centres in the world and is on the threshold of major advances in the care and treatment of cognitive impairment.

We are a very large organization that currently operates the vast majority of services on one campus. To facilitate the continuum of care that we provide, we have one centralized health records department. In this presentation I will first discuss why Baycrest finds this legislation commendable. I will then discuss the provisions which we believe would be improved by amendment. These concern research; fundraising; one custodian operating more than one facility, program or service; and penalties.

First, in praise of Bill 159. We would like to congratulate the government on a bill well done. For years we have struggled with deciphering our obligations under the Public Hospitals Act and case law concerning the transfer of health information.

We appreciate the broad scope of the new legislation. We applaud the delicate balance it strikes between a person's right to privacy and a health care provider's ability to access health information that it requires to serve the person's needs.

Specifically, we support the removal of the so-called lockbox provision which had been included under the 1997 government consultation document. Under the new bill, a person will not be able to cut off a health care provider's access to the very information they require to provide appropriate health care to a person in need.

We support the power of clients to control if and when their personal health information may be disclosed for a non-health-related purpose.

We support the new provisions that recognize the crucial importance of quality-of-care information and research to improve health care while at the same time providing a meaningful process to guard against unnecessary and improper disclosure of personal health information.

Regarding research, we fully support the recommendations for the amendment made by the Toronto Academic Health Science Council, of which Baycrest is a member. We refer you to their brief. We think the provisions concerning research strike an appropriate balance by ensuring a flexible and thoughtful review process for research projects using personal health information.

One concern, however, is the need for the entire research ethics review body, which in most centres meets monthly, to review projects that involve no patient contact, provide no risk to patients and have adequate safeguards to protect confidentiality. Another concern is the ability of a research ethics review body to complete a timely review of such projects. Often, academic research conducted by students, for example, has short deadlines. Having to wait for a meeting and approval of the ethics review body committee could have the effect of discouraging this type of critical research.

We suggest that a research ethics review body should be able to appoint a subcommittee. The subcommittee should have the power to review and make recommendations to the research ethics board on chart review studies.

Fundraising: As you know, subsections 26(2) and (3) enable a custodian to disclose the name and address of the patient without consent for the purpose of fundraising. This exception for fundraising is most welcome. We applaud the government's recognition that health care facilities rely heavily on the financial support of the community and require a practical way to access that support. We agree that a person should have the right to request that they not be solicited for funds, and we respect these requests. But Baycrest faces a unique but important problem: most of our support comes from the families of our clients, not the clients themselves. We are a geriatric institution. Many of our clients do not have the capacity to provide the consent to enable us to contact family members for their support. Obtaining consent from our current clients or their substitute decision-makers will take time and significant resources.

As you know, fundraising is more important now than ever for long-term-care organizations because of the reduction in funding, and for organizations such as Baycrest, we must also raise dollars to help us provide culturally sensitive care. Given our elderly clientele and our reliance on funding from family members, we feel our foundation should be able to continue using names and addresses of family members of clients presently served by Baycrest without express consent in order to raise the needed funds.

We suggest the following amendment. As a minimum, we are asking for grandparenting provisions that will enable health facilities to continue using the names and

addresses of family members currently on their donor lists. This would oblige us to seek consent from new clients or their substitutes to use family names and their addresses.

Regarding one custodian operating more than one facility, program or service, subsection 3(1) provides that one custodian operating more than one facility, program or service shall be deemed to be a separate custodian with respect to each facility, program or service. This provision makes sense for a licensee of several nursing homes, for example, who may operate at arm's length several facilities on different sites. However, we suspect that several health organizations, such as hospitals, co-ordinate related facilities or programs on one campus or perhaps on a few sites. In this context, we believe that application of the provision will not help to facilitate services nor protect privacy.

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We at Baycrest are proud of the important continuum of care we provide for those in the later stages of life. Separating out the administrative responsibilities for personal health records according to each facility, program or service we operate, despite the fact it is on one campus, would create expensive and time-consuming demands. It would also function to increase gaps in information at critical junctures compared to our present communication standard. We are relieved to see that an exemption can be made in regulations and we will rely on the government to make exemptions for organizations such as ours.

Regarding penalties, protection of the privacy of personal health information is crucial and the offence provision correctly targets those who willfully disregard or abuse it. We are pleased to note that a health care custodian, its employees, officers and directors are protected for acts or omissions done in good faith. That being said, we feel that volunteers who help us provide services and who sit on our board of directors may hesitate to do so in view of severe penalties in legislation. As a charitable organization, we simply could not exist without our volunteers.

We find the penalties for an offence in Bill 159 unduly high and inconsistent with other health care legislation and with information statutes such as the municipal and provincial freedom of information and protection of privacy acts. Even the federal Personal Information Protection and Electronic Documents Act has lower penalties.

We suggest the following amendment to subsection 73(3):

"A person who is guilty of an offence under subsection (1) is liable, on conviction,

"(a) if the person is an individual, to a fine of not more than \$10,000; and

"(b) if the person is not an individual, to a fine of not more than \$100,000."

Thank you very much.

The Acting Chair: Thank you, Ms Yacht. That leaves us about 10 minutes, or roughly three minutes per caucus.

Mrs McLeod: I note that you're supportive of the removal of the lockbox provision that was originally suggested, but I don't have a real sense of how that lockbox provision, which would be somebody saying they didn't want their health information revealed, for whatever reason, could actually interfere with your ability to provide care, certainly in a majority of situations.

Ms Yacht: We felt it was cumbersome. Also, we estimate that 80% of the clients we serve, both in residential and community services, have some degree of cognitive impairment. A lot of work goes into communicating with our clients. If at some stage they have placed information in a lockbox and the information is critically necessary for their ongoing care, we feel it may be very difficult to access it in a timely fashion.

Mrs McLeod: You don't think the provisions around competence to make decisions would enable you to access the information, that they provide enough freedom to access the information with substitute decision-maker agreements, for example?

Ms Yacht: With our population, change is ongoing. So when the information is placed in the lockbox all of the controls may be appropriate, and within a fairly short time the change may make it difficult to access the information.

Mrs McLeod: You indicated that you were in support of the recommendations that were presented to us earlier by the Toronto Academic Health Science Council. One of those that we didn't have an opportunity to ask about was opposition to disclosure directed by the minister. I don't know if you feel you would be in a position to comment on the concerns about directed disclosure.

Ms Yacht: I'm afraid I'm not in a position to comment at this time.

Mrs McLeod: Fair enough; I just hadn't had a chance to ask them.

Let me ask you about the fundraising issue. One of the concerns that was raised with me earlier was that the timing of the notification to somebody that their name could be used for fundraising purposes was a real issue. Is that something you think needs to be clarified in the legislation?

Ms Yacht: We do feel it is an issue that when we first come into contact with a client they are probably at their most vulnerable. It would be easy for them to feel pressured into giving consent. We don't want to put them in that position. Yes, it is an issue.

Mrs McLeod: Something preferable might be to have written notification of that go out at some subsequent time? I think there's a real sensitivity too in terms of what should be the priority in contact with the individual.

Ms Yacht: Our other concern is that we currently have 1,000 people in residential care at Baycrest and we see a lot more than that, roughly 5,000 a day.

Our concern is that the names we currently have on our donor list not be lost. We are certainly prepared to follow the directions of the government on a regulation, but we would like permission to be exempted and al-

lowed to use those names as long as the clients are still working with us.

Ms Lankin: I might have missed something in the legislation. Is there a retroactive provision with respect to fundraising lists that foundations have? I'm not aware of that.

Ms Yacht: The legislation requires consent from all of our clients. It doesn't give us permission to use existing lists. It requires that there be a consent for everyone, which would mean that we'd have to go back.

Ms Lankin: But a foundation not covered by this legislation which currently has a list, you're saying that list becomes null and void as a result of this legislation?

Ms Yacht: That's what it appears to us. I guess we need it clarified at the very least.

Ms Lankin: That's helpful. I also wanted to ask about your opposition to the lockbox provision and set out for you what the federal Privacy Commissioner told us in very direct terms. Health information is private information. We, as individuals, own it. We have control over what anyone knows or doesn't know, irrespective of whether that information may be helpful to our long-term health care treatment decisions or recommendations from health care professionals. For the health care profession, the various aspects of it, the service providers, to say, "We need access and we need to determine what's relevant to the treatment decision we are making," is incredibly paternalistic.

I understand also that you're dealing with a particular segment of society, a large portion of whom have cognitive impairments and therefore may not be capable of making treatment decisions and/or decisions about unlocking a lockbox. But backing it up in the system, if I, at my age, made a decision about some information that I did not want shared, you're saying that from the health care professions' perspective, that's inappropriate? Or is there a mechanism that needs to be put in place, when a person reaches the point of no longer being capable of signing a power of attorney for personal care papers, assigning responsibility to a substitute decision-maker, that there's a specific section which clarifies what their intent is, then and into the future, with respect to that information, even if withholding that information means that a certain aspect of health care treatment might not be provided to them?

Ms Yacht: I think we would agree with the mechanism. I don't think we agree with the lockbox because it didn't seem to have the same level of flexibility for the type of clients that we work with.

Ms Lankin: So if the legislation somehow corresponded with substitute decisions, consent to treatment, capacity and decision-making, and indicated that, either when you are doing a living will or when you're doing a power of attorney for personal care or when you're being challenged around your capacity, there's a mechanism for that issue to be reviewed, either prior wishes determined by the individual or as there is now—if you have prior wishes in place and somehow or other there's a question of whether that is the right thing to do, the

substitute decision-maker can go through consent and capacity and get a different ruling. Aren't those protections sufficient enough?

Ms Yacht: Yes, we think those are.

Ms Lankin: So we could then have a lockbox if it was linked to all of those other protections?

Ms Yacht: I guess we'd need to see it. As stated in the previous draft legislation, we found it not an easily workable solution.

Mrs Molinari: Thank you very much for your presentation. I represent the riding of Thornhill, so my constituents are quite pleased with the work at Baycrest. Also, recently the government announced 200 additional long-term-care beds, so a number of constituents from Thornhill are quite pleased.

Ms Yacht: I guess we should thank you, too.

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Mrs Molinari: You're more than welcome. Just some questions. I understand the cultural sensitivity of Baycrest and some of the fundraising you do that allows you to enhance the services you provide. Your suggestions and amendments with respect to the donor list—if you already have a donor list which is separate from your clients and clients' families, this legislation would not allow you to use that donor list?

Ms Yacht: The legislation requires interpretation. The regulations have not yet been built, that we know of. I guess we felt strongly that we should be able to use the donor list. Because that wasn't clear in the legislation, we felt that should be clarified for us.

Mrs Molinari: So this is something that you're suggesting be clarified in the regulations.

Ms Yacht: Either that or that we be granted that exemption to be able to use the existing list.

Mrs Molinari: Regarding the comments you made with respect to penalties and your suggested amendments, in reading the act, under offences, "A person is guilty of an offence if the person," and it goes on, (a), (b), (c), and in all cases it says "knowingly contravenes" or does something knowingly.

Your concern is about having volunteers being more cautious about whether or not they're going to volunteer because of the penalties. I think you're suggesting \$10,000 where the legislation has \$50,000, and you're suggesting \$100,000 where the legislation has \$500,000.

Do you think that's a really crucial part of the legislation? When I read it, it says "knowingly." So if a volunteer knowingly does that, does it make a difference how much the penalty is?

Ms Yacht: It was felt that the penalties should be more in line with other legislation. This is far in excess of any other existing legislation with respect to privacy that affects Canadians and Ontarians.

The Chair: Thank you very much for coming before us today.

REGISTERED PRACTICAL NURSES ASSOCIATION OF ONTARIO

The Chair: Our next presentation will be from the Registered Practical Nurses Association of Ontario. Good afternoon and welcome to the committee.

Ms Joanne Young Evans: Good afternoon. My name is Joanne Young Evans and I am the executive director of the Registered Practical Nurses Association of Ontario.

The RPNAO has represented registered practical nurses, RPNs, since 1958. Today we represent approximately 5,000 RPNs across Ontario who are proud members of the nursing team. Our members work primarily in hospital settings, but they can also be found in long-term-care facilities, community health facilities, physicians' offices and in corporations and educational institutions. Needless to say, our members are accustomed to working in a multi-professional environment.

We support the principles behind Bill 159 but we must stress our areas of concern about the bill and its implementation. RPNs are already becoming increasingly reliant upon electronically stored and transmitted data. Based on experience, our reservations are focused on the need to find the right balance between access and privacy.

Bill 159 unnecessarily expands the instances in which personal health information may be disclosed without the person's consent. For example, subsection 26(3) permits a health information custodian to "use or disclose the individual's name and address for the purpose of fundraising activities" without the patient's consent. Section 27 also outlines other instances in which health information custodians may provide patient information without patient consent.

Some of these instances are: to the government for the purposes of "planning or delivering programs or services of the custodian, allocating resources to any of them, evaluating or monitoring any of them or detecting, monitoring or preventing fraud related to any of them" or for a research project or program.

We are also concerned that the definition of "health information custodian" in section 2 is too broad. A health information custodian, according to the bill, can be a district health council, Cancer Care Ontario, the Minister of Health and Long-Term Care or a researcher, among others.

What the government appears to have done is to create a Pandora's box and then distributed numerous duplicable keys. We believe that health information should be disclosed for purposes relating directly and exclusively to health care, with only very limited exceptions.

The provisions of the bill, as written, have the potential to violate the necessary confidentiality of patient-provider relationships and patient privacy. We recommend that informed patient consent be required in all cases.

This leads me to our second concern: adherence to the principle of mandatory informed consent to protect patient privacy and confidentiality. The RPNAO holds that

health information should not be distributed unless authorized by the patient, and that those who receive such information must take all reasonable measures to safeguard it effectively. As George Radwanski, federal Privacy Commissioner, said to this committee two weeks ago, "There is no control without the right of consent, and there is no privacy without control. It follows that the requirement for consent must be at the heart of any good privacy law."

The bill has too many potential loopholes that weaken privacy defences. Access and consent have to be married and be equal partners in every request for sharing the patient health information. We recommend standardized access request forms and procedures that include inherent audit trails. To proceed with this legislation without closing the loopholes and securing rights and protocols to access is to court disaster. Look at how loosely defined the sections dealing with access for research purposes are outlined in clauses 27(e) and 27(i). In our view, the legislation should explicitly state that identifying health information may not be disclosed if anonymous information is equally available. If personally identifiable information is legitimately required, the proposed research ethics body should arbitrate the request for information.

Achieving a better balance between ensuring patient privacy and the additional burden imposed on the custodian is our third concern. The bill stipulates that, "A health information custodian shall designate an individual or individuals who are employed by or in the service of the custodian to, (a) facilitate the custodian's compliance with this act; (b) ensure that all persons who are employed by or in the service of the custodian are appropriately informed of their duties under this act while employed by or in the service of the custodian; (c) respond to inquiries from the public about the custodian's information practices; and (d) receive complaints from the public about the custodian's alleged contravention of this act or the regulations."

RPNs already follow stringent health record maintenance and storage policies and procedures. In small practices, each employee or contractor is required to sign a confidentiality agreement. If the agreement is contravened, it constitutes grounds for immediate dismissal. Furthermore, access to health records by multiple providers is often necessary. Requiring that the custodian appoint one individual to oversee records management is therefore impractical.

Further, although it is outside the legislated scope of Bill 159, we suggest that the government help to encourage the use of electronic charting to record all disclosures. We believe that electronic charting could ensure consistency and avoid duplication across professions, especially within multidisciplinary health care teams involved in patient care. The multidisciplinary team could use one form, and each professional could add to it when necessary. In addition, with electronic charting one can obtain information such as how often the personal chart is accessed and by whom; each provider is given a PIN number. We believe this method of

recording client information is not only safe but also expedites the delivery of information.

Our fourth and final concern lies with controlling third party access. As I already mentioned, our members believe that personally identifiable information should not be used if suitable anonymous information is equally available. Best efforts should be made to ensure that patient confidentiality is assured at all times. A research ethics review body, proposed in the bill to review requests for research related projects and programs only—subsection 32(3)—is a too-little, too-late control mechanism. For example, the review body will not be empowered to review requests for personally identifiable information made by other parties, such as the Ministry of Health and Long-Term Care, Cancer Care Ontario and public hospitals for fundraising purposes.

Again, when the bill addresses the issue of electronic data transfers, it fails to give section 13, which states, "A health information custodian shall comply with the requirements prescribed by the regulations with respect to the electronic transfer of personal health information," any teeth. Something should be inserted to ensure mandatory encryption, complete with a public key that serves to track and restrict access.

Records can often be linked or identified through a combination of non-unique identifiers such as birthdate, birthplace, mother's first name. We acknowledge that additional work is required to distinguish between identifiable and non-identifiable health data. In the meantime, protection can be provided by releasing data with common identifiers that have been changed in a way that does not affect the application of the data to the user. If unique identifiers are required, then they should be categorized clearly by health condition, rather than individual identifiers.

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The RPNAO supports the stated goals of Bill 159. Patient care and protection of privacy are a major pre-occupation for health care practitioners. Unfortunately, we believe this bill increases third party access to identifiable patient information, thereby putting patients' privacy at risk.

We appreciate the opportunity to outline our concerns regarding Bill 159 and look forward to continuing to work collaboratively with this committee and with the Ministry of Health and Long-Term Care on implementation of the bill once it is amended. Thank you for your attention.

The Chair: Thank you very much. That leaves us just over three minutes per caucus for questioning. This time we'll start with the NDP.

Ms Lankin: You make a very strong case for increased privacy protection. One of the issues that's not on the table in this bill but was in the previous draft is that of the lockbox. You've heard us speak of that to some of the earlier presenters. Does your organization have a position with respect to the inclusion of a lockbox provision in this legislation?

Ms Young Evans: Not at this time. Our board and our membership have concentrated more on the issue of electronic charting, because we think that is actually one of the key answers to all of this, even though the bill doesn't identify it. We think that that's a better solution.

Ms Lankin: Perhaps you could give us a little more information about what you mean by that. As I listened to your presentation, I got the sense that each health care provider who needs to have access to get information has a PIN number, can get in there and has to record what they've seen, or it's electronically done. So we have a record of what's been disclosed to whom. Maybe you could elaborate on that. But also tell me, how does that address the issue of myself as a patient perhaps having information that I do not want shared, irrespective of whether that affects my future health care or not?

Ms Young Evans: With regard to electronic charting, one of the reasons we support that is we may have practitioners who go in just to look at the information. If there's nothing to report, going in just to look at the information, then it begins to show; there's a pattern that people are beginning to look for information and access records where it's not necessary to do so. OK? I'm not answering your question, am I?

Ms Lankin: No. That's OK. Is there anything else with respect to electronic charting that you think would protect people, the actual privacy of the information that's there?

Ms Young Evans: What it does is tell us who's having access, when they're having access. I think one of the things that the association also supports is the whole issue of identifying perhaps by illness, rather than by either their health card number or SIN number, whatever. Let's say it's breast cancer. So we have BC and then perhaps the mother's birthdate or something, and therefore it's extremely anonymous and it's done by the health issue, rather than by the patient. You're still going to achieve what you're looking for as far as finding out those particular data.

Ms Lankin: In terms of research.

Ms Young Evans: In terms of research.

Mr Wood: Have you had an opportunity to review the federal act at all, Bill C-6?

Ms Young Evans: No.

Mr Wood: I was going to ask you whether or not you would be satisfied with an act of that nature. You might want to take a look at it at your convenience and let us know your thoughts, what you like and don't like about the federal act.

Ms Young Evans: Thank you. Actually, what I'd like to do is to be able to pass on our national counterpart. The Canadian Practical Nurses Association has actually submitted their response on the federal legislation. I will pass that on to the committee, if it is so desired.

Mr Wood: Certainly from my point of view that would be very helpful. I thought the rest of your presentation was very clear. Those are all the questions that I had, and I think that completes the questioning from the government side.

Mrs McLeod: Following up on your discussion with Ms Lankin, can you think of situations in which it might be necessary to have identifiable information for research purposes, something more broadly identifiable, more specifically identified than you've suggested?

Ms Young Evans: You mean as far as the patient is concerned?

Mrs McLeod: Yes.

Ms Young Evans: I think the concern that we have is that as soon as you identify by patient, then there are ways of that information getting out. If it's done by health issue, it's going to take a very unique individual, someone with congestive heart failure, urinary problems, dialysis—whatever. If they have a number of identifiable health issues, then you're obviously going to be able to pick that person out of the system without any difficulty, but those people are obviously a minority.

In looking at an individual patient, we can't really see where you're going to need to have any information on one specific person. Our association is already getting complaints. Cancer Care Ontario is one example where they actually called up a woman who had breast cancer and knew her name, knew exactly what happened, treatment, and were calling her regarding research purposes without her consent that the information even be released.

Mrs McLeod: That's interesting. I was going to ask you what kinds of concerns your members have been encountering in terms of privacy and that's a good example of it.

You seem to suggest that you would be more comfortable with the privacy protection of an electronic record. Is that a fair read from your brief?

Ms Young Evans: Yes.

Mrs McLeod: Do you not have concerns about the ability of people to access electronic records in ways that are still mysterious to me but that seem to happen on a frequent enough basis that they've become the stuff of legend already?

Ms Young Evans: Where there's a will, there's a way. I could relate horror stories back to you, stories that we've had where you've got clerical staff who are filing boxes of patient information and having a good old chin wag and a coffee down in the basement and reading them as they file them away.

So again, when it comes to electronic charting, you can see at least it eliminates that kind of very easy access to patient records. At least you know who is accessing it and when and what is the particular reason that you're accessing it. If the patient is not up at 3 o'clock in the morning, why did you go into their file? There was no need for that.

Mrs McLeod: Do you think Bill 159, as drafted, would protect against that kind of example, because the people handling those files, say, in a hospital setting, would be bound by the same rules around disclosure as the health care custodian who is the employer?

Ms Young Evans: But they already are, really.

Mrs McLeod: And it still happens.

Ms Young Evans: It still happens. As soon as you work in a health care setting, whether it be a hospital, a long-term-care facility or out in the community, patient information is confidential.

Mrs McLeod: That's one of the things we're struggling with, because we've had a number of the colleges come forward and talk to us about the inconsistency between this legislation and their own. Of course, they already have codes for handling, but when it happens, it happens, and the penalties under the HPRAC legislation don't seem to be more or less effective than the penalties under this may be.

Ms Young Evans: But you also have to find them, I guess, abusing the confidentiality codes as well. The one issue I indicated to you, it was only because one of the staff walked downstairs because she wanted to look up a file. She made some comment about, "Oh, having a good time reading?" "Oh, no, we're filing," and quickly everything was hustled and they started putting things away. But that obviously was a common practice in that particular location.

The Chair: Thank you very much for coming before us here this afternoon. We appreciate your presentation.

Recognizing that we have a cancellation for the next spot, Ms Lankin has asked if the committee could take a 10-minute recess. Seeing no opposition to that, the committee stands recessed for 10 minutes.

The committee recessed from 1608 to 1621.

FEDERATION OF HEALTH REGULATORY COLLEGES OF ONTARIO

The Chair: I'll call the committee back to order.

We'll proceed with our next deputation, from the Federation of Health Regulatory Colleges of Ontario. Good afternoon, gentlemen. Welcome to the committee. We have 20 minutes for you to divide as you see fit between either presentation or question-and-answer period.

Mr Jaro Wojcicky: Good afternoon, Mr Chair and members of the standing committee. My name is Jaro Wojcicky and I'm the president of the Federation of Health Regulatory Colleges of Ontario.

The federation is composed of 21 regulatory colleges that govern Ontario's health professions. Almost 200,000 health practitioners are regulated by these colleges. The colleges are not educational institutions. They are regulatory agencies created under the Regulated Health Professions Act.

I'm also the registrar for the College of Denturists. With me today are Rod Hamilton, director of policy and communications from the College of Physiotherapists of Ontario, and Richard Steinecke, legal counsel, who will attempt to answer any legal or technical questions you may have. Also in the audience are a number of the regulatory colleges representatives with us today.

The federation is pleased to have this opportunity to make a presentation to the standing committee on this very important bill. We have three primary submissions that we wish to make to you today.

(1) Colleges are not suitable health information custodians.

(2) The bill's protections for quality assurance information should also apply to the colleges' quality assurance programs.

(3) The consent provisions for youth under 16 years of age should be reconsidered.

Colleges are not suitable health information custodians. The federation is extremely concerned that the bill characterizes health colleges as personal health custodians. This concern is based upon two main considerations. First, appropriate access and use protections for patient health information already exist in the Regulated Health Professions Act, our governing statute. However, many of the provisions in the bill are given priority over the Regulated Health Professions Act.

The federation is concerned that unless the Regulated Health Professions Act provisions have priority over the bill, the colleges' ability to act in the public interest will be diminished. The colleges' statutory obligation to regulate their members in the public interest requires that access and use of patient health information be governed by statutory provisions specifically devised for this purpose.

Second, the application of the bill's provisions on the colleges would be inconsistent with policy decisions that have already been made in the bill. The bill makes special provisions to ensure that most non-police agencies can obtain and use health information in investigations and proceedings and for quality-of-care purposes. Thus it is apparent that unintended barriers to such use by colleges under the Regulated Health Professions Act are not intended.

Let me give you an example. A group practice realizes within weeks that a new colleague they have hired from another province, Mr Green, is grossly incompetent. They fire Mr Green. Mr Green's lawyer threatens legal action. A deal is negotiated that Mr Green will leave quietly so long as an innocuous letter of reference is provided by the group and so long as no mandatory report is made to Mr Green's college under the Regulated Health Professions Act. The group's lawyer advises that since the college is covered by the bill, the mandatory reporting requirements are now discretionary by virtue of subsection 11(2) and clause 36(1)(b) of the bill. No mandatory report is made. Mr Green goes on to solo practice where he injures a number of patients before the college learns about him. This example illustrates why colleges should not be treated as custodians in the same way that health practitioners are.

The bill's protections for quality assurance information should apply to the colleges' quality assurance programs. The federation commends the government for recognizing the need to provide protections for information used in improving the quality of health care. We believe these provisions will assist the organizations covered by them to develop and expand programs that will improve the quality of health care provided in Ontario. However, these protections do not apply to

colleges. The federation would like clarification as to why the colleges' quality improvement programs have not been provided with the same protection. In order to gain members' candid participation in the colleges' quality-of-care programs, their quality assurance information must be provided with the same protections.

Let me give you another example. A practitioner completes a self-evaluation portfolio identifying a problem she has had with a particular patient. The practitioner candidly records the deficiencies in her skills that resulted in the problem and develops a plan for ensuring that a similar problem does not occur in the future. The college then requires the practitioner to submit the portfolio to the quality assurance committee for review. The committee commends the practitioner for her candidness and for her plan and suggests some additional measures that may assist her in this area. The original patient sues the practitioner for damages and requests that the court order the college to produce a copy of the portfolio for pre-trial discovery purposes. The college resists the request based on the damage it would do to the quality assurance process. The patient argues that the existing provisions under the Regulated Health Professions Act do not expressly protect these documents from production and therefore they ought to be produced.

Our suggested amendment is that section 40 of the bill should be amended so that colleges' quality assurance committees are included in the definition of "committee."

The consent provisions for youth under 16 years of age should be reconsidered. The federation supports the bill's use of many of the consent principles codified by the government's Health Care Consent Act. However, the federation's members are gravely concerned that the bill departs from these principles in two key areas: (1) its use of the chronological age of 16 years as a factor in assessing a patient's competency and (2) the lack of protection given to the confidentiality of children's health information when the information does not relate to treatments within the meaning of the Health Care Consent Act.

Young people are no different from other health care consumers. All health care consumers need to be comfortable that information given in confidence to their health care provider will remain confidential. Patients need to be confident that their health care professionals will do their utmost to maintain the confidentiality of their information. Only if this assurance exists will patients provide the full information on symptoms, lifestyles and habits that health professionals need to make informed assessments and treatment recommendations.

Our suggested amendment is that to address these concerns sections 46 and 56 of the bill should be amended to comply with the approach taken in the Health Care Consent Act so that competent patients can have privacy over their own records.

1630

In conclusion, to review the main points, the public will not be served well by making regulated health colleges custodians of patient charts. These charts are not

created by the colleges and are used only as evidence. The protection in the bill for quality improvement activities ought to apply to colleges' quality assurance programs as well. The consent provisions for youth under 16 years of age should be consistent with the scheme set out in the Health Care Consent Act.

There are additional points, some of which are more technical in nature, contained in our written submission. For example, we are concerned that making the bill paramount over our enabling statute, the Regulated Health Professions Act, may jeopardize our ability to obtain key evidence for investigations into misconduct or incompetence. The definition of "proceeding" in the bill may interfere with our investigations as well.

Outside access to college investigative files may defeat some very crucial investigations, particularly those related to fraudulent billing or narcotics peddling.

We would ask you to review our submission on these points. On behalf of the federation, I thank the committee for your time, and if you have any questions of us now—

The Chair: Thank you very much. That does leave us about three minutes per caucus. We'll start this round with the government.

Mr Wood: That was a very clear and helpful submission. We have no questions. Thank you very much.

Mrs McLeod: It seems that it doesn't matter how much time we spend on technical briefings on this bill, there's always something we've missed. I'm not aware of this issue around mandatory reporting, and I wonder if you could just explain to me a little bit more about your concerns with the fact that the current requirement for mandatory reporting is removed by Bill 159.

Mr Richard Steinecke: In our regulating statute, the Regulated Health Professions Act, which is our enabling statute, a practitioner or an employer of a practitioner must mandatorily report certain things. For instance, he must mandatorily report reasonable grounds of sexual abuse of a patient; he must mandatorily report, in confidence, professional misconduct or incapacity if it leads to suspension or firing of the employee or the colleague or dissolving of the partnership. Those have to be made on a mandatory basis. The concern is that since this bill overrides all other provisions, someone could say that we no longer have to make this mandatory report; under section 36 of the bill everything is discretionary. The employer or colleague "may" report, and so may choose not to, harming the public and putting them at risk because we don't know what's going on.

Mrs McLeod: I appreciate that clarification because I realized it was the permissiveness that was the concern, but I hadn't really understood that that potentially could override the mandatory reporting in those areas.

We've heard a lot today about the inconsistency between Bill 159 and the regulatory codes that the colleges are working under. I guess the bottom-line question comes down to, do we need Bill 159 in order to protect the privacy of patient records, or in your view does the HPRAC legislation respond adequately to the need for protection in terms of health care practitioners?

Mr Steinecke: We can't comment in general as to the benefits of the bill outside of our area, but we believe that as far as the regulated health profession colleges are concerned there is no need for the bill, that our legislation is specific, it covers our unique situation well and it doesn't create problems. So as far as we're concerned we believe that the colleges should not need to be covered, that they should be exempt in some form or another. Whether the bill is needed for other purposes, for example for practitioners, I think it's not really for us to comment.

Mrs McLeod: But there could be a difference then between the standard of privacy protection carried out by a practitioner and the standard required by the college? I would have thought those two things should be synonymous for all of the health practitioners that are regulated.

Mr Steinecke: I think there is actually a significant difference. The practitioner is a gatherer of the information and uses it for treatment. The college does not gather, does not create the information itself; it simply uses the information that is created by others as evidence for its regulatory processes. That really puts us in a very different category, and it puts us in very unique situations in terms of, for instance, the need for information perhaps without consent. In order to do our jobs we would have a need for that that practitioners don't have.

Mrs McLeod: If we have Bill 159 and the colleges are exempt, which takes us back to the original recommendation read this morning, would that not put practitioners in the position of working under two very different sets of rules regarding privacy and the collection, disclosure and protection of information?

Mr Steinecke: If the colleges were exempt, it wouldn't directly affect practitioners at all. They would still be covered by the bill or whatever replaces it. The colleges, however, are the ones that could end up with two separate regulatory rules, because the Regulated Health Professions Act does not directly set rules for practitioners. It only does this indirectly through what is professional misconduct. But it directly governs the colleges' handling of the information. So to put us under the bill without proper accommodation would put us under two sets of rules. The same would not necessarily apply to practitioners, because they would be governed by the bill and not directly through the legislation itself.

Ms Lankin: I appreciate the examples you have provided to us. All the colleges so far, and you as a federation, have indicated that you think the provisions under the Regulated Health Professions Act should have primacy over the Personal Health Information Privacy Act. I have a concern with blanket exemptions. I would like to see issue by issue spelled out, and where it's necessary to have the exemption, build that into the legislation around that particular exemption. Perhaps that's a challenge to go back—you've identified some and there may be others—and provide the committee with that.

But let me ask you, following on Ms McLeod's question around mandatory reporting: you specifically said

that subsection 11(2) and clause 36(1)(b) are discretionary and that provides a problem. Could you tell us how you see those sections providing discretion that would interfere with the mandatory reporting provisions?

Mr Steinecke: Section 11 says this legislation supersedes or is paramount over any other legislation with respect to confidentiality. To the extent that our legislation was in conflict, it would be overridden. Section 36 says that a practitioner or a health care custodian of any sort may disclose information to a college pursuing its mandate under the Regulated Health Professions Act. Our concern is that a court would interpret that "may" as saying you don't have to unless you want to. The provision in the Regulated Health Professions Act that says you must report sexual abuse, for instance, is now overridden. You don't have to do it unless you want to. Of course the whole purpose of making it mandatory was so that people couldn't decide to withhold the information for whatever reason, whether it be a very legitimate reason but misguided, or whether it be some sort of deal so that their problems would go away but the public would still be at risk.

Ms Lankin: So if that language in a section like that was amended to bring it in line with the RHPA provision, if this committee and the government felt that was appropriate, that would be satisfactory, and if we addressed all the other concerns, as opposed to a blanket supremacy clause for your legislation?

Mr Steinecke: Yes. It would be possible to deal with it throughout the legislation. The problem is that the two pieces of legislation are so detailed and so complex that we don't think it can be done. We think the only approach that would really capture all the unforeseen, unintended consequences would be to allow the Regulated Health Professions Act to be the scheme that applies to colleges in most circumstances.

Ms Lankin: Currently, as the bill is proposed naming colleges health information custodians, people you release that information to then become recipients under this legislation. So, for example, there is an obligation on experts if you have them review files. What is currently within the RHPA scheme that protects information that you share with other third parties?

Mr Steinecke: The secrecy and confidentiality provision in the Regulated Health Professions Act is quite broad, and it really does address this. It's not only the colleges; anyone who receives it—for instance, experts, lawyers, whatever—is then governed that they must keep it secret as well. So the recipients are dealt with very comprehensively.

Ms Lankin: Would it be parallel to the obligations on recipients under Bill 159?

Mr Steinecke: I would say it's analogous. They basically cannot release it to anybody except for an RHPA purpose. So an expert couldn't tell anyone else, but they could use it when they testify at a discipline hearing, for instance.

The Chair: Thank you, gentlemen, for your presentation before us here this afternoon.

BOB FRANKFORD

The Chair: We've done some realignment of the agenda to fill the vacancy at 5 o'clock. Our next presentation will be Dr Bob Frankford. Bob, good to see you again. Welcome back to committee and to Queen's Park. We appreciate your accommodating our vacancy.

Dr Bob Frankford: I appreciate being able to come and contribute to this discussion of Bill 159. I am here as an individual, and I want to mention some affiliations and experience that make me qualified to speak on the topic of health information and privacy. I qualified as a doctor in England and have spent over 30 years in the medical field in Ontario. I've spent the largest part of my career as a general practitioner in Scarborough and east-end Toronto. More recently, I spent over three years as attending physician at Seaton House, the largest shelter for homeless men in Canada. This is a distinctive setting, with a high turnover of patients suffering from a wide variety of mental and physical health problems. It certainly would have been helpful, in that setting, to have ready access to individuals' medical records; for example, for maintaining recommended prescriptions for psychiatric disorders or infectious diseases.

I am also currently a board member and vice-chair of a supportive housing agency for individuals with mental health conditions called Bayview Community Services, which is situated in the north of the city. I am not here directly on their behalf, but was able at a recent board meeting to discuss aspects of this bill, and I would certainly like to make the committee aware of some of the concerns raised by staff and clients there. This agency and others in the field of community health stress the importance of long-term trust in the relationships with their clients and feel that, if passed, the bill could be quite harmful to the often fragile stability they have been able to create for their clients.

It's a complex bill with many details. I certainly have not read it page by page, but if some observations I make are helpful, that's what I would like to do now. This bill would impact all individuals in the province and a huge range of health providers: individual practitioners, institutions and organizations. The basic premise of this bill should be, "Does it advance health care delivery?" To remind you, at any time we presumably are dealing with the health and records of some 10 million people. This means the number of records, let alone items of information, must be multiplied many times, given the multiplicity of ways in which care may be received.

I looked with interest at the Hansard of this committee. I see the extensive contributions of Ms Cavoukian, the Ontario privacy commissioner, and Mr Radwanski, her federal counterpart. Mr Radwanski's submission seemed particularly forceful and critical of the bill. I was impressed by his understanding of the issues and his questioning of how much the management of health systems requires access to personal information. The ex-

ample he talked about, of studying appendectomies done within a hospital, was a good one.

One of the general principles of the bill states that, to the extent possible, individual identifiers should be removed or concealed. I don't believe anonymization is a drawback to effective planning or research. In fact, it can be argued that anonymization is actually beneficial.

In introducing the bill, Minister Witmer stated it was a necessary step in the introduction of primary care reform. So far as I can see, this connection hasn't been followed up very much in subsequent debates I have read, and I frankly do not see it as being fundamental to primary care reform, of which I think some type is certainly long overdue. It's something I have wanted to work on for many years. Unified, lifelong medical records with rights of patient access could well be beneficial and may be how we bring health care into the electronic age, but I think that needs to be planned in detail before legislation is introduced.

I'd like to raise questions about what constitutes health information. You may be aware of the debates that have raged about what to include in diagnostic categories. I'm thinking, for instance, of the DSM classification of psychiatric conditions put out by the American Psychiatric Association, which I think is the standard for psychiatric diagnosis. Until fairly recently, homosexuality was listed as a diagnostic category, which led to considerable controversy. Was it health information then? Is it now?

I fully appreciate the importance of comprehensive and transferable health information for patient care. A career in general practice means that individuals you saw as babies come asking to know their immunization records in order to work in their own children's day cares. I was pleased to see there was discussion in the committee about the transfer of medical information into jails for the treatment of inmates. My experience at Seaton House more often involved the reverse, of requesting the transfer of information out.

Obviously there are issues of consent and privacy, which warrant considerable discussion of individual versus group rights. However, I suggest this is something that can and should be dealt with in relation to existing practices within and between health professions. The minister and ministry of corrections certainly need aggregate data about their populations, but even so I think inmates are entitled to the general rights of all.

On one specific area in the bill, I find the limited ability for individuals to change their records quite strange and self-defeating. Surely planning and other purposes seen in the bill require accurate information. Apparently, even the finding of fraud in a court of law only allows the filing of a record of objection.

In conclusion, I believe there is a need for the transfer of useful information to ensure effective health care for individuals and to do research and planning. The potential for using currently available data is far from being realized. Epidemiology and population-based approaches are needed, but to a large degree I believe the data can be

made anonymous. I won't comment on the relationship of the proposed Ontario legislation with federal legislation, though it would seem that working this out may be the first priority.

Finally, I would like to return to the basic question about this and any other health legislation. Does it advance health care delivery?

The Chair: Thank you very much, Doctor. You've left us time for a question from one caucus, and this time the rotation will start with the Liberals.

Mrs McLeod: You're absolutely right that the legislation, when it was introduced, was seen to be something that was necessary to move into primary care reform, and yet in the presentations we've had and the technical briefing we've had, I'm not sure that's really been a focus.

My sense of the issue, though, is that it's a question of coordination of care. If an integral part of primary care reform is to have coordinated health care between the various providers, there needs to be an ability to exchange information fairly freely between those providers.

I guess my question would be, in your view is it possible to move ahead with that kind of coordinated care across the current providers—hospitals, physicians' offices, the long-term-care setting, the community health setting—and have that information available as it's needed and still not open legislation as broadly as this bill appears to do?

Dr Frankford: I think we have to look at what is the system now. I think it's slow, paper-based, has many institutions and all sorts of either legislated or customary requirements about transferring records which I think are far from satisfactory, but it's there. I think we certainly could be moving gradually to make it more electronic, and I think some things are really very fundamental now.

I would like to take this opportunity of mentioning something I have mentioned in forums before, which is universal primary care registration. We know the minister is or has been in the UK, and it is fundamental to the National Health Service that everyone is registered with a GP or health centre or something. I feel this is really basic to making it universal. To start with the electronic records is very nice, but I think it's going to take a long time coming and I don't think it's the base from which primary health care starts.

The Chair: Thank you, Mrs McLeod. Good to see you again, Doctor, and thank you for taking the time to make a presentation before us today.

Ms Lankin: Mr. Chair, is it possible to make copies of the notes Dr Frankford had and have them circulated to the committee?

The Chair: I'll certainly ask the clerk, if he's prepared to share those with us.

1650

ONTARIO COLLEGE OF PHARMACISTS

The Chair: Our next presentation will be from the Ontario College of Pharmacists. Good afternoon and welcome to the committee.

Ms Tina Langlois: Good afternoon. My name is Tina Langlois. I'm the manager of legal services and patient-relation programs at the College of Pharmacists. Sitting with me is Deanna Laws, the registrar of the Ontario College of Pharmacists and herself a pharmacist.

We want to thank you for the opportunity to provide you with our comments on this piece of legislation. We've done so in writing, and we will not be filing any additional written information. We simply want to emphasize a few points and perhaps give you our unique perspective from pharmacy.

I think the first thing we need to state as a college is that we very much support the goals of this legislation. We feel it's important that personal health information is collected, used and disclosed in an appropriate fashion that protects the confidentiality of the information for the patients. We also want to advise you that we concur in the submissions of the federation, and we won't be repeating them because I think they've covered them in quite a fulsome way.

Again, a little bit of our own perspective from the world of pharmacy. Pharmacists practise in an information-rich and technologically driven environment. They have been keeping computerized records for many, many years. Electronic transmission and storage of these records is nothing new in pharmacy. Pharmacists have been transmitting electronic information to insurers—in fact, to Ontario drug benefit—for quite some time. I believe it's actually a requirement of Ontario drug benefit that pharmacists transmit that information electronically. So the electronic and computer world is nothing new to the world of pharmacy. The other thing you need to know in terms of our information-rich environment is that millions and millions of prescriptions are filled annually in Ontario, and each of those prescriptions creates an individual piece of personal health care information which is then required to be stored and dealt with by our members.

Our members have always displayed a high standard of professionalism as it relates to confidentiality. To let you know why that is or where they get the guidance for that, we have a principle in our code of ethics that deals with the concept of confidentiality of patient records. If I could, I'd like to read it to you so that you understand the environment in which pharmacists practice:

"The pharmacist preserves the confidentiality of information about individual patients acquired in the course of his or her professional practice and does not divulge this information except where authorized by the patient or required by law. Pharmacists protect their patients by serving them in a private and confidential manner. Pharmacists do not divulge information that identifies the patient; except in instances where there is a compelling need, in the pharmacist's professional judgment, to share information in order to protect the patient or another person from harm or where authorized by the patient or required by law."

That is the extent of the information in our legislation, standards or codes that deals with confidentiality. While

that may seem like it's not a great deal, it has allowed pharmacists to practise very professionally with very few complaints in this area to date. In fact, complaints regarding the manner in which confidentiality of patient information has been dealt with by our members represent less than 0.03% of complaints received in the last five years.

We as a college are confident that our members will continue to preserve the confidentiality of patient health information and deal with it appropriately because they have this obligation under the code of ethics, regardless of whether this legislation should apply to them. The other thing we want to clarify is that we do think it should apply to pharmacists. They are health care professionals and, as such, should be covered by this legislation.

We come to you to ask that you consider not including colleges—ourselves as a college—as custodians under the act. A couple of reasons for this: firstly, we don't think we need to be included as custodians under the act in order to protect the public in this regard, in order to preserve the confidentiality of their records. Further, we are concerned that there may be problems that manifest themselves with regard to our investigations and conflicting legislation and potential court challenges, should we in fact be included in this act.

A little bit about who we are and what we do at the college, now that I've told you about our members and the environment in which they practise. The college's mission is to regulate the practice of pharmacy, through the participation of the public and the profession, in accordance with standards of practice which ensure that pharmacists provide the public with quality pharmaceutical service and care.

The personal health care information that is gathered by the college is done so in the course of performing this mission and in the course of regulating pharmacists and the practice of pharmacy in the public interest. We are generally seeking to gather personal health information where we have either received a complaint from a member of the public or where the college is initiating an investigation due to its concern for public safety. That is the context in which we would be collecting personal health information.

As you have heard no doubt from other colleges and from the federation, the college is governed by section 36 of the Regulated Health Professions Act, which provides extensive confidentiality safeguards for any information that comes to the college's attention, be it personal health care information or other information, for that matter. I can assure you that with a \$25,000 penalty, those of us who work in these areas at the college are extremely cautious in the way we deal with the information. We keep computerized records of what information we gather and where we store it. We also log receipt of it and return the originals to the source upon completion of our investigation. That is not done because of this particular piece of legislation but rather in keeping with general good practices for investigations that may well lead to

litigation. There is a need to preserve the evidence and to make sure that you keep a handle on it. So we do it because we need to currently.

We're not aware of any complaints or concerns that have been expressed about the way in which the college has handled personal health care information from members of the public of Ontario. The concerns that we have if the college is defined as a custodian within the act are outlined in our submission. Just to review them again, we are concerned that our inclusion in the act may impact our ability to investigate, particularly where the patient involved may in fact be involved in the offence in question. I turn your attention to perhaps the issue of insurance fraud, where somebody is getting prescriptions run through a pharmacy or getting prescriptions from a doctor and in fact the patient is the one who is benefiting by being reimbursed by their insurer. It's obviously in their interest not to co-operate with us or provide their consent to get those records.

Our concern is that we may find ourselves—and it is speculative in nature and I will grant this, that we don't know this is what will happen in the future. It is indeed a concern. Our concern is that we will end up in court, challenged by members and challenged by patients and spending valuable college resources that are better directed at regulating the profession in the public interest. These kinds of court challenges take a very long time and eat up a lot of resources, so our concern is there.

Conflicting legislation always causes problems until it is sorted out, and that takes time. Our request of you is that you allow this time for these things to filter through this particular piece of legislation, but in the interim you have faith in the provisions of the Regulated Health Professions Act as they relate to the colleges and allow that act to take primacy over this. Any changes or concerns that may manifest themselves in the fullness of time as this legislation is applied to members, and as we hear from the commissioner about what particular complaints or concerns are expressed, we feel can adequately be dealt with by amending the Regulated Health Professions Act. Again, the colleges have many challenges. Certainly, we would not look forward to adding another piece of legislation that potentially conflicts to our level of challenges.

The options you have available to you: I guess the first option is to, again, simply have faith in the fact that the Regulated Health Professions Act, which is a fairly recently drafted piece of legislation that is currently under a very extensive review, should be the primary piece of legislation that deals with colleges, that it deals adequately with the issue of confidentiality of patient records and that there is really no pressing public need to include colleges as custodians at this time.

1700

The other thing that I would just like to bring to your attention is the fact that as recipients of this information from custodians, because we believe that our members should be custodians, if we receive the information from our members in this way, then obviously we would be

covered by the provisions of the act that deal with recipients of the information. Again, were we not covered by the RHPA and those very strict confidentiality provisions, I think the pieces of the legislation found in section 24 that deal with how a recipient of information has to act or behave would adequately also protect the public from any concerns they might have around the release of this information inappropriately.

I hope that we've been able to help you at least understand the environment in which our members practise and the concerns that our college has. We would urge you to consider not including colleges in the definition of custodians of personal health care information.

The Chair: That leaves us just under three minutes per caucus for questioning. This time we'll start with the NDP.

Ms Lankin: I actually don't have any questions. I have a request to make, following this and the other colleges' presentations, first of all, to legislative research, if we could have an analysis provided of the privacy protections under the RHPA and if it's obvious where there are any differences between that and the Personal Health Information Privacy Act, and secondly, if we could ask the ministry if they would determine whether or not the HPRAC review, which we understand is just about over—

Ms Langlois: I believe so.

Ms Lankin: —and long-awaited, and we don't want to hold it up. But is there any capacity for HPRAC, even secondary to the main review, on a separate issue, to take a look at this and provide either any recommendations they may have if there are required amendments to the RHPA or if they have any recommendations with respect to this issue of primacy. That might be helpful.

Mr Spina: Thanks for the presentation. You were fairly concise—and we all appreciated it—in distinguishing between who was the actual custodian of the data in the case of the pharmacists themselves versus the college and therefore you felt that the current legislation would cover your status as a college in accessing information in the course of an investigation as a result of a complaint.

Ms Langlois: What I was saying was that if the college is not included as a custodian but in fact they receive their information from one, then those sections apply, which I believe provide certain parameters around how a recipient can behave.

Mr Spina: Do you practise any mechanism of anonymity when you do the investigation where you are accessing patient data? Are you dealing with a number or are you dealing with a name and address and so forth?

Ms Langlois: We are dealing firstly with a number. Prescriptions have numbers on them and oftentimes the data is indeed presented in that fashion because there's no need to identify any patients. There is a prescription number, a drug dispensed and an amount paid, and the patient's name is really not relevant at all. It is revealed, however, when we're trying to determine whether or not a prescription was authorized, for instance. If we contact

a doctor and we want to know if the doctor has prescribed a certain thing for a patient, we need obviously to provide that physician with the information in order that he or she could either confirm or deny that they have in fact prescribed it.

Mr Spina: You would also probably identify the difference between someone who's under the DBF or someone who would be paying under their own insurance plan.

Ms Langlois: We don't. However, the insurers certainly do. Most of us who are covered by a drug plan have already signed away many of our confidentiality rights anyway, because the person who pays for our drugs has permission to review the information in question. But we at the college certainly don't deal with the information any differently. We would still get it from the pharmacy because the actual hard copy records are there.

Mr Spina: Do you collect any data other than in the course of investigation from the perspective of analysis of usage or comparative data, market research data, any of that sort of information either among the various pharmacists or classes of pharmacies etc?

Ms Langlois: We don't collect that kind of information. However, there are groups that do. IMS, I believe, is the most notable example of a group that collects data about drugs dispensed and prescribing habits etc. The college's standards and documents that were written around that specifically state that no identifying patient information can be released with that, so it can only be dealt with in a statistical fashion.

Mr Spina: That's IMS's practice, or yours?

Ms Langlois: That's the college's standard on its members, so if you as a member are going to release information to someone, you have to ensure for yourself that they are using it for a purpose that is appropriate and that there is no identifying information—forget name, include also address etc—in the information you are providing.

Mr Spina: It's not entirely fair of me to ask this next question, but you don't have any idea whether IMS practises anonymity or not? They say they do.

Ms Langlois: The data they receive are anonymous. They can only reveal what we reveal to them, and since they only get anonymous data, then what they get is cumulative.

The Chair: We'll move to the Liberal caucus. Mrs Papatello.

Mrs Papatello: In short, the college needs to be separate from Bill 159 so that you have greater powers of investigation to fulfil your mandate.

It is my understanding that the pharmacists would like to have greater access because it helps them do their job better.

Ms Langlois: Sure.

Mrs Papatello: As a pharmacist, they want to see that there aren't other medications out there that are going to conflict etc, or they could develop patterns of overuse or whatever all those things are. So the pharmacists like the

idea of being able to see more of the information around the patient.

Ms Langlois: Absolutely. I think you will see that they are even looking to ensure that they can have access to diagnoses and things like that which perhaps aren't traditionally given to them because, again, it will help them do their job.

Mrs Papatello: If you had to choose in terms of standards, is Bill 159 considered to have higher or lower standards that you should be subject to? One would replace the other. In this case, you would be superseded by 159, which actually hampers your authority to do your job.

Ms Langlois: I guess my position is different with regard to us versus our members. Our members right now are governed by a code of ethics around confidentiality and this bill is a higher standard because it is more specific and it is more detailed in the way in which they have to deal with things. As I read to you, our code of ethics is a very general and overarching statement of guiding principles. As it relates to the college, though, I think our confidentiality provisions in the RHPA, at least the way I have always read them, are very strict and they impose a very high level of confidentiality. I'm not sure that I would think that this particular bill would impose any higher level of confidentiality on the college. It may just lead to confusion.

Mrs Papatello: The idea of a lockbox being included in the legislation—if you followed, it had been in originally and now it's out. How would that change how you do your work?

Ms Langlois: I'm afraid I came to this piece of legislation after it had been removed so I'm not really familiar with the lockbox provisions of the act.

Mrs Papatello: It's just the notion that there would be certain features that an individual could select to be put in the box and not allowed. I guess only in terms of that example you used for our colleague, if it's the patient you're actually investigating and not the pharmacist—

Ms Langlois: Sure. It's always the pharmacist we are investigating, but sometimes the pharmacist has the assistance of the patients or at least the concurrence of the patients in doing what they're doing. We would never investigate a patient, ever. That's not our job nor is it our intent.

Mrs Papatello: But it comes as a result of this type of review that you would see this.

Ms Langlois: We would be investigating a pharmacist. Our concern would be if a patient was in collusion with the pharmacist. They could either lock away that information, if that's how a lockbox is to be used, or ask that it be varied or changed in some way. Because there's a financial benefit and incentive to them, frankly, in that limited scenario for them to do that, the college would be completely hampered in their ability to get to the bottom of that.

The Chair: Thank you very much for coming before us this afternoon. We appreciate your presentation.

RISA DEBER

The Chair: Our last presentation this afternoon is Professor Risa Deber. Thank you for accommodating our slightly altered agenda.

Dr Risa Deber: Thank you very much for inviting me. I'm speaking here not as a representative of any group at all; I'm speaking here as an academic.

I commend you and the drafters of the bill for the careful thought that's been devoted to this very difficult issue. What I want to talk about is the need to balance privacy issues and the critical importance of protecting the public against what I consider to be also the critical issue of making sure that valuable research can be conducted. I would urge caution in how the bill is amended with respect to access to information because some of the suggestions I've been hearing I think would interfere with things that people would want to have happen.

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In terms of who I am, I'm a professor in the department of health administration at the University of Toronto, which is in the faculty of medicine. I'm an active teacher and researcher but I specialize in health policy and medical decision-making. I'm not a lawyer, I'm not a privacy expert, I'm not an epidemiologist. In fact, most of my own research does not involve identifiable data, so in narrow terms, my research agenda is not likely to be personally affected by this bill. But I do sit on a lot of committees, including grant review committees for most of the major national granting bodies. I've sat on the Social Sciences and Humanities Research Council, the Medical Research Council and the National Health Research and Development Program. I've also sat on government task forces and committees, including a current one looking at genetic screening for adult-onset disease. I'm also on the ethics review committee for health services at the University of Toronto, which handles faculty medicine and other health services. I am also past-president of the Canadian Health Economics Research Association. I am not speaking on behalf of any of these bodies.

I am concerned that if we take too narrow a definition of privacy, I think we'll end up doing harm to research and to the public which relies on research. For example, I've heard comments that suggest that the only valid use of personal data is to advance the care of the individual whose data is being accessed. But our care depends on access to information from previous individuals. There is a famous quote from Isaac Newton saying, "If I have achieved anything at all in life it is because I have been able to stand on the shoulders of giants." Should we become unlucky enough to be ill, we expect to be able to benefit from research on previous patients. Similarly, if we want to access services, we expect that somebody, whether it be government, district health councils, hospitals or doctors, will be examining the performance of our system, making sure that the needed services we have

are both available and of high quality and at reasonable cost, that we're not wasting.

Many people have pointed out that our health care system suffers from too little information and too little research, not too much. We don't know what we're spending. We don't know what the results are of the resources we are devoting to health care. We don't know what we're buying with them. We don't know what best practices are to guide and improve the performance of our system.

When I read some of the testimony that has come to the committee, with its stress on, "Let us control and limit data collection and use, let us prohibit gathering of data that is not required by law," I feel it would be very unfortunate, because we can't see the future clearly. Our track record in identifying beforehand precisely what information is going to be required is not very good. It's precisely because we don't have unified systems of care that it is often essential to be able to link data, not just to ensure an accurate depiction of the population, which was Dr Cavoukian's point—and I really appreciated her comments—but because any one data source is going to give you a partial and incomplete picture.

In many cases, from a practical point of view, obtaining consent is an inferior solution, not only because it is often very expensive and often infeasible, but because it can require a much greater invasion of privacy than simply linking and anonymizing files. If I'm not going to be identified, I'm not going to be contacted. I think it is far more invasive to have somebody call me up and say, "Can we put your record into our study?" than simply to put your record into the study and make absolutely sure there's no way of tracking it back to you or affecting what happens to you.

There's research I was doing with the HIV population in which I managed to convince our ethics committee that the only way I could endanger these people was to get their signed consent, because then I have names that could be leaked. If there was no signed consent but implied consent, then there was no possibility that anything could be leaked or they could be endangered. I think sometimes too narrow a legalistic view can endanger people more.

I thought you might find helpful a couple of examples of research that I think most people would want to have done but which the suggested approach to privacy and the requirement for prior consent could make impossible if we're not careful in how the bill is drafted. These are not hypothetical; these all come from examples I have seen and, in one case, from research I have been trying to do.

The first one is a women's health question. About a year ago I was approached by a young woman who was a cancer survivor and who was working with a breast cancer support group. She was receiving frequent requests from women with pre-menopausal, often aggressive disease. They wanted to know which of the alternative treatment approaches offered to them would maximize the likelihood that they could subsequently

have children. She found remarkably little information available. So her support group, which was not well resourced, wanted to know whether they could contact people who had run clinical trials and see if they could contact the women who had been in the clinical trials and ask them about what the impact was on their subsequent fertility, depending on what sort of treatment they had received. Note that there is no way these women would have given prior consent to having their data put to a second use, because nobody had thought of doing this study. I was forced to tell her that no ethics committee I know of would approve this. But also I suspect, given the opportunity, almost every woman surviving cancer would be delighted to have this sort of research done. There's one example of which we will not be able to know because of requirements of consent.

The second is an issue about workplace hazards. This is a study that did come to our ethics committee in a province, not Ontario. They began to suspect workers in a particular plant might have been exposed to hazardous materials in the years prior to 1985, when they changed the process. This was supported by the union, the company, the province and the Workers' Compensation Board, because they wanted to know about things like should they be giving them workers' compensation, should they be concerned around occupational hazards.

What they wanted to do, and they had a budget of less than \$15,000, was just take a list of everybody who worked in the plant before 1985, link the names to the provincial cancer registry, and see whether there was a higher cancer rate. Now, if you said no, you have to have consent, recognize, first, it's going to be far more intrusive to contact them. Secondly, there is a Catch-22, because if people have died, you can't get their consent. So precisely the people who were most likely to have been adversely affected were the people you would not be able to contact, because you couldn't get consent and because, as best I can read the bill, you certainly don't have proxy consent and you don't have proxy consent for dead people. Also, trying to locate where people in 1980 are now living is going to be a rather onerous thing. I can't see how it's better protection of privacy to set private detectives on you to locate where you are and get permission than to do a linkage.

There's another issue: it's not cheap to try to get consent this way. There's another study I know of that was trying to find out whether disabled workers were getting adequate payments. The entire study would cost \$80,000. They estimated that just to try to get consent would cost an additional \$120,000. This is in an environment where there's not that much research funding around. The latest CIHR competition funded less than a third of all applications and didn't fund them at particularly high levels.

Also note that these studies were very carefully designed. There could be no identifiable information released; there could be no possibility of harm coming to the individuals whose health information was being included. I think those sorts of provisions were critical. But

I think in occupational health and safety studies, ignorance is not bliss. If you can't do research because of views of confidentiality, there's immediate harm to individuals who will continue to be exposed to hazardous situations. There are also people who are going to be denied benefits they should have received. So privacy becomes a shield for no accountability.

My third example is risk assessment. Several decades ago, a number of young women were diagnosed with a very rare form of cancer of the vagina or cervix called clear cell adenocarcinoma. They did case control studies in which they only looked at the women presenting with this condition, and they realized that the mothers of these women had taken a drug called DES during their pregnancies. This terrified these DES daughters, because they thought they were all going to die of this type of cancer. There were suggestions that you might do surgery, all kinds of rather unpleasant things, cauterization, very painful.

Fortunately, they were able to go back and take a larger cohort of the daughters and find that although there was a higher relative risk, there was a very low actual risk. Fewer than one in 1,000 of the DES daughters would actually develop this cancer. As a DES daughter myself, I was rather pleased that they went back and did this research.

But as a sidebar, subsequent research into DES has been really hampered. Because we control and limit the data collection, nobody knows who had it. So the US National Cancer Institute says, "Between five million and 10 million people"—which is a rather wide range—"were exposed to DES during pregnancy," and many of them don't even know they were exposed. Here is a situation where even though there are emerging health issues, you can't even find them.

I think genetic testing is an analogous situation. We're very worried about what this will do to people who are told that they have problematic genes, but a whole lot of the genes we find are what they call propensity genes. These indicate that there's a higher risk for conditions such as heart disease or Alzheimer, but we don't really know it, because all we've got is case control studies. We know that somebody with heart disease is more likely to have the gene, but we have no idea about how likely people who have the gene are to have heart disease. So we have a situation where these propensity genes may not indicate high risk at all.

We're on the verge of spending enormous amounts of money, both public and private—the private will come from employers and will be a burden on payroll and a burden on our economy—for genetic tests that have very serious potential consequences to people who test positive, and we don't know if the results are going to be useful. I really hope we can figure out some way to store genetic samples, very, very carefully protecting who's going to get access and how it can be used; but some way of seeing, "OK, if I really have this supposed heart disease gene, how likely am I to get heart disease and how does that compare to the rest of the population?"

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Getting a false positive is not benign. There's a real psychological impact of being told you're at risk for a serious or life-threatening condition. Additional tests are painful, dangerous and expensive. Here again, if we're ignorant, we're going to enrich the providers of tests, but I don't think we're going to do much for the people who pay for care or for the public.

The final example is a self-serving one, which is my own research, because for the first and certainly last time, I tried to work with administrative data to find out whether setting up regional health authorities, which they've done everywhere except Ontario, affected people's access to specialized care outside their region. The Canadian Institute for Health Information—CIHI—keeps some of these data, not all of them; they still don't know much about outpatient or community-based services.

So we identified some tracer conditions and we didn't need personal information. We weren't going to say that this is what happens to Mrs Smith. We weren't even going to say this is what happens to Peterborough. But we had to be able to link to see if Mrs Smith in Peterborough was being treated in Peterborough or was being treated outside of Peterborough. We could not get those data. We have been fighting for two years to get access to that level of data. Finally, the only way we're able to do it is it's going to be done in-house by CIHI. We couldn't even get that level of linkage, because, among other things, it appears that hospitals are considered people and they have privacy rights too. Even though we weren't going to release identifiable information, we couldn't get it to do the analysis.

I have a graduate student who is trying to see whether repatriation of care from pediatric hospitals would affect their viability. She had to go to each pediatric hospital to get written permission for them to tell her how many cases they were doing and what sort of care. Another student was trying to look at laboratory services. Again, she could not get information. So we have already massive difficulties in monitoring the performance of our system in terms of restrictions on access to data.

I would like to know what an appropriate payment would be if we wanted to move to rostered, capitated delivery systems. We can't get that. I would like to know what the impact is for private insurers and business of shifting care to the community. We can't get that. If we're going to make wise policy, I think it's important to leave some ability to do this.

The legislation gives power to official government agencies, but we'd like to have some way to allow external scrutiny of performance, whether it be from patient organizations or academics, as long as there are careful protections put in place so that you're not going to be identifying or harming individuals. The law, as it stands, will make that very difficult. The amendments I've heard suggested will make it impossible.

With the recognition I am not a legal draftsman, there are a couple of principles I'm being sort of brazen

enough to suggest. The first is I think it's important to clarify how academic researchers can get access, with appropriate safeguards, to linked data at a reasonable cost. There have been health economics meetings in which Canadians were doing their analysis on American data because they could get the American data at cost for the CD, and the Canadian data, if they could get them, would be \$20,000. I don't think it helps us not to be able to see what Canadian data tell us around how to better improve our system, and I don't think most academics will qualify as health information data custodians under the terms of the act. So whatever we're doing, how can that academic get hold of these?

Second, I would not unreasonably limit the collection of data, particularly since history suggests we can't always foresee what research questions are going to be pressing. I think we do need to make sure whatever data we collect can't be misused.

Third, consent is desirable, yes, but it's not always feasible, particularly for retrospective studies. I would hope that we could avoid a blanket requirement for prior consent, particularly if we're going to be anonymizing data and it will not personally affect the population in the study, and when trying to get consent, it's going to be more intrusive than careful controls on access to the personally identified information.

Fourth, we probably have to have some ability to have substitute consent, prior consent, you know, blanket consent, because if researchers don't need to track all potential subjects, I think we're going to have more privacy, not less.

Fifth, I think we've got to recognize there are valid uses of personal data for purposes that go beyond the care of that individual at that point in time.

I'd like to thank this committee for their kind attention. As Mr Sharpe noted at the beginning, there are competing interests, and balancing them is difficult, but I am not seeing the public who would benefit from research—and be harmed by ignorance—testifying in front of you. So what I am trusting and expecting is that you, as their representatives, are going to continue to take their interests to heart.

The Chair: Thank you very much, Professor. As I'm sure the committee has noted, it has allowed you to go well over time. But seeing we'd had a couple of cancellations at the end of the day I thought that was quite acceptable.

Mrs Papatello: Chair, do we have time for a quick question?

The Chair: Well, only in fairness to all of the other presenters who will be limited to 10 minutes, perhaps you could ask it off-line to the professor after we adjourn.

Thank you very much, Professor, for taking the time to present a very detailed brief before us. With that, the committee stands recessed—

Mrs McLeod: Mr Chair, before you recess, I was asked to hold any questions for the researcher until the end of the session.

The Chair: Oh, I thought you were simply going to hand them to him. Did you want to—

Mrs McLeod: May I very quickly read them into the record?

The Chair: You may, sure.

Mrs McLeod: I don't think they're onerous, but I do respect the fact that if the research officer is tied up in hearings for the next three and a half solid days that we wouldn't receive responses to these until after we've completed the public hearings.

The first was a question for Cancer Care Ontario—and I will give these in writing to the researcher. Are there any limitations now in their ability to access data or to protect confidentiality and, second, in the absence of Ontario legislation, would Cancer Care Ontario be under the federal privacy legislation?

Second, relating to the HIV/AIDS brief which refers to model legislation, could we get a copy of that particular model that they had referenced?

Third, does the federal legislation conflict with health professions regulation legislation in Ontario? That's really a question around the issue that we've heard repeatedly today about the HPRAC legislation, and we've talked a lot about it in relationship to Bill 159, but if it's possible to get some sense of its relationship to the federal legislation if there is any place where the federal legislation applies to the regulated health professions in Ontario.

Fourth, are there precedents in Ontario for correcting a health record?

Fifth, does the federal privacy legislation apply to physicians' offices? You will recall that the federal Privacy Commissioner did indicate that physicians' offices would be caught by the federal legislation in the absence of an Ontario bill. I believe there's some disagreement in the Ontario Ministry of Health about that, and any clarification we could get would be very helpful.

Last, what legislation governs the length of time that health records must be maintained?

Ms Lankin: I have a couple of questions, if they could be followed up with the specific organizations. Cancer Care Ontario—I have the same question as Ms McLeod. In addition, we heard in another presentation today of a circumstance when a cancer patient was called by someone on behalf of Cancer Care Ontario to ask them if they would be willing to participate in a research study. In and of itself, it appears there's a breach of confidentiality right up front and I wondered if they could address within their own procedures, is it possible that happened, or how would they explain that?

Second, to the Toronto Academic Health Science Council—

The Chair: Ms Lankin, in fairness, I wonder if the group that made that presentation might be canvassed, because, for example, if it was their doctor phoning back I suspect there's no issue of disclosure there. If the doctor was to phone back and say, "I was wondering if you would like to participate in this study"—

Ms Lankin: But the testimony before us was that somebody from Cancer Care Ontario actually called.

The Chair: But in fairness to the researcher, perhaps the first step should be to see what definition we can get there about whether we're talking about a survey company or a—

Ms Lankin: The presenting group was the Registered Practical Nurses Association of Ontario. So we might do that first step of clarification then, if appropriate.

Second, to the Toronto Academic Health Science Council. Later on in the afternoon we had a presentation from Dr Speers, which included a copy of the Helsinki

declaration with respect to medical research protocol. I wondered if we could ascertain from the Toronto Academic Health Science Council whether that is a standard that is commonly used in university ethics committees and/or whether it is something they think is appropriate—too restrictive, not restrictive enough—and whether that might be something the committee looks at building reference to in legislation.

The Chair: If there are no other questions, the committee stands adjourned until 9 o'clock tomorrow morning.

The committee adjourned at 1730.

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Standing committee on general government

**Personal Health Information
Privacy Act, 2000**

Comité permanent des affaires gouvernementales

**Loi de 2000 sur la confidentialité
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ASSEMBLÉE LÉGISLATIVE DE L'ONTARIO

STANDING COMMITTEE ON
GENERAL GOVERNMENTCOMITÉ PERMANENT DES
AFFAIRES GOUVERNEMENTALES

Tuesday 27 February 2001

Mardi 27 février 2001

*The committee met at 0907 in committee room 1.*PERSONAL HEALTH INFORMATION
PRIVACY ACT, 2000LOI DE 2000 SUR LA CONFIDENTIALITÉ
DES RENSEIGNEMENTS PERSONNELS
SUR LA SANTÉ

Consideration of Bill 159, An Act respecting personal health information and related matters / Projet de loi 159, Loi concernant les renseignements personnels sur la santé et traitant de questions connexes.

The Chair (Mr Steve Gilchrist): I call the committee to order as we proceed with our issues on Bill 159, An Act respecting personal health information and related matters.

OFFICE OF THE PROVINCIAL AUDITOR

The Chair: First up this morning is the Office of the Provincial Auditor. Mr Peters, come forward, please. Good morning and welcome to the committee. You barely escaped public accounts and back again today.

Mrs Lyn McLeod (Thunder Bay-Atikokan): He hasn't escaped public accounts.

Mr Erik Peters: Back in at 10 o'clock.

I appreciate the opportunity to comment on Bill 159, An Act respecting personal health information and related matters, which is also commonly referred to, in short, as PHIPA, even though I find that is just as long as the title of the act.

While most of the members are familiar with the role and responsibilities of the Provincial Auditor, I would like to provide some background and context to our audit work and how this proposed legislation could impact on my ability to carry out my duties and responsibilities under the Audit Act. I've asked the clerk to distribute a copy of the Audit Act to you so that you may refer to the pertinent provisions I will be speaking about.

In a nutshell, the purpose of my presentation is to ensure that our historical and legislated access to information rights mandated under the Audit Act continue under this new proposed legislation.

Free access to all information needed to fulfill responsibilities is fundamental to auditing. This principle, as it applies to the Provincial Auditor, is given statutory definition in the Audit Act, which incidentally I consider a

wonderfully balanced piece of legislation. On one hand, it gives us access to all information that we need to do our job; on the other hand, it limits the use of that through oaths of secrecy to strictly using that information for purposes of the Audit Act. The only exception is if we detect any wrongdoings that should be reported under the Criminal Code.

The opportunity to consider all relevant facts before forming and reporting my opinions is fundamental to the fulfillment of my statutory duties. In conducting their examinations, my staff must have access to all pertinent information and explanations.

Under section 10 of the Audit Act, every ministry of the public service, every agency of the crown and every crown-controlled corporation is required to provide the Provincial Auditor with such information regarding its powers, duties, activities, organization, financial transactions and methods of business as the Provincial Auditor requires, and the Provincial Auditor shall be given access to all books, accounts, financial records, reports, files and all other papers, things or property belonging to the ministry, agency of the crown or crown-controlled corporation and necessary to the performance of the duties of the Provincial Auditor. So very far-reaching access rights.

To fulfill our responsibilities under the Audit Act, we require access to a wide variety of information and records. For this reason, the access-to-information section in the Audit Act is necessarily worded in generic terms. However, specifically in audits of the Ministry of Health and Long-Term Care, we have frequently found it necessary to access ministry information and records that fall within the definition of personal health information. The example that comes to mind is OHIP records. In carrying out our audit work at the ministry, my staff have always had access to all information and records that we considered necessary to conduct our audit work. We would like to see this practice continue and be embodied explicitly in Bill 159.

I would also like to draw to your attention clause 12(2)(a) of the Audit Act, which obliges me to report to the assembly on whether, in carrying out the work of the office, we received all the information and explanations we have required.

To give you a plain illustration on OHIP, how do we make sure that the ministry has not paid for two hysterectomies on the same woman? This has happened. It

became public knowledge that there were in one year at least 43 cases where doctors had billed twice for hysterectomies. For example, how do we ensure that things like this don't happen in our system and don't happen to taxpayers' money?

At this point, I should mention that my office is in the process of seeking amendments to the Audit Act. My office has made proposals to amend the Audit Act with the primary objective of providing the Provincial Auditor with the discretionary authority to perform value-for-money audits of organizations that receive grants from the province of Ontario or an agency of the crown. In 1996, the Legislature's standing committee on public accounts unanimously endorsed our proposed Audit Act amendments. In fact, just last week I updated the public accounts committee on the status of our proposed amendments.

In formulating our proposed amendments to the Audit Act, I should tell you that we have sought—and that was done on my personal advice—the advice of the Information and Privacy Commissioner regarding the issues surrounding privacy and our access to personal health information and records. In this regard, included in our proposed amendments to the Audit Act is an anonymization clause—I have trouble with that word, but the meaning is clear to me—that has been drafted by the office of the Information and Privacy Commissioner. I can share that with you, if you like, and we brought copies along if you'd like to have that.

Turning specifically to the proposals laid out in the paper entitled Ontario's Proposed Personal Health Information Privacy Legislation for the Health Sector, or Health Sector Privacy Rules, dated September 2000, and Bill 159, the health sector privacy rules recognize the need for disclosure of personal health records for audit purposes. I would also note that this is consistent with the following recommendation made by the Royal Commission Into the Confidentiality of Health Information in its 1980 report, and I quote from that report:

"That legislation governing the confidential information maintained by hospitals and health care facilities permit the disclosure of health information to prescribed government recipients authorized to collect, audit"—my emphasis but it's there—"or inspect confidential information under provincial legislation."

So the commission already recommended this.

It is my office's view that, in the absence of specific exclusions in any other act, section 10 of the Audit Act provides my staff with the authority to access for audit purposes only a wide variety of information and records, including what Bill 159 refers to as personal health information.

With this in mind, I would refer the committee to subsection 36(1) of Bill 159, which provides the discretionary authority for a health information custodian to disclose personal health information authorized by other acts. I emphasize the word "discretionary" because the section uses the word "may," not the word "shall."

In discussions with the Ministry of Health staff on this issue, we have been informed that the ministry has always intended that access-to-information rights of the Provincial Auditor that are currently authorized under the Audit Act should continue under PHIPA. Specifically, clause (i) of subsection 36(1) provides for the discretionary—I repeat, discretionary—disclosure of personal health information which could cover the access to information and records permitted or required by the Audit Act. However, again I would like to stress that this provision is discretionary.

Although the policy paper supporting the proposed legislation recognized the need for access to personal health information specifically for audit purposes, the proposed legislation does not sufficiently address the mandatory nature of my office's requirement to access this information for audit purposes.

I want to stress that the success of our audit process depends to a very large degree on access to all relevant information and records that my staff consider necessary to the performance of my office's duties under the Audit Act, and so the wording in PHIPA should make this as clear as possible.

We also understand the sensitivities regarding personal health information and are cognizant of the need to maintain adequate systems to protect the confidentiality of this sensitive information. To this end, we have already for many years instituted a policy of anonymization of personal health information retained in our working papers. As well, the Audit Act provides various measures to protect the confidentiality of information, including a mandatory oath of office and secrecy, and a mandatory requirement that staff of my office are to preserve secrecy with respect to all information that comes to their knowledge in the course of performing their duties under the Audit Act, except—and I repeat section 27 here—"as may be required in the administration of this act"—that's where I referred to balancing—"or any proceedings under this act or under the Criminal Code." Also, under section 19 of the Audit Act, our audit working papers are protected from public disclosure.

To conclude my presentation, I want this committee to know that there will be times when my staff will need access to personal health information in order to fulfill my duties and responsibilities under the Audit Act. I want to ensure that our historical and legislated access-to-information rights under the Audit Act continue under this new proposed legislation.

With this in mind, my suggestion would be to include a separate section for mandatory disclosure to the Provincial Auditor. In this regard, we believe that the following wording would, without any doubt, achieve the intended objective of ensuring that the Provincial Auditor's access-to-information rights authorized under the Audit Act continue under this legislation, Bill 159. The wording is as follows: "A health information custodian shall disclose personal health information to the Provincial Auditor for the purpose of enabling him or her to carry

out his or her statutory responsibilities under the Audit Act.”

This concludes my presentation. I would be happy to answer any questions that you may have.

The Chair: Thank you, Mr Peters. That does give us about two minutes per caucus. We'll start the rotation with the official opposition.

Mrs McLeod: Thank you very much, Mr Peters, for your presentation and also for your recommended amendment. I would share your concern that there be something specifically addressing the issue of access to the auditor as required for public audits, because I think there are a number of areas of the bill which do need amendment, and even those areas of access that you've identified in the bill could be affected by the amendment process we're going to go through. There is a section 11 that allows for other acts to specifically prevail over this act. Some of us have some concerns with even that clause, so I think an amendment that would speak specifically to the access for audit would be important.

Could I ask you, though, a little bit more broadly and touch on something you raised in your presentation, and that's that when you do access OHIP files, if you find evidence of fraud—you didn't say fraud; you said a violation of the Criminal Code—you would be required to report that. If you found evidence of OHIP fraud, I assume there is a potential criminal charge there. To whom would you report that? What I'm getting at is, if we're able to tighten up government access to private health information, how would you see the follow-up to your report of OHIP fraud being carried out?

0920

Mr Peters: I think largely because we are not medical practitioners, to identify whether fraud has occurred—fraud actually is what a court decides is fraud. If we have a suspicion of fraud or an indication of something going wrong, what would normally happen under the circumstances is that we would bring it to the attention of the ministry first, because the ministry has a process whereby these incidents are reported to something called the Medical Review Committee. That is a panel of experts that would sit on it and determine whether something has actually happened, that a doctor has provided a billing that is inappropriate. We would ask them to instigate the process from this end; in other words, have experts look at it from that point of view.

In the audit we also ensure that those processes are in place; in other words, that it doesn't just rely on our audit to identify those instances but also that their own staff have a process to follow when they find instances where they have concerns that should be brought forward.

Specifically, from then on, an investigation starts and processes start. A while back—I don't know how many years back—we had, for example, a doctor billing in such a way that he virtually didn't sleep all week. He charged so many hours that we didn't know where he took the time from, that sort of thing. But all these billings must be supported of course by medical records, identification of the patient and what services were rendered.

Ms Frances Lankin (Beaches-East York): To follow up on that, why is identification of the patient necessary for your office? For example, you could have the record; it can be identified by, say, an OHIP number. You don't need the name and address and that kind of information, do you?

Mr Peters: Absolutely right. That is quite correct. The only problem we have found with the old numbers, as we did in hearings on it, is that the process is now being tightened up, I think partially because of findings we had in 1992. For example, if you just had a name and an initial, you could find yourself in the possession of eight OHIP cards. There was a street value for these cards. They could be sold.

We had an incident, for example, in one hospital where a pregnant woman presented a card and only by accident the nurse identified—she said, “How did you do this? You gave birth about three months ago.” On investigation it turned out that a woman had simply passed off her card to a sister from another country who then came.

Ms Lankin: That would be something the forensic investigators in the Ministry of Health would be notified of or there would be another investigation. For the purposes of audit, is there a requirement for you to see the patient's name attached to the actual OHIP billing record?

Mr Peters: Only one of efficiency, because what we would hate to have ministry staff do is, for example, if we want to look at 100 doctor's billings, that they would have to go through and obliterate all the personal identifiers in it. What we have agreed to with the privacy commissioner is that we can indeed see the name, but that's as far as it will go. Actually, they were more generous with us than I thought. I thought we would be in a research-only mode, if you will, but they said—that's the privacy commissioners' ruling—yes, we can retain the records in our working papers provided we obliterate all information that personally identifies that individual, including, incidentally, the health card number.

Ms Lankin: That probably speaks to the issue of technology within the Ministry of Health and how these records are stored and maintained. With a different technological set-up, they would be able to provide you all of the patient's OHIP payment schedule for a particular doctor without the patient's name being attached to it. Because all you need to see is what that doctor is doing and what those records are, right? Is there anything in your audit process that would relate it back to an individual patient's name?

Mr Peters: It would to some extent, because if you look at Bill 159 again, section 14 identifies that we have the right, for audit purposes, to match computer records. If the name happens to be a critical field on which we need to match, then we should have the right to do that. That is provided for in the bill. I think it's section 14(3) of Bill 159.

Ms Lankin: Would it be satisfactory, if in the majority of cases in doing audits of OHIP it is reasonable to

look at the records without a name, that if a particular kind of audit required the name, you go back to the ministry? It would be like two steps, a higher level of access to that information.

Mr Peters: That would be quite fair and that could be built into the act, but it is vital to us that it shall be disclosed. In other words, we would consider it a scope limitation if we couldn't have information to complete our audit.

Ms Lankin: So whatever information is absolutely required must be guaranteed by the legislation, but it can be done in such a way at every step along the way to protect the personal health information of someone and their personal identifier, until such time as the nature of an audit requires that piece of information.

Mr Peters: Very much so, because one of the things that is paramount under our legislation is that we can follow payments out of the consolidated revenue fund, and we really are looking at all situations where there is a health service provider. Virtually all health service providers must support their demand for public money from the taxpayer with an identification of the services they render. In most instances that information includes the identifier of the people who ultimately receive the service. If this chain were broken, we could not perform our duties under section 9 of the Audit Act, which is to follow properly where taxpayers' money has gone.

Mr Bob Wood (London West): Has the privacy commissioner seen your proposed amendment and does she endorse it?

Mr Peters: Yes, absolutely. As I said in my presentation—and I will provide it to you—I have wording here that was provided by Ms Cavoukian's office.

Mr Wood: Does this give you any greater power than the federal auditor has in terms of access to information?

Mr Peters: No, it does not. It is a straightforward process.

Mr John O'Toole (Durham): Thank you, Mr Peters. I have two small questions. I'm wondering if Bill 159 will give the minister or the ministry more power to manage, measure and report program effectiveness. Will Bill 159 give the ministry more power to manage and control the effectiveness of the different programs?

Mr Peters: I can't answer your question because I have not reviewed Bill 159 for that purpose.

Mr O'Toole: A very short question here is, do you think that paper records are more or less secure than digital records?

Mr Peters: No, they are as secure, we would think.

Mr O'Toole: Paper and digital are both the same level of security in terms of general access?

Mr Peters: It's a rather interesting question and I think you particularly may appreciate the answer. If information is properly password-protected and the system security is properly exercised, I would consider computer records to some extent safer than paper records. But that is a big "if" and this is something we look at continually as to whether there is adequate security over the computer systems.

Mr O'Toole: Isn't that where we generally have to go? Whether it's at the federal level or the provincial level, or in fact the municipal level, the way information moves today, that is an inevitable consequence of the technology and the way business is transacted today.

Mr Peters: Absolutely, and therefore every action must be taken by ministries and agencies and crown-controlled corporations to ensure that those systems are secure, because it is a fact of life that much of the business of government today could not be carried out without adequate information technology support.

The Chair: Thank you, Mr Peters. We appreciate your coming before us here this morning. Good luck in public accounts.

Mr Peters: Thank you. Just a quick question: was the committee interested in Ms Cavoukian's—

The Chair: Very much so, please. In fact, you can leave that with the clerk. Thank you.

Ms Lankin: Is there a copy of your written submission as well that could be circulated?

Mr Peters: Yes, there is one, but it has to be checked against delivery.

0930

ONTARIO MEDICAL ASSOCIATION

The Chair: Our next presentation will be from the Ontario Medical Association. Good morning and welcome to the committee.

Dr Albert Schumacher: Thank you. Good morning. I'm Albert Schumacher, President of the Ontario Medical Association and a family physician from Windsor. Barb LeBlanc from the OMA staff is with me to assist during the question period.

I come before the committee today with some ambivalence, since it is not clear to me that Bill 159, at least in its present form, provides a useful frame of reference for our dialogue. After this committee received technical briefings from the federal and provincial privacy commissioners, the OMA hoped that the formal committee process would be delayed so that the Ministry of Health and Long-Term Care could redraft the bill in order to address the serious concerns that were raised.

We supported this approach for a couple of reasons: first, it seemed like a constructive way to go and, second, it meant that we wouldn't have to sit before you today and state, in no uncertain terms, that we think Bill 159 is not an appropriate piece of legislation as it is written. The OMA has been actively, and we believe constructively, involved in health privacy since we began this process in 1995, but we are feeling extremely frustrated that we've seen very little movement on the key issues. Let me be clear: we support the need for this type of legislation, but if, and only if, it is substantially changed.

Doctors and patients are very disturbed by this legislation for a number of reasons, not the least of which is its impact on the very heart of the doctor-patient relationship. I am very uncomfortable when I hear ministry officials and others talking in very impersonal terms

about their information needs, without appearing to realize that for my patients this isn't about bits of data; it's about their innermost emotional and personal secrets. It's about a bill that would allow the government to have access to those secrets with no patient control.

As a physician, I am in a unique and privileged position of trust. People tell me things that they do not readily share with other people, even their closest family and friends. They tell me things that they're embarrassed about, like parental abuse; they tell me things they're fearful of, like the fact that the chest pains they've had may affect their job status; and they tell me things that might cause them severe stigma if known publicly, like alcohol or drug abuse. They also talk with me about matters linked to their genetics and their family history, things that would have repercussions for their entire family if known. Patients don't share this information with me casually, but they do share it because they know that it's necessary so that I can help them. They also know that I have a duty to maintain their confidentiality and that their secrets are safe with me. That bond of trust is critical to the practice of medicine and must not be underestimated by this committee. Without it, patients may be less likely to share vital information with their doctors. I worry that if you don't give me good information, I can't give you good care.

As we look at the Personal Health Information Privacy Act, we should keep foremost in our minds the fact that patient information is shared in a very sensitive and personal context, and although we might imagine many different and interesting uses for the information, it is not a commodity for common use and trade. In its current form, Bill 159 sets the stage to open patients' medical information to unprecedented access and to undermine the trust relationship that exists between physicians and their patients.

The government correctly argues that it needs information to manage the health care system and to more effectively plan for the future. I believe it's critically important that we move forward to utilize information technology in order to improve patient care and system management. I do not believe, however, that the development of information technology should come at the expense of patient privacy.

Despite having asked repeatedly, the OMA has yet to receive a clear answer as to why the minister, the ministry and the district health councils need complete access to patients' charts for planning purposes. The ministry can capture all of the information it needs for planning by using sophisticated epidemiological information. They do not need access to identifiable individual patient information.

The same holds true for system management. Information that demonstrates patterns of usage by demographic cohort and geographic area provides very useful information for the ministry to fulfill its legitimate planning and management functions. The government does not need to give itself the power to force health care

providers to surrender private patient records for these purposes.

Bill 159 also gives the government the power to regulate how patient information will be coded and stored and with whom it will reside. The OMA believes that these are important policy questions in their own right and should not be buried in the vast regulation-making powers of Bill 159. The government should not be able to force the standardization of patient records or to force all patient information to be stored in massive government data repositories. Instead, the collection of data should be done through a consensual process involving both the physicians and, most importantly, the patients.

I'd just like to return to my previous point relating to ministry access to information for a moment and to clearly state for the record that the OMA does not support the provisions of Bill 159 that would allow the government to force the disclosure of patient charts that are held by physicians. I would like to reiterate in the strongest possible terms the fact that the OMA objects to section 31 of the proposed act and believes that it must be deleted entirely. The OMA does not believe that Bill 159 has any possible claims to legitimacy as a privacy bill if it does not rectify the sweeping intrusion by the government into its citizens' personal lives. This legislation should be about the protection of data and not the collection of data.

The OMA has prepared extensive written comments on Bill 159 which have been circulated; however, the more closely we examine the legislation, the more we realize that we don't need to simply rewrite one section or another of the bill. Instead, we need to start by fundamentally rethinking the underpinnings of the legislation. The OMA remains committed to provincial legislation that is specific to health care, and we cannot and do not support Bill 159 in the form that is before us.

I recognize that I have not addressed many of the specifics in Bill 159 in the time allotted to us today, but I hope that my comments have helped committee members to more clearly understand the strong stand that physicians take on this issue as advocates for our patients. I would be pleased to use our remaining time for questions.

The Chair: We have about three minutes per caucus. This time we'll start with Ms Lankin.

Ms Lankin: Thank you very much. I appreciate your presentation. Yesterday we heard from a member of your association, Dr Franklin from London, who took a very different position and suggested to us that the privacy requirements in Bill 159 were onerous, in particular for group physician practices, although it would be difficult for sole practitioners as well. He was of the opinion that there would be requirements for additional security and those sorts of things. I have to say it left most of us feeling very uncomfortable about how private our records are now in doctors' offices.

I take from the presentation you made today and from the comments you made earlier that the OMA, representing doctors, by and large feels that it's a key responsibility of a physician to maintain patient confidentiality,

that patient-doctor relationships are reliant on that. At this point in time, I think you would disagree with the presentation we've heard from Dr Franklin then.

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Dr Schumacher: Again, not having heard or read his transcripts, I want to reiterate that the first premise of any physician in practice is to do no harm. We certainly know that the information contained in probably everyone's chart in some way or another can harm that patient, so one of our first duties is to make sure that absolute confidence is maintained.

On the issue of how strongly you have to lock up records or how many locks on the doors we've had, on a practical basis we have not, over the last 20 years that I've been in practice, seen violations of this that have certainly come to our attention in any great way.

Ms Lankin: Let me go on to another issue then. You addressed in your presentation support for the need for good information for health systems management. I think we would agree strongly on that. The OMA is involved in participating with the ministry on that; also for good epidemiological research, the kind of development of peer practice, best practices, those sorts of things. We've been told that there are certain circumstances, both in epidemiological study and in systems management, where identifiers are going to be required to do longitudinal studies in order to provide good information. Do you accept that? Do you see any circumstance where identifiers are going to be required? If so, are they the rare minority? What's your opinion on that?

Dr Schumacher: None would come to mind to me that I could describe, so it would certainly have to be something very rare where you would require that to be followed. Certainly in those cases where that would be required, I think it would be paramount to have written patient informed consent to have that happen. But none come to mind.

Ms Lankin: Let me take this one step further. In your defence of protection of privacy of information, in the previous draft of the discussion paper there was the concept of the lockbox. It has been said to us that it should be the patient's right to keep information from you as the doctor, for example, if we are aware of the consequences of that, if we are aware that that means you may not be able to provide the best diagnosis and the best health care, but in a system that's not paternalistic, that is our right as an individual, to control our private information. Is the OMA supportive of a lockbox provision in the legislation?

Dr Schumacher: We are not supportive of the lockbox. We certainly understand the concerns that you raise about the sensitivities of information and not sharing it; however, we are frequently required to seek other opinions, consultations from specialists, where certain things are absolutely critical to the understanding of a patient and how you'll move that forward. Again, I think that in the transmission of that information one tries to certainly be succinct and to be to the point. However, just as you would treat someone who is a diabetic quite differently if

you're a specialist, that's a piece of information you really can't leave out in the even two-sentence discussion of that patient. Similarly, in many circumstances other diagnoses, whether they be heart disease or positive HIV status or other important indicators that affect a whole variety of other conditions and treatment, can't necessarily be well withheld. So, no, we don't agree with the lockbox on that basis.

Mr Wood: Would you support a provincial act that was substantially similar to the federal act?

Dr Schumacher: As this committee is aware, we certainly had problems with the federal legislation. We would like to see a provincial act that would be similar to the federal act so that we could beat it out and have our own act in Ontario. We have some common concerns about the federal act as it's written and we would certainly look forward to an act that would not be ruled substantively dissimilar so that we would be ruled out of order by the feds.

Ms Barbara LeBlanc: I think the other thing is that we're supporting a provincial scheme partly because the federal legislation wasn't drafted with health care in mind and so it doesn't always fit very well. One of the positive things about Bill 159 is the fact that it allows information to move for health care purposes in ways that we think it needs to.

Mr Wood: In 30 seconds, could you describe what changes you'd like to see in the federal act and a provincial act, just to touch on the areas very quickly.

Ms LeBlanc: I don't think we really have any opportunity to change the federal act.

Mr Wood: What I'm saying is, in the drafting of the provincial act, tell us what changes from the federal act you would like to see.

Ms LeBlanc: I think the first thing is that the federal act requires that there be a consent each time information moves within a system. Obviously in health care, among health care providers, that's not necessarily reasonable enough for the hospital circumstance, for example. That's a significant issue.

The other thing that's important, and I'm not sure how we're going to deal with it, is the consent question. The federal act deals with consent. The provincial act also deals with informed consent, and we're going to have to grapple with how we define that. I think those are two of the big issues.

Mr O'Toole: I have a couple of very quick questions. You would agree that in the profession information is shared between practitioners today?

Dr Schumacher: That's correct.

Mr O'Toole: And it's shared in various formats?

Dr Schumacher: Yes, it is.

Mr O'Toole: And for very ethical and professional reasons always.

Dr Schumacher: That's right.

Mr O'Toole: Is the patient always informed?

Dr Schumacher: I believe the patient is usually aware. Certainly when I consult with a consultant, they're aware that I'm going to transmit a referral request

or a letter that accompanies that. The patient will usually ask that the other pertinent documents go forward. So there is usually patient involvement and implied consent in all of those transactions.

In the areas that go outside of my transmitting information to another physician, when it deals with an insurance company or another third party, that certainly requires written consent by the patient. I think most physicians take that further. They provide a typewritten report based upon that written consent. But when the entire chart is requested by the insurer or by a lawyer, physicians will usually go back and check with the patient that that's indeed what they wanted. There's a lot of difference between your entire record and what I transmit for the purposes of a car accident or a lawsuit.

Mr O'Toole: I just have one further small question. On page 2, in the second last paragraph, you go to some length to explain that the government shouldn't be able to standardize patient records. I find it inconceivable that there isn't some uniformity for the transmission, either electronically or in paper form. Without that, the system is completely incomprehensible. If you are insisting that this enforced standardization isn't acceptable to the OMA, what is?

You are sharing data, digital and otherwise, today. You have a format. It's called a language of some sort. I find it incomprehensible that that would be a dismissive part of this legislation, given the fact that today is already here digitally, and if it isn't, they'd better get their heads around it, in my view.

If that can be used in some critical way to be more accountable in the system, even if it's in digital format, without the patient identifiers, there is some risk that Erik Peters or others could make some assessments based on this kind of data format much more easily than some years ago. Do you follow the line of thinking? Not only that, it should be uniform across Canada, in my view; Canada shouldn't have different codes in every province. I'd like you to respond to that.

Dr Schumacher: Sure. Let me respond first of all by saying that even with the data that OHIP has tried to organize around diagnostic coding, this has not gone extremely far or served the patient very well, especially from the fact that typically in my office I'm seeing the average patient for three or four diagnoses at the same time and actually treating all three or four of those things. There's only one coding that OHIP can accept or is even interested in. In fact, the statistical data from that code has never been very good because of the way it has been managed. So it is not as good as the information in the hospitals.

Second, a lot of innovative charting has been developed, not by the ministry or by the government but indeed by physicians. I would point out and highlight the well baby record used in Ontario, which was developed by two family physicians in Goderich, as an excellent way of charting and managing our newest residents.

Similarly, the maternity documentation is something that's undergoing continuous review, that is being de-

veloped and pushed forward. It's a standard that's taken up by all the delivery rooms in the hospitals and enforced in that way.

I think there is a lot of innovation that is always moving forward in record-keeping to make it not only more patient-friendly but physician-friendly and in a form usable by all. One would hate to see it very limited or constrained in any way as to affect progress.

0950

Ms LeBlanc: Just to add to that, the OMA is working with the ministry on developing the core data set emergency health records, and we think that standardizing certain information is very useful. You have to realize that what we're talking about is the entirety of the patient chart.

Mrs McLeod: I have one question and then a question from my colleague. I completely share your concerns about the breadth of directed disclosure, where the minister can require you to disclose confidential health records. I think the breadth of that in the bill has raised some questions about what is the government's intent in bringing forward the bill—is it really to get better access for government to health information?—as opposed to the stated intent, which I think you would support, which is the assurance of health information among the health care professionals that need to share that information for the better management of the patient.

You oppose the lockbox, which is in the federal legislation. Do you see the lockbox as inhibiting the ability to share that needed information? You seem to suggest that. Is that your primary concern about the federal legislation and is it therefore your main reason for feeling that Ontario legislation is needed, to ensure that we don't have a lockbox through the federal legislation that would prohibit the sharing of information? If that's not the primary reason for Ontario legislation, what gap do you think is there that we need legislation to fill right now?

Dr Schumacher: I think the reason for requiring the legislation—and you asked a bigger question going back—is that we need to make sure that health information which is now collected and dealt with by many people other than doctors, nurses and hospitals is treated in the same way with the same constraints on it and the same attention to privacy that my profession has dealt with over the last 200 years in Ontario. We know that the information in many other people's records will contain many elements that are very similar, so we want to make sure that in the health context that's taken into account.

The lockbox is not the only concern as far as the federal legislation goes. Certainly there are logistical problems with going into a record and having two parts, the secret part and the not-secret part, that can be shared and disclosed. As I mentioned, sometimes the secret part is very important and critical for many other areas of care. I think Ontario needs its own legislation, because I've always felt that Ontario is one of the forerunners in the provision of health care in Canada. We certainly lead many of the other provinces in our developments, in our technology and so forth, and I hope we continue to in the

future. I think it's important that we have our own health privacy legislation for that reason. I am adamant in seeking the protection of the patient as something that actually works.

Mr John Gerretsen (Kingston and the Islands): I'd like to ask you a question with respect to a presentation that was made yesterday here. There was false information in medical records of a doctor who was convicted of fraud. What is the OMA's position on that? Do you support the idea that obvious erroneous information, as a result of court cases etc, that's contained in a patient's file should be deleted by the ministry as a matter of course, rather than the lengthy process that this individual had to go through? There are still no assurances that the erroneous information will be taken from his file. Does the OMA have a position on that kind of situation?

Dr Schumacher: It's certainly our position that in cases of fraud, OHIP needs to deal with and correct that information. That should be done without any lengthy delay or process. I can tell you that the medical record kept by any physician who has been charged with that kind of fraud on a criminal basis becomes completely irrelevant and would be ignored by anyone else in my profession. Certainly, any insurers or other people who may have contact with that need to treat that information in that same fashion.

Mr Gerretsen: You've made 23 recommendations here in your lengthier report. Have you shared these with the government before and have you had any response to them at all?

Ms LeBlanc: We've been involved in this process for five years now and this is merely the latest iteration of concerns that have been on the table several times at this stage of the game. We've been dealing with Ministry of Health staff very closely.

The Chair: Thank you very much for making your presentation before us here this morning.

ONTARIO PHARMACISTS' ASSOCIATION

The Chair: Our next presentation will be from the Ontario Pharmacists' Association. Perhaps we could get everyone to take their discussions outside, please.

Welcome to the committee. Again, we have 20 minutes for your presentation, for you to divide as you see fit between either an oral presentation or a question-and-answer period.

Ms Barbara Stuart: Good morning, Mr Chairman and committee members. My name is Barbara Stuart. I'm the CEO of the Ontario Pharmacists' Association. Thank you for allowing us to make our submission today.

Before we begin, I'd like to introduce our delegates. To my left, Sal Cimino is a practising licensed pharmacist and is the chairman of OPA's board of directors. To his left is Gerry Cook, also a practising licensed pharmacist and a member of the executive committee of OPA's board of directors. To my immediate right is Holly Rasky, who is our director of government relations

and general counsel. Ethan Poskanzer, to Holly's right, is our external legal counsel.

In terms of who we are, we've included in your brief an overview of OPA. I think most of you know who we are. Also included for your reference are two of our previous submissions that we've made to the government on the issue of the privacy legislation.

We have a few concerns, and we'd like to address those this morning. There are only about three or four in number, so we'll be brief.

We support the need for legislation which establishes clear rules respecting the confidentiality of health information, the circumstances in which disclosure is permitted and the necessary requirements to obtain patient consent. We also recognize, though, that the requirements for patient confidentiality should not impede the ability of health care providers to provide needed medical care to patients. As a result, we support the legislation's goal of safeguarding the privacy rights of individuals, while at the same time ensuring that health care providers have ready access to personal health information.

We are concerned, though, that some portions of the act are unclear or too broad, thus defeating these purposes. I'll go right to our first point of concern. It refers to section 29, the ability of pharmacists to access needed health information from prescribers. First and foremost, it is essential that pharmacists, in order to perform their role in the health care system, be able to obtain all health information necessary to allow pharmacists to do four things: (1) to provide optimal patient care; (2) to determine whether the patient meets criteria for government-related programs; (3) to be compensated for their services; and, (4) to comply with all legal requirements. Section 29 of the act should be revised to clearly provide that prescribers may provide personal health information to pharmacists for all of these reasons.

The problem is that the current wording of section 29 could be interpreted as only allowing the prescriber to release this information so that the prescriber can get paid. It is not clear that the language authorizes one health care professional to release information to another so that the second health care professional may obtain reimbursement. As a result, it is not entirely clear that a physician is permitted to disclose health care information to a pharmacist under section 29 so that the pharmacist may obtain payment. Further, it's not clear that such disclosure is permitted where it is necessary for a pharmacist to comply with relevant statutory obligations.

A related concern is that other legislation that impacts on health information, such as the Medicine Act, needs to be reviewed and revised to ensure that a single, clear set of rules applies to the disclosure of personal health information. There is little point in allowing prescribers to provide information to a pharmacist under one act while another act may be interpreted as limiting or prohibiting such disclosure.

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Under the regulations to the Medicine Act, it is not considered to be professional misconduct for a doctor to

give information about a patient, including access to the patient's records, to a pharmacist for "the purpose of providing care to the patient." What is meant by the phrase "providing care" seems to vary, depending upon the particular physician. Unfortunately, many prescribers take a narrow view of what information they can or will provide to a pharmacist. This can have a significant impact on the pharmacist's ability to provide optimal care, follow the law and obtain payment for his or her services.

The reason section 29 is so important is that in order to fill a prescription lawfully and in order to ensure proper payment, the pharmacist may need to know why the prescription was written. This is particularly true when dealing with the interchangeability of products on the Ontario Drug Benefit Formulary.

It is essential that a pharmacist be able to obtain reliable information from the attending physician since an individual patient may not be aware of the diagnosis or may forget important details of treatment. Further, the pharmacist may have no direct interaction with the patient, whose prescription may be presented by a person acting on the patient's behalf rather than directly by the patient at the pharmacy.

While pharmacists have a good working relationship with the medical profession, our members tell us that prescribers often refuse to provide them with necessary patient information, stating that it would be professional misconduct to do so as the information is related to questions of reimbursement and not relevant to patient care. However, as we just explained, pharmacists require this information to be able to dispense medications following the rules established by the government and to provide optimal patient care.

Just as it is critical for physicians to have all relevant medical information to permit them to perform their tasks, so too is it critical for pharmacists to have all relevant information to permit them to perform their tasks. Prescribers, given their role in the health care system, generally are the gatekeepers of patient information. It is essential, however, that the law permit professionals, who must work as a team, to have access to necessary information in order to adequately and lawfully fulfill their role as health care providers.

Item number 2 of concern is the definition of "operators." I would now like to turn to the difficulty we foresee in determining which individual in a particular pharmacy is the health information custodian for the purposes of the act. This difficulty arises from the term "a person who operates" in paragraph 4 of the definition of health information custodian. Bill 159 deems "a person who operates ... a pharmacy" as a health information custodian. The meaning and extent of who is included in this definition has a significant impact on the interpretation and application of the entire act.

The problem is, in the case of a pharmacy, the person who operates the pharmacy could be an individual store owner; two or more individuals who are in partnership with one another; a corporate head office, as may be the case for a chain of stores; or a non-pharmacy, non-health-

care-related corporation, such as a supermarket which operates a pharmacy in one or more of its stores.

The definition of "a person who operates ... a pharmacy" will impact on how the act applies and is interpreted, as the operator of the pharmacy is the custodian of the personal health information.

It may be useful where there is more than one person or entity which may be considered to be the health care custodian to allow the individuals to designate among themselves who will be the health care custodian for the purposes of the act in order to avoid these difficulties.

A related concern is the implications of the definition of "person who is employed by or in the service of a health information custodian." Section 16 of the act deems these individuals as acting on behalf of the custodian "when exercising powers or performing duties for or on behalf of the custodian." It does not appear that these powers and duties are required to be tied to the provision of health care. Therefore, if the custodian is a supermarket, then employees who are not involved in the providing of health care or related services, such as the butcher, may be deemed to be acting on behalf of the custodian. We are concerned that this is too broad. Is the supermarket supposed to ensure that the butcher does not have any access to personal health information, and ensure that if he or she does, that the collection is done in accordance with the rules? What is the butcher to do if Mrs Smith decides to tell him or her about her arthritis while the meat order is being filled?

Consideration should be given to including a provision which limits the application of the act to persons who perform services related to the delivery of health care on behalf of the custodian.

Item 3 of our concern is the requirement to keep the identity of individuals separate from personal health information, which is subsection 12(5). We are concerned that the requirements of this section may result in compromised patient care. This section requires custodians, when using, collecting or disclosing personal health information, to do so in a manner, to the extent reasonably possible, that conceals the identity of the individual. We appreciate that the section includes the proviso that the purpose of the collection, use or disclosure of the information still be met. However, these requirements are too onerous and ambiguous in the context of a pharmacy. We recognize it is important to ensure that such information is kept confidential and secure. However, requiring the segregation of all patient information would be onerous, time-consuming and potentially dangerous for the patient; for example, separating the name from the medication on the prescription bottle.

Item 4, and it's our last item of concern, is duties with respect to accuracy, and again that is in section 24(2). It's the final concern, because we feel it's not reasonable to require the health information custodian to ensure that the information is "accurate, complete and not misleading" when disclosing the information. A pharmacist cannot, in all circumstances, ensure that the information provided to him or her meets these standards since the

pharmacist often is required to rely on others, whether it is the patient, the prescriber or another source, for that information.

Mr Chairman, those are our comments. Again, I thank you for the opportunity to present them to you. We would be pleased to answer any questions.

The Chair: That leaves us three minutes per caucus for questions. This time we'll start with the government.

Mr Wood: That was a very clear and helpful presentation. I have no questions, but thank you very much for coming.

Mrs McLeod: I appreciate a number of points you have raised that we hadn't heard before. One of them is that whole issue around payment, which I hadn't understood until I realized that you're now dealing in some cases with differential uses of certain drugs and the only way you can find out whether or not it is in fact on the drug plan, whether the individual is going to be covered as well as whether the pharmacist will get paid, is to call the doctor and find out whether or not this is under the formulary a prescribed use of that drug. Thank you for bringing that to our attention.

I was a little less sure about that person who operates a pharmacy question because it seems to me—God forbid I should be speaking for the government, but the answer the government might give is, yes, that owner of the supermarket is required to make sure that the health records that are kept in the pharmacy section are secure and that there is not access to the butcher of an actual record. I would appreciate some further comment on that.

Also, we've had a number of presentations from the colleges, including the Ontario College of Pharmacists, and one of the concerns they have is that the colleges should be exempt so that they can carry out their regulatory functions and they can access the records they need for that purpose. My main question, among others I'd like to ask you today, is, if the colleges are exempt, as the regulatory bodies, and we have Ontario legislation that deals with front-line providers, does that create two sets of rules, in your view, that the providers are operating under, or is that something you'd be fairly comfortable with?

Mrs Holly Rasky: Thank you for the question. I don't think there would be a problem with there being two sets of rules, because the purposes of the colleges' business would be different from the fundamental business of the health care providers. I understand that they are regulated under the Regulated Health Professions Act, and if it's their position that they shouldn't be covered under this legislation, as I understand that to be, then I don't think we have a reason to disagree with that. There are safeguards in place.

Mrs McLeod: Could I ask you too, if I have another moment, about the lockbox provisions that are in the federal legislation. The federal legislation, as I understand it, would certainly apply to pharmacies if we don't have Ontario legislation. Do you see the provision of a lockbox as making it difficult for pharmacists to be able to contribute fully to patient management, or, for example,

if you think somebody is doctor-hopping with drug prescriptions, can you spot that through the prescribing as opposed to having broader access to the patient records?

Ms Rasky: I think we were pleased to see the removal of the lockbox provision from the provincial act. I think it's dangerous to have. Patients may not necessarily appreciate the information and the sensitivity of the use of that information in their own care. For example, you may not be aware, but one pharmacy cannot provide information to another pharmacy, even if they're in the same chain. If you have a situation where a patient put a lockbox around certain information in one store and the other store is trying to fill a prescription, it's very hard then for the pharmacist to identify potential dangers between interaction of the possible medication, or other information a pharmacist might need to get the information to provide the best treatment. It's important that the pharmacists and the health care providers need to have a certain amount of information to provide sufficient patient care and I think that's just a very important principle. That's part of the balancing between a patient's rights and the ability of health care providers to do their job.

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Ms Lankin: Two or three things. Let me start at the tail end of your presentation. I'm perplexed by your concerns around section 24(2), which says that people who are going to disclose information have to take reasonable steps to ensure that it's accurate. Presumably your records contain information about prescriptions that have been written and have been filled, and the registration information in most cases. Presumably you take reasonable steps as you're entering that into your system when you're talking to the individual patient or the person presenting on behalf of the patient. I am often asked, "Is your address still such-and-such, Ms Lankin?" I don't understand your concern about that section, that that's an unreasonable requirement.

Ms Rasky: I guess it's a concern that arises out of, in particular, a government program called the limited use program. Under that program the patient is only covered for certain prescriptions provided that they've taken certain medications, step-up therapy. You don't get the big drug until you've tried other medication. There is need for clarity with some of these programs about what the obligation of the pharmacist is to obtain confirmation about whether the patient has—

Ms Lankin: That really has nothing to do with disclosing information. The circumstances in which you disclose information as a health information custodian are limited, right?

Ms Rasky: Yes. I guess our concern is whether the obligation would extend to actually phoning the physician to ensure that patient information we got perhaps from the patient or one of the patient's health care givers is accurate. It's hard to know what "reasonable steps" means, that's all. Just some clarity would be helpful.

Mr Gerry Cook: The concern is largely with information we don't receive at first hand but receive from a

second party. We can't actually take the steps to ensure whether that information is accurate or not.

Ms Lankin: I think what most pharmacists do now would be deemed to be reasonable, but it's something we could get the ministry's interpretation of and that might give you ease.

With respect to your concern about keeping the identity of individuals separate from personal health information, again, this is a section that really steps out in a number of ways and says "where possible." It's not an absolute requirement. I would think all of us concerned about the privacy of our health information would want all reasonable steps to be taken. It says that if you can do it without private health information, just on registration, do it just on registration. If you've got to go the next step, take this precaution. If you can do it by keeping separate the identifier from that and it still meets the purpose of why you're collecting the information, then do that. If the purpose of a pharmacy collecting the information is to be able, when the person comes back, to check and see what their prior prescriptions are and ensure that there aren't any contraindications or whatever, I can't see how anyone would oblige you under this legislation to have taken the step and to keep the information separate. Again, I don't understand the nature of the concern here. Is it something you just need clarification on from the ministry and a sense of ease about what's expected of you?

Ms Rasky: I think that's exactly right. Our sense is that the legislation is drafted to try and catch a number of instances, including different kinds of health care providers. Our concern is simply that the rules be clear, easy to follow and not interfere in patient care. A clarification is really what we'd be looking for there.

Ms Lankin: My last question is with respect to your concern under section 29. Right at the beginning, section 29 indicates that a health information custodian may disclose personal health information to another health information custodian "if the disclosure is made for the purpose of providing, or assisting in providing, health care to the individual." Although we've had a number of suggestions of amendments that should be made to that section, you're saying you think what will happen under that is you will only be given the information if it's for the purpose of payment. Yet it says here, "for the purposes of providing, or assisting in" the provision of health care. There may be a need for a better understanding between doctors and pharmacists, but it would seem to me that what you do is the provision of health care and that you would be covered under that.

Tell me exactly what your concern is, and would you also comment on the overarching statement there where it says the person's custodian "may disclose personal health information." We've heard a number of comments that that "may" is too discretionary. Could you comment on the discretionary aspect of it and comment on what your actual concern is, given clause (a), which says you should get the information?

Ms Rasky: I think part of the concern is a drafting issue. I may be overstepping, but my sense is the inten-

tion was to allow exactly for the provision of the information, as you say. My concern is that in the drafting it doesn't clearly appear to allow for the provision of the information from one health care provider to another for the purpose of that second health care provider to get paid. It just says that they can release the information and it could be—you see, as you read at, for example, 29(1) that you can disclose the personal health information relating to an individual, "(c) for the purpose of obtaining payment...."

Ms Lankin: But sub (a)—

The Chair: Sorry, Ms Lankin. We've hit our 20 minutes.

Ms Lankin: It says, "for the purpose of providing, or assisting in" health care.

Mr Cook: I think the concern is that you wouldn't have needed a separate section for payment if that was encompassed by (a). So payment is a separate issue, and the problem is that while the legislation is clear as to whom you provide the information to in (a), it's not that clear as to whom you provide the information to in the other sections. It's largely a drafting problem, but I think the intent is to allow for the sharing of that information for all of those purposes. It's just that in some cases they tell you whom you provide the information to; in some cases they tell you the purpose for which the information is provided.

Ms Stuart: I would just add to that, if I may, very quickly that all three questions that you ask really revolve around the broadness of the wording. It's not so much that the content or the intent is not understood; it's that when several different people read it or try to understand it, they come up with different interpretations.

The Chair: Thank you very much for coming before us this morning.

PSYCHIATRIC PATIENT ADVOCATE OFFICE

The Chair: Our next presentation will be from the Psychiatric Patient Advocate Office. Good morning and welcome to the committee.

Mr Vahe Kehyayan: Good morning. My name is Vahe Kehyayan. I'm the director of the Psychiatric Patient Advocate Office. With me are Lora Patton, our legal counsel, and David Simpson, our systemic policy adviser.

We would like to thank the committee for its invitation to further consult on the proposed personal health information bill. The PPAO is a quasi-independent program of the Ministry of Health and Long-Term Care which was created in 1983, in part to advocate on behalf of the psychiatric patients in the provincial psychiatric hospitals, including those recently divested.

We are here before the committee to raise concerns with the proposed bill from the perspective of our clients, who are the seriously mentally ill. Although some of the issues raised by our office will echo those of others, we

hope to provide this committee with some insight into the specific areas of concern for our clients.

We strongly support the government's recognition of the need for clear, effective legislation that will protect the personal health information of the people of Ontario. We also recognize the challenges in creating legislation that enhances health care delivery while ensuring that individual privacy is protected.

We also support the decision to incorporate an impartial oversight body to ensure compliance with the law and to resolve disputes. The selection of the privacy commissioner to fulfill this role allows a single point of contact for individuals seeking adjudication of complaints and will allow a single body to review the implementation, application and compliance with the law.

In addition, we are pleased that the bill incorporates the concept of consent from the Health Care Consent Act. The definition of consent as provided in the bill requires that a valid consent be specific, informed, voluntary and not obtained through misrepresentation or fraud. These elements have a profound impact on the balance of the bill, setting a high standard for an individual's choice in the process. That high standard must be maintained in each provision of the bill and remembered when drafting all exclusions to that basic principle.

We believe that further amendments are necessary to strengthen the bill's ability to protect private health information and enhance public confidence in the integrity of the health care system.

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Our submission which is before you will primarily address three areas of concern: (1) the erosion of consent-based disclosure; (2) the decreased access to one's own personal health information; and (3) the lack of sufficient enforcement mechanisms. I'm going to ask Lora Patton to comment on these three areas.

Ms Lora Patton: Good morning, Mr Chair, members of the committee. As Mr Kehyayan has stated, I am going to begin discussing the erosion of consent-based disclosure that we find in the bill, and before we begin dealing with specifics I'd like to take a step back and comment on the general thrust and the purpose of the legislation.

The protection of individual health information is fundamental to our clients. Those suffering from mental illness continue to face discrimination from many sources and unanticipated disclosures could cause significant harm. Disclosure of information relating to diagnosis, hospitalization and treatment could adversely impact personal relationships, employment and insurance coverage, as well as causing embarrassment due to the stigma still associated with mental illness.

Beyond the potential harm resulting from disclosure, the individual's inability to control that disclosure and the inability to track potential distribution erodes our clients' comfort in any protective legislation. Our clients have an expectation that their private health information will be protected and only disclosed with their knowledge and consent. They have an expectation that the

government does not have unlimited access to that information and an expectation that the government or health information custodians cannot pass that information to other parties for undefined purposes.

This fundamental belief that information will be kept confidential by a health care practitioner is essential to maintain trust with the health care system to encourage individuals to seek diagnosis and treatment, and to confide sensitive information that may be necessary for that treatment.

To illustrate the importance of the public's trust, we can look to recent changes to the Mental Health Act. In that act, new changes create community treatment orders, or CTOs. CTOs can allow an individual to remain in or return to the community by providing a comprehensive system of treatment, care and supervision. A CTO may be thought advantageous by the treatment team for a number of individuals who would otherwise be required to stay in a hospital for long periods of time.

One problem with the CTO scheme, however, is the lack of protection surrounding personal health information. At the time a CTO is being considered, a physician may discuss that individual's health information with a number of organizations, professionals or lay people in the community. Consultations may take place with landlords, family members and any other person who may be involved in the treatment plan, all without the specific consent of the individual.

As a consequence of these provisions, a number of our clients are extremely reluctant to enter a CTO. While a CTO may provide increased freedoms and access to specialized programs, our clients are concerned that their information will not be properly protected within this scheme.

Privacy legislation must address the public's concerns relating to confidentiality and ensure that specific, informed and voluntary consent is obtained whenever identifiable personal mental health information is disclosed. This bill, despite the specific provisions of consent, as set out in section 21, fails to meet the basic premise that disclosure requires consent and consequently it fails to meet the privacy expectations of our clients.

The bill grants broad powers to the Minister of Health and Long-Term Care to obtain and disclose personal health information. Subsection 30(5), for example, allows disclosure by the minister for the purpose of managing the health care system. This clause exemplifies the excessively broad drafting of exceptions to basic privacy protections. It is unclear what types of services would be included in the phrase "for the purpose of management of the health care system," and it is unclear what type of programs would be granted access through the regulations.

Section 30 of the bill provides a number of such broad, undefined exceptions to individual privacy rights. Although the general principles contained in section 12 indicate that only the minimum amount of information necessary shall be disclosed, it is uncertain on the surface

of the bill how these protections will mesh with the balance of the legislation.

Similar to the minister's powers, under section 29 a health information custodian can disclose information to a hospital or a physician, for example, for the purpose of providing health care without the consent of that individual. This section again fails to recognize individual choice in the disclosure of information and that individual's right to withhold information and take responsibility for any withholding.

In addition to the powers of the minister and health information custodians to access and disclose information, the bill outlines a number of areas in which consent is deemed. For example, section 30(1)(c) allows a health information custodian to disclose information for health screening programs unless specifically directed otherwise, by either the client or the substitute decision-maker.

Similarly, section 29 of the bill allows facilities to assume a patient's consent to disclose his or her presence as a patient in the facility and his or her general health status. Such opt-out clauses do not satisfy the elements of consent as outlined in section 21.

Many of the PPAO's clients may be acutely ill, and even if they become aware of the negative-option consent provisions, may be unable to specifically express refusal. Further, as a result of their illness, they may not be able to understand the consequences or ramifications of consent at the time of admission. It is unreasonable to place the onus on the individual to initiate discussions and then express his or her feelings regarding disclosure of information in any circumstances.

As for our recommendations, the PPAO recommends that the very structure of the bill be revisited, with a consistent emphasis on consent-based disclosure. We recommend that the legislation require a positive act of consent prior to disclosures of any nature.

The definition of "consent," which is already outlined in section 21, and the limits on disclosure in section 12, are integral to the bill, laying the building blocks for privacy. However, there are too many exceptions, inconsistencies and unclear provisions to ensure that these concepts will read as a fundamental section in its interpretation. The PPAO recommends that the exceptions to consent-based disclosure be carefully articulated in the bill and the purposes of the exceptions be carefully defined.

The PPAO supports and encourages the use of a locked box system, a system that allows an individual the statutory right to block the transfer of any part of his or her personal health information. Such a mechanism resolves some of the concerns outlined above regarding disclosures which are not based on consent.

In addition, we recommend that forms which are executed consenting to the disclosure of information be standardized, as is done with the Mental Health Act in form 14. The consent forms must make clear the extent of the information being released by the individual, the purposes for which the information is being released and any limits or conditions on the disclosure, with an expiry

date for the period that the release is valid for. There should also be a standardized method for withdrawing consent within the legislation.

Also fundamental to any information privacy legislation is reasonable access to one's own information. The proposed privacy legislation will replace sections of the Mental Health Act with respect to patient access to his or her clinical records. The current level of protection enjoyed by patients must be continued. There is a detailed list of the Mental Health Act provisions located in our written submission. I believe it's on page 5, for your reference.

Under the Mental Health Act, a facility must respond to a request to access a file within seven days. This bill allows the health care custodian 30 days to respond. Further, the health information custodian may delay a response for successive 30-day periods at his or her own discretion. We support the timelines that are currently available under the Mental Health Act.

The proposed legislation provides for a number of situations in which a health information custodian can refuse access to an individual's file. Under the Mental Health Act, only the Consent and Capacity Board has the authority to withhold a record, and then only when there is a demonstrable safety risk. Again, we would support provisions that reflect the MHA.

The PPAO also recommends that any person who is denied access to his or her own health information be given independent rights advice, with clear access to an appeal mechanism. We further recommend that the Consent and Capacity Board be given jurisdiction to review complaints under this particular section, as that board has particular expertise in the area of mental competency.

The right to examine one's own records may be further complicated by the potential to levy fees for access. The cost of fees may be preventive to our seriously mentally ill clients, as many are indigent and receive social assistance. In addition to costs that may be charged to simply view a record, costs may be charged to copy that record. The PPAO recommends that no new fees be instituted to view a record. We also recommend that there be a means of reducing or waiving photocopying costs in accordance with a financial means test where the cost acts as a barrier to access.

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The incorporation of the privacy commissioner as an oversight body represents a significant change in the enforcement structure of the bill. However, the proposed legislation stops short of providing the commissioner's office with sufficient powers to ensure compliance with the legislation. The PPAO recommends that the commissioner be given clear and full authority to conduct independent audits of the policies and procedures of all health information custodians. Power must be granted to allow full complaints investigations. Finally, the commissioner must have the power to enforce decisions and to compel compliance with the legislation.

The PPAO also recommends wide-based education to further promote compliance. Education programs will

assist all people affected by the legislation, including health information custodians, health care workers, government and the general public, to obtain and understand their rights and responsibilities under the act.

In conclusion, the PPAO supports some of the steps taken to date with respect to this proposed legislation. A bill of this nature is long overdue and the momentum behind this draft document is encouraging. We support attempts to strengthen this document, to make the changes that are necessary while ensuring that the bill moves forward to completion.

Prior to making specific amendments to the bill, we ask that the committee take a step back from the individual provisions and review the proposed legislation as a whole. Section 12 outlines the guiding principles, the context against which all other parts of the bill are read and measured. These principles must inform the balance of the provisions to ensure consistency and clarity.

Further, if the purpose of this legislation is truly to protect individual privacy values, the bill must be revisited with a view to ensuring specific, informed and voluntary consent, as is outlined in section 21. The current bill falls short of this value by allowing broad, cryptic exceptions to consent-based disclosure and negative-option consent. This issue must be answered before the public and particularly the seriously mentally ill will have any confidence that the health care system truly protects individual information. Thank you.

The Chair: That leaves us about a minute and a half per caucus, so one question with preamble, two without. We'll start with the official opposition.

Mrs McLeod: How about half a preamble?

I very much appreciate your presentation, because you've very thoughtfully raised some issues that we need to think about.

I want to deal specifically with the lockbox. You haven't called it a lockbox in your presentation, but it's the ability of the individual patient to say whether or not the record will be disclosed or will be locked, or some part of it will be locked. You have said that in emergency situations, under the Health Care Consent Act, which I assume means competency—

Failure of sound system.

Mrs McLeod: —who the mental health professional believes is suicidal but who is obviously competent under the Health Care Consent Act and who, for all kinds of emotional reasons, is not prepared to let that professional release information. Would that constitute an emergency in which there should be an ability to share information without consent?

Ms Patton: If we're assuming she's competent and assuming that the substitute decision-maker isn't involved, I think that may be a circumstance where it may be appropriate. Again, just as a broad hypothetical, I can imagine that may be an issue. In that instance, however, the entry into the locked box would be written down, recorded by the physician, and the patient would be notified. So there may be circumstances like that when access can be gained, but if the patient disputes it later,

then the doctor may have to answer to the circumstances in which—

Mrs McLeod: It actually wasn't hypothetical; it was a case I dealt with in my brief non-political life. It's one that really challenges me around the issue of the lockbox, which I believe in philosophically. I'd like to find a way to allow, in some cases like that, an element of protection, even though it might seem paternalistic.

Ms Patton: I agree that in some cases there should be some mechanism for opening that box, but I think ultimately it comes back to individual choice and an individual has the responsibility. If they choose not to provide history to their doctor, they're going to take responsibility for what happens as a result of that non-disclosure.

Ms Lankin: I want to follow up on that as well. I suppose that happens every day, that someone goes to a doctor and has a certain circumstance and the doctor attempts to take a history related to that and the individual chooses what information to share or not. You trust that as a relationship builds, an individual is going to make a decision as to what the doctor needs to know and/or what is in their best interests. It does seem awfully paternalistic in a day in which we're seeking out various kinds of complementary medicines, alternative medicines, that in this one type of health care under the health care system someone else determines what's best for you.

On the other hand—and let me throw another issue on the table—in this health care system, which is provided collectively through our tax dollars, we have a responsibility for efficient use of those dollars as well, and where counter-interdictions, for example, lack of information, where incorrect diagnoses based on lack of thorough review of a chart or a piece of information being withheld could lead to substantial complications and costs for the health care system, is that reasonable as well? I'm genuinely trying to get my head around this, because the individual privacy protection part of me says, absolutely, it should be my right to say what I want known and what I don't want known, but this is a system; it is not an individual contractual relationship between one person and a health care provider.

Ms Patton: You're right. I think it is a balancing act, but I think fundamental to the system has to be the individual control. My concern is that if we take that away, we have patients who aren't going to see their doctors and who aren't telling them that they have issues or a history that may impact, and then we end up with the same potential complications two years down the road if a client is withholding that information and not going in for treatment quickly and promptly. I think it has to come back to the individual choice.

Mr Wood: Would you support a provincial act that was substantially similar to the federal privacy act?

Ms Patton: The information I have regarding the federal act, I believe that we wouldn't support it.

Mr Wood: I'd like to ask you to briefly address the question of disclosure without consent for research purposes. We've heard that there are certain research projects, because of the smallness of the sample, that you

either have to do without consent or you can't do them. If there were proper oversight, would you support some provision for research projects of that nature to be done?

Ms Patton: I think some provision may be appropriate. The inclusion of the ethics body was a significant step, but I think you may also add a layer and have the privacy commissioner review any proposals and ensure that all other steps have been taken before such a proposal goes forward.

The Chair: Thank you very much for making your presentation before us here today.

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CARP

The Chair: Our next presentation will be from the Canadian Association of Retired Persons. Good morning and welcome to the committee.

Mr Bill Gleberzon: Thank you very much for this opportunity to talk to the committee. We appreciate it very much. Very briefly, we now call ourselves Canada's Association for the Fifty-Plus. We've retired the word "retired" in our name, but CARP still remains.

Just to let you know very briefly, CARP represents the consumer and, I guess, patient and informal caregiver and non-professional point of view. We have some 236,000 members in Ontario and almost 400,000 across Canada. We're a non-profit organization and don't take money from any level of government for operating purposes.

To begin, Bill 159 is of great concern to 50-plus Ontarians because at one time or another they will make up the majority of people affected by the bill.

As we understand it, the previous Minister of Health, Elizabeth Witmer, justified Bill 159 on the grounds that it would improve the effective implementation of primary care reform, and we support that objective. However, if that justification is still valid, then CARP believes that Bill 159 as presently constituted strays far beyond its intended purpose.

CARP's position on Bill 159 is that it should be limited and restricted to provide the personal and health information to those professional health care workers involved in providing direct health care to the patient to whom the health information pertains, except in obvious and clearly stated emergencies. The patient or his or her family or substitute decision-maker must give explicit informed consent to share this information. Those professional health care workers who have legitimate access to this information must guarantee to keep it strictly confidential.

CARP recommends that a distinction between the personal information of a patient—that is, name, address, SIN and other personal vital information—and the patient's health information, such as the individual's physical, physiological and/or mental condition, must be made. This differentiation must be part of Bill 159 and applied to anyone who is not involved in the individual patient's health treatment or health care.

Integrated personal and health information should not be available to the Minister of Health, any bureaucrats, employers, insurance companies, researchers, marketers, fundraisers or any other individuals or groups not directly involved in the care or treatment of an individual's health. We're talking about both the personal and health-related information; that is, although health information may be made available, there is no need to link it to the patient's personal information.

As we understand it, OHIP already has the authority to access and investigate medical records of health care professionals that it reimburses for services. This is done to ensure that the services claimed to have been provided for reimbursement have indeed been provided. But this information is accessed for accountability purposes directed at the health care practitioner and not directly concerned with the personal and health information of the patient. In what other ways would having access to the personal information of patients assist the Minister of Health or any other politicians or bureaucrats in managing the health system in Ontario, as the act states?

Employers and insurance companies have no need for direct access to health records. Both require only the confirmation of a professional health care worker to confirm health status by employees or insured customers. Similarly, researchers have no need for personal information to undertake their health or epidemiological research. The bill does establish a protective system to ensure anonymity of subjects through the use of IDs that cannot be traced back to the individual. If researchers do require knowledge of a subject's personal information, the current practice should be retained whereby the researcher can request the custodian of the information to contact the subject either to have the subject contact the researcher or to obtain the subject's informed consent to have the personal information provided to the researcher.

The bill rightly prohibits marketers from obtaining personal information. It should extend this prohibition to fundraisers. We assume that fundraisers for health associations such as for the cancer society or the diabetes association are intended in this context. The decision to contribute money and/or time should be left to the voluntary discretion of the individual. However, the same system that is in operation for researchers could be put in place for fundraisers. Moreover, CARP would accept the idea of providing a patient with the option of deciding whether their name could be shared with an organization for fundraising purposes through an advance approval process that would include informed consent.

CARP recommends that the provincial government provide sufficient additional funding to institutions that need to establish the new position of custodian of information and the staff and equipment required to support this function.

CARP recommends that the information and privacy commission, which we understand are envisioned as two separate entities, should remain two distinct officials and positions, each with a distinct office and staff, in order to ensure that necessary checks and balances would be in

effect between the two separate and potentially conflicting functions.

CARP believes that the patient is the owner of their own personal and health information; therefore, they should have easy access to this information whenever they request it. They should only be charged a minimal basic administrative fee, for example, to pay for photocopying etc, when they want to access their own information. This same principle should apply to substitute decision-makers.

If an individual can prove that the personal or health information in their record is incorrect, the incorrect information should be deleted and the correct information substituted immediately without any cost to the patient.

Finally, we assume, but we are requesting, that Bill 159 must be correlated with the federal government's Bill C-6 to ensure that there are no discrepancies or contradictions between the two bills.

Thank you very much.

The Chair: Thank you. That leaves us about three and a half minutes per caucus for questioning. This time we'll begin with Ms Lankin.

Ms Lankin: Thank you. As always, I appreciate the input of your organization.

One of the questions that I've been trying to get clearer answers to as time goes along—and the next presenters are CIHI so this is something maybe they can answer when they come—is we're being told by researchers that there is very important epidemiological research that does require identifiers for, perhaps, longitudinal studies. We've had a couple of examples but I don't have a clear grasp on it. I'm still looking for that lightning bolt that says, "Aha, we wouldn't have known this piece of information which is so critical to all our health if we hadn't been able to do this kind of research and had access to identifiable information."

If we get that example, as a reasonable person I'd think in some circumstances that's going to be OK, but there have to be a lot of safeguards. We're told that the safeguards that are in place now, and proposed by this bill, involve that kind of research being submitted to a reputable, designated ethics committee who bend over backwards to protect privacy and ensure anonymity unless there's no other way. Do you think your organization is comfortable that in the rare exceptions, if it can be proven that there's a need for identifiers for that kind of common-good epidemiological research, identifiers be used, or do you think it always has to come back to consent, no matter what?

Mr Gleberzon: At this point in time, as far as I know, it always has to come back. Ethics committees which already exist won't approve the use of private and personal information, and we stand by that principle. You could be right and the researchers could be right, but I think they have to make a better case than they have.

Ms Lankin: In the case of health systems management and the objection that you put forward, I think no one, when they use those words, is really talking about the fraud investigations and OHIP billings, or whatever;

they're talking more systems management questions. For example, the cardiac care registry was established in Ontario because we had long waiting lists for heart surgeries and we wanted to better monitor and see what had happened, what the outcomes were, and make sure we had the resources in the right place, and as a result of that, we were able to bring down the waiting time for cardiac surgery. For someone who is prone to having a heart attack or may be having one, having access to that preventive surgery in advance is a really important thing. Is that a circumstance in which we can see that it is reasonable for the ministry, for management purposes, to have a group access personal and identifiable information?

Mr Gleberzon: Why couldn't they have that along with informed consent? If the patient has been registered, all you're talking about is another piece of paper for the patient to say, "Sure, I agree to this," and the principle is intact. As someone said before, you've got your balancing act where you balance the needs of the patient with the needs of the system. In the OHIP system, as we said, the right for OHIP to check records already exists.

Ms Lankin: Right.

Mr Gleberzon: This isn't done in order to second-guess the doctor entirely. If the doctor is proven to be fraudulent, that's another matter.

Ms Lankin: I think I'm still looking for that example that answers your question, "Why couldn't it be done through a consent?" Perhaps we got one partial answer from Cancer Care Ontario yesterday when they indicated that if anyone goes to one of their regional cancer centres, or Princess Margaret, that's part of that network, it's very easy. They control the issue of consent. They're hooked into that system. But you could be diagnosed with cancer through an outlying hospital or through a pathology report, through tests in your doctor's office, and unless there's a way for them to pick up and bring that person on to the network, they have to rely on the individual physicians to ask for consent to put that person on the network. People fall through the systems. Our information in terms of what kind of resources we need to be able to treat people is also lacking. Does that warrant worries about consent?

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Mr Gleberzon: If you followed that example, how would you know about the patient? The doctor would forward that information, so that would mean the doctor should also forward the consent. You're talking about a principle here.

Ms Lankin: Yes.

Mr Gleberzon: The issue is that no one can deny the need for the procedure immediately and as quickly as possible, there's no doubt about that, but we're talking about retaining the principle of privacy as well as ensuring that the system, which today, with modern technology, can be done very easily, is filling the immediate need as it arises.

Mr Wood: Would you be prepared to support a provincial act that was substantially similar to the federal act?

Mr Gleberzon: I have to admit we're just beginning to go through the federal act, so I can't answer that question right now. You can ask me in about a week's time and I can probably give you an answer on that.

Mr Wood: If you have a moment, please write the Minister of Health and tell him what your thoughts are on that.

Mr Gleberzon: Sure, I'd be happy to do that.

Mr Wood: I'd like to come back to the question of research for a moment. What we've heard is that there are certain kinds of research that effectively cannot be done if consent is required. They involve a very small sample of people who can't be found and so on. If you were satisfied that that position was right, and if there was proper oversight, would you be prepared to allow research in those circumstances, or would you be prepared to say the research should not be done?

Mr Gleberzon: I think the answer is that we'd have to see what the case is. I mean, we're talking about hypothetical—

Mr Wood: I've given you the case. If the alternative is we either allow it under proper supervision or the research isn't done, which side of that would you come down on?

Mr Gleberzon: You were saying that—

Mr Wood: I'm putting a tough question here, I know.

Mr Gleberzon: You are and that's fine; that's the way it should be. What I'm trying to envision is the type of research you're talking about where you have a very small sample of people. Are we talking about a case of some kind of potential epidemic and the people are unknown, or if we have an emergency situation?

Mr Wood: No, I wasn't really thinking about an emergency situation. I was thinking of a situation where you have, say, a fairly rare form of cancer so you have a very small sample and it's not practical to get consent. The issue is, do we insist upon consent and not do the research or, under proper supervision, do we do the research without consent?

Mr Gleberzon: I have to admit that's something I can't answer off the top of my head and I wouldn't want to, because it's part of this balancing act that has to be retained. The easy answer is, sure, go ahead and do the research because of the long-term benefits, but what are we going to be sacrificing on the other side? That may seem like an overly purist point of view, I admit that, but I think that's the kind of very pointed and clear thinking that has to go in before these kinds of decisions are made.

Mr Wood: I think you've framed the question very well. We invite you to give it some thought and pass your answer along to the Minister of Health.

Mr Gleberzon: Sure.

Mrs McLeod: Just before we leave this issue of informed consent, you mentioned registration. Are you advocating that patients could be asked whether they would want to sign a consent form for the sharing of their

health information but on very clear and restricted terms that it would be with other health care providers, for example?

Mr Gleberzon: Sure.

Mrs McLeod: And have that as a matter of a patient's record so it's not a matter of contacting the individual?

Mr Gleberzon: If the patient owns the information—we would begin from that principle—then they have the right to determine who has access to it.

Mrs McLeod: So it's sort of a variation on a lockbox?

Mr Gleberzon: Yes.

Mrs McLeod: I wanted to ask you about the insurance issue. You've been very clear and very strong about the fact that any sharing of health care information, without consent—I assume that's the underlying premise there—should only be with health care providers, not with the Ministry of Health and not with insurers. The issues we hear, and that I suspect you do at CARP, are from private insurers who ask for consent, and their weapon is that if you don't give them consent to get your health records, you're not going to get the insurance anyway. So people feel as though it's not really consent that they're being given. First of all, is that a problem? Are you running into a lot of people who are being denied insurance because of access to health records? Is it fair, and are there ways we should be trying to deal with it, quite apart from the issue of sharing information without consent?

Mr Gleberzon: I have to say we have not gotten a lot of complaints about the particular issue of being forced to give consent. I think what you're touching on is a reality of life, and that leads to the larger issue of protection around informed consent. I suppose that in realistic terms, even though there may be all the protection in the world, pressure can still be brought to bear in many ways, and people buckle under and are afraid to complain because of the consequences. I'm not sure how you deal with that kind of issue when you're dealing with whatever the law says and whatever practice is being done. It's just one of those issues that might even defy any kind of legislation. The individual has to decide what kind of consequences they're prepared to take.

Mrs McLeod: Suppose our legislation had a lockbox, so that the individual denies consent to release at least some aspects of that health record. Now we get to the private sector, which is outside of that. They seek consent and get it, because otherwise you're not going to get the insurance. Should they have access to what an individual has put in their lockbox? Is that something the private sector has as a right to, or is their power to deny insurance just so powerful that they can basically get anything they want?

Mr Gleberzon: As I understand the way the system works now, they would go through the doctor or the health care professional to get confirmation of whatever the claim is. Why should that be changed?

Mrs McLeod: I was thinking of not so much the claim as actually applying to get insurance and whether they're being denied.

Mr Gleberzon: That's part of a larger issue too. In fact, I was talking to one of my colleagues today—he's retired—and he was telling me that one of the conditions of his work was that as senior management he had to get an annual medical checkup. He heard of cases of other people who found ways to kind of avoid that from happening for various reasons. That's informed consent, isn't it? But it's also a condition of employment.

Mrs McLeod: Exactly.

Mr Gleberzon: Those are the kinds of issues this bill should be grappling with. But how you grapple with them, I have to admit, is a very thorny question. When pressure is brought to bear and it affects your livelihood and those other issues, how do you deal with that in a realistic manner?

Mrs McLeod: Are there some things the private sector should not have the right to, nor the right to deny access to a certain—

Mr Gleberzon: In theory, yes, but how do you prevent that from happening?

Mrs McLeod: I agree.

The Chair: Thank you very much for coming before us today.

COLLEGE OF PHYSIOTHERAPISTS OF ONTARIO

The Chair: Our next presentation will be from the College of Physiotherapists of Ontario. Good morning and welcome to the committee.

Ms Jackie Schleifer Taylor: Good morning. My name is Jackie Schleifer Taylor, and I'm the president of the council of the College of Physiotherapists of Ontario. I have accompanying me Rod Hamilton, who is our director of policy and communications, and Richard Steinecke, who is our legal council.

I want to thank you for hearing us on this matter. In this brief presentation I will just outline who we are as a college, what our mandate is and the purpose of our visit here today, and highlight three areas of key concern that we would care to bring to your attention.

First, the College of Physiotherapists of Ontario is not an educational organization. It is a regulatory body created under Ontario's Regulated Health Professions Act. Our primary role is to serve the public interest by carrying out the duties that the RHPA requires of us. These include registering physiotherapists for practice in Ontario, regulating physiotherapy practice by establishing professional conduct standards and investigating allegations of professional misconduct against members, and establishing quality-of-care programs to improve physiotherapy practice in Ontario.

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The college collects and uses health information for two purposes. It does so for investigations and as evidence in proceedings against physiotherapists who are alleged to have acted improperly. We also use health information to develop and maintain the programs that

are required under the RHPA for the purposes of improving the quality of physiotherapy care in Ontario.

A key part of understanding the college's role is to realize that it does not use the patient health information it collects in the way that health care providers or funders do. We do not use health information to make or suggest treatments to patients. Instead, we use it as dictated by our governing statute, the RHPA.

In order to accomplish these statutory obligations, the RHPA gives the college the authority of a tribunal. As such, the college is empowered to investigate members and, where necessary, hold disciplinary hearings at which findings are made and penalties can be assessed. The investigation process requires the college to collect many types of evidence, including patient health information. Without the ability to use health information for this purpose, the college would not be able to determine whether physiotherapists who are alleged to have acted improperly have actually done so.

The RHPA also requires the college to develop quality assurance programs to improve the quality of physiotherapy practice. The program developed under this statutory obligation also uses patient health information to assess and improve the quality of physiotherapy care. Without the ability to use this health information for this purpose, the college would also not be able to provide the quality-improvement programs that are required by law.

The RHPA recognizes the sensitivity of patient health information as well as the college's need to use it in investigations and quality-improvement programs. The law contains strong protections to ensure that patient health information is not misused and that patient confidentiality is maintained.

The college has come before the standing committee on general government for two purposes. First, we're here to provide support for the general intent of the Personal Health Information Privacy Act. The college believes that clear rules are needed to govern the collection, use, retention, disclosure and disposition of personal health information. Consistency and clarity in the obligations of health information custodians in all these circumstances will serve the public of Ontario well. PHIPA will accomplish its purpose if it provides both the public and the agencies charged with protecting the public interest with the appropriate access provisions and confidentiality protections for health information.

The college is also here to note some potential problems with the act that may limit its potential to benefit the Ontario public. The college's concerns relate to seven key areas, which are outlined in our written submission. Of those, I will highlight three areas. They relate to the college's role as a health information custodian, legislative priority and the application of the PHIPA legislation.

With respect to the college's role as a health information custodian, the college understands the need for broad application of the Personal Health Information and Privacy Act and, on that basis, the need to designate the college as a health information custodian. However, it is

very important that government recognize the statutory obligations that are placed upon the college and how these require us to use and protect health information in ways that are tailored to our public protection role. This concern is based upon two main considerations.

First, appropriate access and use protections for personal health information already exist in the Regulated Health Professions Act, RHPA. However, many of the confidentiality and use provisions in PHIPA are given priority over RHPA. We are concerned that unless the RHPA's use and confidentiality provisions have priority over the Personal Health Information Privacy Act, our ability to act in the public interest will be diminished. The statutory obligation that we have to regulate their members in the public interest requires that access and use of patient health information be governed by statutory provisions specifically devised for this purpose.

Second, we suggest that questions as to the appropriate application of PHIPA's provisions regarding use and access of patient health information have already been considered and decided upon. It is a clear policy decision by those who have developed PHIPA that special provisions should exist to ensure that for most agencies health information that is used in proceedings and for quality-of-care purposes is excluded from the access and use provisions of the act. However, this decision is not consistently applied to the college.

We have already indicated that our use of patient health information is as evidence in proceedings or for quality-improvement purposes. We also note that the college's use is already governed by the Regulated Health Professions Act. With this in mind, we believe it would be inconsistent for the access and use provisions in PHIPA to be applied to college activities. However, we note that while the college is exempted from some of the duties respecting access and use, some custodial obligations will still fall upon the college. To remedy this problem, the college suggests that upon proclamation, the existing regulation-making authority in PHIPA be used to ensure that PHIPA's obligations for health information custodians do not apply to the college in the performance of its statutory duties under RHPA.

Although the issue of legislative priority is somewhat illustrated by this first point, I would like to further expand on the second area of concern, legislative priority. The college believes that government has taken an important step in supporting the public protection role of regulatory agencies by recognizing that, in some cases, existing confidentiality protections in other legislation should have priority over PHIPA. It is clear that certain sections of the RHPA are given clear priority in this fashion. There are, however, other sections of the RHPA that the college uses, and these have not been given clear priority.

We would like to stress the point that the college's sole purpose for the collection of personal health information is to protect the public interest by regulating physiotherapists. We wish to remind the committee that the RHPA is intended to serve the very specific task of

allowing us to regulate our members in the public interest. The RHPA's confidentiality provisions were specifically developed for this purpose. For the college to maintain its regulatory authority without challenges, the priority of the RHPA must remain clear.

If PHIPA imposes confidentiality protections on the college that are different from those currently existing in the RHPA, we believe it will impair our statutory duty to regulate health professions in the public interest. We suggest that paragraph 3 of subsection 11(2) of PHIPA be broadened to ensure that whenever there is a conflict between the RHPA and the Personal Health Information Privacy Act, then the RHPA provision takes precedence.

The third and final point relates to the application of the legislation. The college would like to express once again its approval of PHIPA's broad, underlying principle that access to and use of personal health information should be governed by statute. However, the college is concerned that in practice PHIPA does not completely fulfill this expectation. The college noted that commercial enterprises that collect and use substantial amounts of personal health information are not included within the definition of health information custodians, nor are such commercial enterprises governed by other statutes that clearly dictate the appropriate use of personal health information.

For example, in its role of protecting the public interest, the college has seen numerous circumstances where commercial organizations such as insurance companies collect and use personal health information. It is clear that such companies make legitimate use of this information for purposes such as assessing claims and researching actuarial trends. However, it is also clear that many patients are not aware of how information is obtained and used by these companies and are not able to access their information for the purposes of correcting errors or reviewing their health status. This lack of informed consent to the use of their health information and their inability to access it causes patients great concern and should be addressed using PHIPA's general principles.

If the health information that commercial agencies use was subject to the same protections with respect to use and access that PHIPA requires of other users of health information, patient concerns over the inappropriate use of their personal health information would be much diminished. So the college believes that the definition of "health information custodian" in section 2 of PHIPA should be expanded to include a specific clause that would capture those operations of commercial agencies that collect and use personal health information.

In summary, the College of Physiotherapists of Ontario firmly believes that if government wishes to maintain the role of the college in regulating physiotherapists in the public interest, our concerns about PHIPA's imposition of custodial duties on colleges and the questions about the priority of legislation should receive serious consideration.

I would like to close by expressing the college's sincere thanks for the opportunity to address the standing committee and have our concerns about PHIPA placed under consideration.

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The Chair: Thank you very much. That gives us about two minutes per caucus for questioning. We will start with the government.

Mr Wood: Do you have the power of subpoena?

Mr Richard Steinecke: Yes. Investigators do have the power to summons.

Mr Wood: In that case, I don't understand the problem with the application of PHIPA to you, over and above the RHPA.

Mr Steinecke: First of all, the college can only use the summons if it has initiated an investigation with reasonable and probable grounds. It has to know about the information first. Much of the college's finding out about the problem only occurs, for instance, after a mandatory report where a complaint has been made. So if the patient isn't aware, often this information comes to the attention of the college through colleagues and co-workers or employers. If they don't have the power to make a mandatory report, if they have some concerns that it may only be voluntary, then the college won't find out about this information and people will continue to practice without being investigated.

Mr Wood: If you received information that was credible, would that not give you grounds for a subpoena?

Mr Steinecke: Yes. But, first of all, can we get the information?

Mr Wood: If you've received information from co-workers—

Mr Steinecke: They won't necessarily be able to give it to us under PHIPA. Under PHIPA, first of all, it's optional whether they will give it to us. They may decide not to. They may decide it's in their best interests to let the person move on quietly somewhere else, to cause problems somewhere else without telling us, because then they can avoid a lawsuit.

Mr Wood: What I'm not grasping is how the application of PHIPA to what you do would prevent your doing what you do. If you have the power of subpoena, you can get the information without the consent of the patient.

Mr Steinecke: Only if we know about it first.

Mr Wood: You've got to have grounds for the subpoena, obviously.

Mr Steinecke: Yes.

Mr Wood: Surely you wouldn't seek information without grounds.

Mr Steinecke: Of course, but people won't bring it to the attention of the college because they will believe that PHIPA is a barrier, or they may decide they don't want to give information to the college, whereas now they have to tell us, because PHIPA overrides the duty to tell us about problems in confidence—sexual abuse, those kinds of things. We won't find out about it because they'll say,

"PHIPA gives us a choice. We don't have to tell the college," or "We don't want to tell the college."

Mr Wood: I don't want to get into a lot of technical discussion today, because obviously time does not permit it. But I would be interested in your giving us a memo explaining why you think the duty to report is overridden by PHIPA. That would be an important item that would be helpful to us.

Mrs McLeod: We have had a lot of representation from the regulating colleges in terms of whether they should be excluded altogether or whether there should be some amendments to the act to deal with their ability to carry out their regulatory functions, so I'm not going to spend time questioning you about that.

I want to deal with the last section of your presentation, application of the legislation. First of all, it would be absolutely clear under this bill, even as it's drafted now, that physiotherapists who are practising in private clinics, which the majority are, would be covered as health care custodians and would be bound by all the conditions around protection of privacy information.

Have you been involved in the government's consultations on parallel privacy legislation affecting the private sector and, if so, have you made any representations?

Ms Schleifer Taylor: No.

Mrs McLeod: That's not something you've been involved with as a college. You spend quite a bit of time with your concern about the private sector institutions that do collect health information which aren't under Bill 159.

When it comes to the insurance companies, you talk about the lack of informed consent because people don't know how that information will be used. We do hear stories of things you would clearly like to prevent, both in terms of access to health information which perhaps not even insurance companies should have, and secondly, access to information with consent because the person has no alternative but to give consent if they want the service or the employment, and the selling of lists, once they get them, the selling of that kind of information.

Do you hear those kinds of stories? I'm wondering what underlies the emphasis you've put on this section of your presentation.

Mr Rod Hamilton: Our concerns are more generally around people's concerns that the information that the companies may have is not necessarily accurate and may not reflect their true health status. So it's concern around not only access but also ensuring that the information is accurate and having access to the ability to make corrections where necessary to that type of information.

Mrs McLeod: Are you suggesting that for there to be truly informed consent, there almost has to be a provision that the individual has seen the health record prior to it being released to a private company?

Mr Hamilton: I'm sorry, I don't quite understand your question.

Mrs McLeod: I'm wondering how you would provide for that kind of informed consent. The individual that signs that consent doesn't necessarily know what infor-

mation is going to be provided. How do you make sure the consent is informed?

Mr Hamilton: I think that you have laid out the principles of consent fairly clearly in the act. If those are complied with, then I shouldn't think there would be a lot of difficulty. The important thing is making sure that those do apply to all instances where health information is transferred.

Ms Lankin: I want to follow up on Mr Wood's request for you to submit in writing something about the way in which you see this legislation overriding mandatory reporting. I've been having trouble understanding that as well, so I would appreciate that.

Let me ask you just one question on that subject, though. In section 29, which governs the disclosure of information, is it the overriding language that says a health information custodian "may" disclose? Is it the word "may" that concerns you, in that somehow the difference between "may disclose" in this legislation and "shall report" in your legislation—there's the conflict?

Mr Steinecke: Yes.

Ms Lankin: OK. We need to sort through that, but if that's a real issue, it's also an issue for child welfare legislation, reporting of abused children and things like that as well.

Mr Steinecke: Yes, but if you go back to section 11, which is the override provision, there is specific exemption for child and family services reports.

Ms Lankin: Maybe that's the answer, as opposed to a general exemption from the legislation.

I'm actually interested with respect to the definition of health information custodian. All of the other colleges in the federation have said, "Exempt us completely." You take a slightly different tack, in which you say, "In regulation, exempt us for those uses of the information that are statutorily set out, mandated for our organization." That's interesting. Could you, when you're putting together your information, look through the legislation and tell us what the difference would be? For what purposes or in what circumstances would you be a health information custodian and subject to this legislation, and then for what purposes would you not? That would be useful.

I'm also concerned about any approach that would simply give the RHPA primacy over this legislation where there are conflicts. Again, I would like to know the specific areas. It's sort of what we've already talked about, but if there are more, the specific areas where you think there are conflicts and where, if the committee were to address it, we could have the option of addressing it by specific mention in that section of the legislation.

My goal would be that anyone who reads the privacy legislation is going to know what their rights are and know when another act overrides it in what section, instead of having to go to four or five different pieces of legislation and work it out themselves. So if you could give us those examples of where the override is necessary, that would be helpful.

Mr Steinecke: Sure.

The Chair: Thank you very much for coming before us this morning.

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CANADIAN INSTITUTE FOR HEALTH INFORMATION

The Chair: Our final presentation of the morning will be from the Canadian Institute for Health Information. Good morning. Welcome to the committee.

Mr Richard Alvarez: Good morning. As the chief executive officer of the Canadian Institute for Health Information, or CIHI, which is a national organization located here in Ontario, I want to start by thanking the committee for the opportunity to appear before you today. I should add, we're very much in support of Bill 159.

Before we actually make our comments about the bill, perhaps you would permit me to say a few words about CIHI so that you can see why this bill and this issue of privacy is very important to us.

The institute itself was incorporated in December 1993 as a federally chartered, independent, not-for-profit organization, and was agreed to and incorporated by the federal and provincial ministers of health. It was set up with a mandate to do two things: to serve as a national mechanism to coordinate the development and maintenance of an integrated approach for Canada's health information system. By that we've taken the whole aspect as a mechanism of making sure that there are standards, whether they be data standards, financial and statistical standards, that sort of thing, because as you do efficiency analysis or effectiveness analysis, you want to make sure that you're comparing apples with apples.

The second aspect is a lot more straightforward. We are to provide and coordinate the provision of accurate and timely information, to establish a sound health policy, to improve the management of the health care system and to generate public awareness about factors that affect health.

Under the mandate, the institute conducts analyses of health data and issues health information and reports—we issued one last year, a very major annual report—that serve, we believe, the public interest. For example, we collect information from hospitals on patients being discharged. That information typically uses coded summaries of hospital stay information to report on causes of hospitalization, procedures done and length of stay.

You should note that our analysis of this data and application and then the application of cost data really form the basis of funding and the efficiency of hospitals here in Ontario.

The Canadian Organ Replacement Register tracks trends in renal dialysis and organ transplantation, including patient survival rates. A further example would be the Ontario Trauma Registry, which produces statistics on the causes of hospitalization for trauma which are used for planning trauma services and for developing injury prevention programs.

In conducting our work, let me assure the committee that we take the whole issue of privacy very seriously. At the outset we realized that our analysis, information and standards programs would only be successful if we had strong measures to protect the confidentiality and security of the personal health information that we hold. Notwithstanding the fact that CIHI was formed in 1993, it was really formed from two or three predecessor organizations that in fact had been in business for the last 15 years before we came into existence. Those predecessor organizations also had a strong culture of privacy protection. Over the last 20 years, as far as we can tell, there have been absolutely no confidentiality breaches.

In 1993 we put in place privacy principles based on the CSA model code to guide and govern our operations. Through agreements with provincial and territorial ministries of health, we also commit to abide by the relevant health and privacy legislation in the respective jurisdictions. Within this rather complex national framework, we have successfully self-regulated our health information practices.

Turning to our comments on Bill 159, while I have sat here this morning and understand the matters of concern being raised by other groups, I must tell the committee that CIHI is very encouraged by plans to put in place a health information privacy act here in Ontario. We believe this is a positive move and will set out a foundation for legislated authorities and clear rules for the protection of health information, which really don't exist today.

For us, Bill 159 will ensure that CIHI's activities are visibly subject to legislated rules, either as a custodian or in the service of a custodian. Having a clear framework of rules for the collection, use and disclosure of health information will be helpful for all who are entrusted with this sensitive information.

Frankly, CIHI looks forward to being identified as a custodian under the bill or through designation in the regulations as a person who maintains a repository for personal health information for data analysis and research. This would make us clearly subject to the oversight provisions of the law.

You should know that as a national organization, obviously we collect data from provinces and territories. At this time we have agreements with most ministries to abide by the legislation in their respective jurisdictions. Obviously, for example, Alberta data is subject to Alberta laws. While it might seem obvious in Bill 159, for clarity we would suggest that it applies only to health information about health services provided here in Ontario, so as not to be confused with the other data that we hold.

Bill 159 adopts the principles of only collecting the information necessary for the purposes intended and of limiting access to such information. Again, CIHI supports and already abides by such principles.

We strongly support and encourage the principles of notification and consent. Bill 159 also supports these principles, while recognizing that there are specific situ-

ations where consent is in fact not practical. It's important to recognize that, as secondary users of health information, CIHI has no direct contact with individuals and thus cannot obtain consent. In such situations notification is very appropriate.

As it stands, we know that the bill would authorize health information custodians in Ontario to disclose health information to secondary custodians for specified purposes. This will assist us in our mandate to support health systems management, planning and evaluation and to serve the public within a legislatively prescribed framework.

Bill 159 prescribes rules for research that must be adhered to by researchers requesting information from us. Currently, we have very strict rules regarding access to data from researchers.

We certainly welcome the clarity in the bill in those situations where CIHI provides information management services by way of an agreement. Bill 159 prescribes the content of the agreements related to disclosure and use of information without the individual's consent, as well as the security of the information.

As far as we can tell, the bill's provisions will increase transparency about our role in the health system. The public will be better informed about anticipated disclosures to CIHI and how to obtain more information about CIHI's information policies.

Finally, we welcome the designation of the Ontario Information and Privacy Commissioner's office as the experienced entity to perform the oversight function with respect to personal health information.

In closing, we realize there are many viewpoints on how health information should be protected. We believe Bill 159 provides a reasonable foundation for handling health information in Ontario. We see it as positive. We also expect that after this process the committee and the Legislature will refine the bill in light of both what they've heard and privacy considerations that we need for an effective and efficient health care system in this province. If the bill does not proceed, we will continue to self-regulate and to abide by applicable legislation.

Thank you for this opportunity. I have with me two colleagues, Joan Roch and Ed Chown, who work in the privacy secretariat which reports directly to me. We are available, obviously, to answer your questions.

The Chair: That leaves us three minutes for each caucus. This time we'll start with Mrs McLeod.

Mrs McLeod: You would obviously anticipate being named under the regulations, under section 213, as a health care custodian for the purposes of collecting data for research. Is there any advantage to being specifically named in the legislation as a health care custodian?

Mr Alvarez: What we're striving for is a lot more clarity and transparency in the whole aspect of privacy. Given the kind of job that we do, being named makes it very clear in terms of why we're being named and what our purpose is to the public and to all those we deal with.

Mrs McLeod: If Ontario legislation should not go ahead, you indicated you would then, of course, have to

abide by existing legislation. One of the things you would have to abide by is the federal legislation, which does contain a form of lockbox. I'm wondering whether you see that as limiting your ability to do the kind of research and data analysis that you're now doing. You are starting to have some experience with three provinces that do have some form of a lockbox. Is that causing any problems or presenting any limitations for your work?

Mr Alvarez: Two questions, and the first question is Bill C-6. As we understand it, Bill C-6 applies to organizations engaged in commercial activities. We are not engaged in commercial activities.

Mrs McLeod: So you would be exempt under C-6.

Mr Alvarez: Having said that, we will abide by Bill C-6. The only one that gives us real problems is the aspect of patient consent, given that we are in the secondary data collection business. In terms of the lockbox, again, if that becomes pervasive, we will start to see fragmentation of the data, which will affect the integrity of the data and the quality of the studies that we do. That's a real concern with the lockbox, having understood quite clearly that an individual does have the right to say what should be in there and what shouldn't.

Mrs McLeod: Do you require names or can you work with health numbers and do the same analysis?

1130

Mr Alvarez: We have 14 national databases. Of the 14 national databases, generally, 13 of the 14 national databases contain such things as date of birth, postal code, gender and personal health number. None of them contains name or address. The only one that contains name and address is the organ replacement registry and the reason for that is that as we track individuals who have had transplants and they move from one province to the next, it's useful to have their names to basically follow them through, because by that stage their health care insurance number is not valid any more.

Mrs McLeod: But even without names you can't access that information if it's in a lockbox under the legislation currently in place in those three provinces?

Mr Alvarez: Correct.

Ms Lankin: Why in the organ transplant registry do you need to track the individual? What's the end information that you're looking for?

Mr Alvarez: Survival data. We're looking at the effectiveness of our procedures. We're looking to see basically kidney survival rates and some of the other organs, whether in fact they're improving, whether they're going down etc. That's basically the reason.

Ms Lankin: That's really valuable information. Why in that circumstance wouldn't we be able to ask the patient who has undergone the transplant if they would be willing to be part of the registry to be tracked for the kind of investigative work that's done?

Mr Alvarez: This is something that's historical. This database has been going on for quite a while. We've just done a complete review of all our policies and procedures and in fact are going back to our board and saying that's exactly what we should be doing, is consent.

We have got some of the specialists who are very concerned, given the few numbers that are done, that in fact patients don't agree with this and then that would lessen the value, if you like, of the research. As far as CIHI is concerned, we strongly believe that in those cases we do need consent. A good example would be that we're just in the process of developing a hip and knee joint replacement registry, again looking at the effectiveness of hips and knees and how long the first procedure lasts before the next one is put in. There, very strongly, we have a patient consent form that we will require prior to adding that to our data.

Ms Lankin: I got my new knee last September and I would be delighted to sign a consent form so you can add me to the registry.

I wanted to ask you a question about the inter-jurisdictional issue. That's interesting; we haven't heard that before. You suggest that Bill 159 should apply only to health information about health services provided in Ontario. Of course, the privacy of the information is about the information of the person, who may go from jurisdiction to jurisdiction. A patient chart may contain medical history of services that were provided in Alberta or BC and the person now lives in Ontario. It would be very hard for us to say to a practitioner that the rules only apply to those services that have been provided in Ontario, when it's the confidentiality of the patient's information. Could you rationalize those two?

Mr Alvarez: It's a tough one. What we are starting to see is very similar legislation starting to be developed across the country, as it relates in a lot of cases to Bill C-6. So while Ontario is probably the second or third province out, there are other legislation moves on the way to have a similar sort of legislation. We just don't see from a practical point of view how this legislation could, from a legal point of view, be valid outside Ontario. Having said that, we are encouraged to see that similar legislation is being developed across the country.

Ms Lankin: But surely this legislation governs the information of individual citizens in Ontario. It's a citizen's health information that's being protected by this legislation; it's not the health system's provision of services. The legislation would be dependent on where the person is resident, not where the procedure was done, I would think.

Mr Alvarez: That's right.

Ms Lankin: One last question then. You have indicated that right now in terms of your databases the organ transplant is the only one where you have names and you're looking at going to consent-based, like you will with the new hip and knee registry. That means there won't be any circumstances in which you're gathering information right now that requires names. I've been asking this question over and over for research, because I believe the work that you do, and ICES and others, is very important. Can you tell us of any examples of secondary use of this information that requires a name? Can you imagine a situation, a clear example, so the

committee can understand why an exemption to consent—

Mr Alvarez: Other than the ones that I've told you about, where we're trying to track an individual who has moved from one province to the next and we lose track of the health care insurance number and we're trying to track the effectiveness of a particular procedure—

Ms Lankin: But you already said that could be done with consent, right? That's all I'm saying.

Mr Alvarez: Right. We do not see, without consent, with those sort of circumstances why we would need names.

Mr Wood: Would you agree that a lot of the medical research can be done with the consent of the patient, that you don't have to get data without their consent to do that research?

Mr Alvarez: I think the issue for the health system, given the pressures on them, is getting truly informed consent for secondary uses and research. That's a really tough one. If we're going to very specific aspects of names, then we really should try to get consent on those aspects.

Mr Wood: I was asking a slightly different question. There's a lot of research you can do where you can get a representative sample by getting the consent of the people whose data are being used. Is that not correct?

Mr Alvarez: There are two questions here again: one is getting the consent and the other is representative samples. We would have a problem with just representative samples with some of the work that we do.

Mr Wood: I gather, in essence, because you can't get a big enough sample.

Mr Alvarez: In a lot of cases we can't get a big enough sample; in other cases, when there are low-volume, high-cost procedures and this forms the basis of a major efficiency look at the health system and funding formulas, that could be really problematic, if you don't get your sample right or you exclude those particular cases.

Mr Wood: Would you agree with the proposition that information shouldn't be provided without consent where research can be done by getting consent?

Mr Alvarez: Yes, I do.

Mr Wood: Do you have a problem with the Information and Privacy Commissioner ultimately signing off on the ethics reviews?

Mr Alvarez: My only problem would be from an operational point of view. That would be my only problem. Right now, we do on occasion go to the privacy commissioner's office and seek her advice, but given the volume that's likely to come through, that could be problematic.

Mr Wood: There was one thing I didn't quite understand. You said you believed in notification rather than consent. If you can notify, why can't you get consent?

Mr Alvarez: I suppose the subtle difference for us is actually getting a patient to write a consent as opposed to notifying a patient of how their data is going to be used and how the data is going to flow, notwithstanding the

fact that the data doesn't have names and addresses on it—so a sign that is posted, a form the patient sees, to say, "Your data will be sent to CIHI for these purposes."

Mr Wood: Suppose they don't want it sent.

Mr Alvarez: That's always a risk and problematic, because again it starts to fragment the database and stops some of the work that we do.

Mr Wood: Do you feel that I should be compelled to give my information to you? By the way, I might say that I would give it to you, but suppose I don't, for whatever reason. Do you feel I should be compelled to give data to you for research purposes?

Mr Alvarez: No, I don't think you should be compelled to give it to me.

Mr Wood: But you would agree there may be certain limited exceptions where we have to compel you, if we can't do the research. You would come down on the side of doing the research rather than not, if we have to do it by compelling people.

Mr Alvarez: In the business I am in, absolutely. Obviously there is a balance between an individual's right to privacy and the public good. We believe very much that the kind of business we are in and why we were set up by the Ministry of Health is an aspect of the public good. So that balance has to be found.

Mr Wood: But your principle, as I think I've heard it, is that you want to get consent where that's possible.

Mr Alvarez: Absolutely.

Mr Wood: Those are my questions.

The Chair: Thank you for taking the time to come before us this morning and making your presentation.

With that, unless there are any questions, the committee stands in recess until 1 o'clock.

The committee recessed from 1139 to 1300.

The Chair: We'll call the committee to order and continue our hearings on Bill 159.

COLLEGE OF DENTAL HYGIENISTS OF ONTARIO

The Chair: First up this afternoon is the College of Dental Hygienists. Good afternoon and welcome to the committee. Please proceed.

Ms Fran Richardson: Thank you very much, Mr Chair and members of the standing committee. My name is Fran Richardson and I'm the registrar for the College of Dental Hygienists of Ontario. With me is our legal counsel, Richard Steinecke, who will answer legal questions. I believe you've already met Mr Steinecke.

The college is pleased to have this opportunity to present before the standing committee on this very important piece of proposed legislation. Our college is one of the ones that was newly formed under the Regulated Health Professions Act and it regulates the 6,500 dental hygienists who practise in Ontario.

While we often think of dental hygienists as only working in dental offices, an increasing number of dental hygienists are now working in alternative areas or setting up their own practices. In particular, dental hygienists are

treating underserved segments of the population such as children, shut-ins, long-term-care residents, new Canadians and the homeless. In fact right now we have dental hygienists in Niagara who have a bus that goes out to the homeless, finds the homeless and treats them for their preventive care and gives them vouchers so they can get dental treatment. We also have a project that is being sponsored by our college in Windsor for the homeless, to get them into the academic teaching college there. So we've been working in that area.

The dental hygiene profession is a primary-care profession that sees patients directly. Consequently, it has its own standards of practice, its own code of ethics and independent professional obligations to its clients in the public interest.

Our college supports and affirms the position submitted by the Federation of Health Regulatory Colleges of Ontario that was presented to you yesterday. We're one of the signatories on that.

Our college understands the need for the enactment of privacy legislation and commends the Ontario government for championing patient rights. Dental hygienists are charged with the responsibility of creating original documentation and housing patient records. This may occur in either the public or private sector. The college accepts that the enactment of this privacy legislation will mean rewriting our own regulations, an activity that the college is very well prepared to do; that is, our records regulations.

The College of Dental Hygienists is providing the standing committee with a formal written submission and wishes to highlight three important points related to the bill.

First, the college is well aware that the mandate of all 21 health colleges is to govern the profession in the public interest. That public interest includes investigating complaints of professional misconduct, incidents of incompetence and, for us, concerns about the fitness of dental hygienists to safely practise the profession. Patient information, when used to carry out our mandate, is used only as evidence by the college in these proceedings and is not used in any other manner.

This bill, however, is written for custodians who use personal health information to treat patients. The bill does not always consider the special role and circumstances in which the health colleges operate. The college does not generate new personal health information. The college simply collects, as evidence, information that already exists. For example, the bill presumes that custodians will almost always obtain personal health information directly from the patient. Colleges, on the other hand, almost always obtain personal health information from the patient chart, often without the patient's knowledge. This information is used only for what it reveals about the dental hygienist's conduct and competence, not for what it indicates about the patient. In fact, the identity of the patient may be concealed. Colleges just don't fit in with the custodian approach taken in this bill. A couple of examples are on page 3 of our written submission.

Taking all this into account, our college is of the opinion that the regulated health colleges should be exempt from the role of custodian. The colleges do not use patient health information for treatment; they use charts as evidence.

Second, the concept of returning to an arbitrary age delineation for consent to treatment or for the disclosure of personal health information to a parent or guardian is baffling to our college, as it appears that the government is reversing its own policy. When the age restriction was eliminated in the Health Care Consent Act, the college applauded the move. Dental hygienists are the primary oral health professionals. They require the trust of their clients to effect meaningful treatment. Dental hygienists who have the trust of their clients prevent further disease that will ultimately reduce the strain on the health care budget. This is because our primary goal is prevention, not treatment.

A perfect example is dental hygiene's commitment to smoking cessation. A dental hygienist is able to tell, just by looking in the oral cavity, whether or not a person is smoking. Young people may routinely attend the dental hygienist for preventive assessments, fluoride treatments, sealants and mouth guard preparations. The dental hygienist can effectively intervene if the person has started tobacco use. But young people are not going to be honest if they know that their secret is going to be told to their parent or guardian. The 16-year-age delineation needs to be dropped and replaced with an assessment of the individual's maturity and competence of the client to decide.

Third, the Regulated Health Professions Act, the statute that governs all 21 health colleges, is a very complex piece of legislation. While there are several issues related to the Regulated Health Professions Act that may require strengthening, section 36 on confidentiality is not one of the problems. Section 36 is clear: confidentiality must be maintained in all cases. That section was well drafted and the colleges need no other piece of legislation to override such an important and salient component to their stated mandate to act in the public interest. The college recognizes the privacy legislation is intended to provide additional protection, but there is a very real possibility that by overriding the Regulated Health Professions Act, the exact opposite will occur.

For example, under the Regulated Health Professions Act the college has the right to inspect a dental hygienist's records to investigate whether a complaint or report of incompetence is valid. The wording of the bill suggests that disclosure to the college of personal health information is voluntary, at the discretion of the dental hygienist even. If the bill overrides the Regulated Health Professions Act, incompetent practitioners could try to refuse to provide access to their patients' charts. Surely that is not in the public interest.

To review the main points: the public will not be well served by making the regulated health colleges custodians of client charts. These charts are not created by the college and are used only as evidence. A delineated age

of consent is counterproductive in health care. Competence to make a decision is far more relevant. The confidentiality and access provisions of the Regulated Health Professions Act should not be compromised or weakened by the privacy bill.

The college thanks the members of the committee for listening and respects that you have an enormous task in front of you.

The Chair: Thank you very much. That gives us about two and a half minutes per caucus. This time we'll start with Ms Lankin.

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Ms Lankin: On the last point you referred to, the primacy of the RHPA over the Personal Health Information Privacy Act, a number of the colleges have made that point. One of the questions I've been asking is if you would take the time to go through the legislation and give us the actual areas where you believe there is a conflict. One of the options, of course, is not simply to make RHPA paramount over the privacy act—I told you this before, didn't I? I just realized that you are here again—but to make the privacy act clear in those provisions, with the exception of the RHPA, so that it's spelled out with clarity, all contained within the privacy act, as opposed to simply deferring to another piece of legislation. If you could go through and give us that kind of detail, it is another option the committee may look at and it would be helpful to have your input on that.

Mr Wood: I'd like to get a clear focus on where you think PHIPA having primacy over the RHPA would create a problem for you. I heard that in the area of quality assurance. Are there other areas where you think that would create a problem?

Ms Richardson: I believe there are issues, especially in areas of mandatory reports, as in the example that was given previously; for instance, if we have a situation where theoretically a dental hygienist could refuse to submit some material because the wording is "may," and yet the college, under the RHPA, has the right to request that material.

Mr Steinecke: Yes. Another example would be in the area of investigations. First of all, as I mentioned earlier, you need to have the information to start an investigation. Secondly, even if you issue a summons, on occasion the summons isn't good enough because it allows the member to delay or even change the records. It happens rarely, but on occasion you need to obtain the chart before it has been altered, particularly in cases of dishonest billings or something like that.

Thirdly, there is a concern that the summons provision in the bill does not adequately deal with the investigative summons. The definition of "proceeding" in the bill does not clearly deal with the investigative summons. It deals with hearing summonses and it deal with investigative summonses in other contexts, but it doesn't deal with investigative summonses here. That's referred to in one of the recommendations, that it should refer to college summonses as well. That would be in the definition of

"proceeding," which is recommendation number 5 in the paper.

Ms Richardson: Page 10.

Mr Steinecke: The other concern about summonses is that under 34(5) of the bill, if a practitioner believes the release of the information can be harmful to the patient, they can make a statement to this effect and there has to be an independent ruling on whether the information should be produced or not. Of course, in our context that could stymie an investigation because a person could say, "I don't think that this chart should be disclosed," and it's not clear, under the bill, who does the independent ruling. Is it the investigator who acts as a commissioner under the Public Inquiries Act provision or is it somebody else? So there are some drafting concerns even with respect to the summons provision.

Mrs McLeod: Thank you for your submission. I note that you have also referred to the issue of parental access. You've broadened my thinking about this whole issue because I think there was a sense that the two provisions in the bill which would allow somebody under the age of 16 to protect the privacy of their records when they sought treatment or in counselling covered the ground. You've obviously raised another issue that we need to look at, so I appreciate your doing that.

I am wishing, Mr Chair, there was a way that we could simply get Mr Jackson up here to deal with this issue of the mandatory reporting aspect quickly, because I've watched him react to this issue as if there isn't a problem that the colleges need to be worried about with this. But when I read the language of "may" rather than "shall," I can certainly see where the concern is coming from.

I think we need a response from the ministry to this issue now or at some future point. I would certainly hope that if there is reassurance to be provided around the mandatory reporting, that will given to all of the colleges. That's obviously an issue of concern, as it would be to all of us if that implication is in this legislation, because we don't want to do anything to interfere with mandatory reporting.

The other issue is the primacy issue and it's more a question than a comment. I'm rather inclined to be concerned about the privacy bill not having primacy over other acts because of the breadth of acts where you could be given access to health information. I just think it's too open. Obviously with the colleges, the regulatory powers of colleges need to be taken into consideration.

As Ms Lankin has said, let's assume that the health privacy act, in whatever form it emerges, has primacy over any other act, including your own. What needs to be in this bill in order to ensure that your regulatory powers are not interfered with? That may not be answerable this afternoon, but I think that would be an important question for us to have you address.

The Chair: Thank you very much for coming before us today. We appreciate your presentation.

Our next presenter will be Mr Marvin Siegel. Is Mr Siegel here? OK.

We've had a cancellation; the 1:30 slot has cancelled.

Just following up on Mrs McLeod's comments, and not to put you on the spot without any notice, Mr Jackson, I certainly give you the opportunity, recognizing we've got a few minutes, if you want to take up to five minutes to address the issue, and perhaps the folks from the college might like to stick around long enough—if you're so inclined.

Mr Phil Jackson: It will be a very brief answer. There is no intent to remove the mandatory reporting requirements to colleges as set out in the RHPA. One of the dilemmas when you're drafting a privacy statute is to not make it an offence for that disclosure to take place, which is why the language as drafted is permissive in the legislation. It would permit the disclosure to take place under another act and the legislation itself references where there is a requirement under another act.

Obviously this is an area where there's going to need to be more sit-downs and more work with the colleges just to ensure that there is absolute clarity on that. But there is certainly no intent in the drafting to remove the mandatory reporting requirement of the colleges or their ability to undertake investigations.

Mrs McLeod: If we were to amend the act in such a way that the privacy act was given primacy and there had to an exemption under the privacy act for any other act that was in conflict to prevail, would that language then be a concern for the colleges? In other words, if that language of "may disclose" was in the privacy act, the privacy act prevails, then the concern the colleges have been raising about how that might affect their mandatory reporting would be a legitimate concern, would it not?

Mr Jackson: I don't want to speak for the colleges in terms of the answer to it, because there are obligations that come with being called a health information custodian and there are requirements that would have to be put in place. To the extent that we need to go through the specifics of their briefs and also have the ability to access the answers to some of the specific questions that were asked by the committee, they will be very useful for us. We've had a range of meetings on a discussion paper, not on draft legislation, and now we're at the stage where the devil is in the details and the answers to the questions that were posed will be very useful for us because the feedback at the technician level has been solely on a concept document, not on legislation.

We would look forward to those answers. We'll be looking to be able to see the submissions that come in in detail, because it may be more than the "may" clause; it may also be the requirements that come with being a health information custodian.

Mrs McLeod: Exactly. One of the college's recommendations was that they not be defined as a health information custodian, which carries its own set of complications in terms of how their regulatory powers would then be affected under PHIPA.

The Chair: Thank you very much, Mr Jackson.

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MARVIN SIEGEL

The Chair: We are joined by Mr Siegel. Mr Siegel, if you'd like to come forward, thank you very much. I just wanted to put on the record, as I did yesterday afternoon—Mr Siegel, please don't read anything malevolent into this—one of the things we caution witnesses before committees who may not have appeared before is that while the MPPs may enjoy parliamentary privileges and certain protections pursuant to the Legislative Assembly Act, it's unclear whether or not these privileges and protections extend to witnesses who appear before committees. For example, it may very well be that testimony you have given or are about to give could be used against you in a legal proceeding. We caution witnesses to take this into consideration when making their comments. Now it's on the record, once every afternoon. With that, welcome to the committee. We have 10 minutes for your presentation.

Mr Marvin Siegel: I shall keep my eye on my watch, Mr Chairman. Thank you. I'm an almost-70-year-old widower who is the victim of a fraudulent doctor.

The Chair: You might want to sit, because Hansard has a hard time picking it up.

Mr Siegel: Do you have an objection if I stand?

The Chair: I don't, but if Hansard—as long as you speak clearly into the microphone.

Mr Siegel: I'm much more comfortable standing and speaking than I am sitting.

Very simply, I had vibrations about this particular psychiatrist. I searched out my own OHIP billing records, pursuant to section 38(2) of the Health Insurance Act, and found out that he was billing me fraudulently. I was a member of a bereavement group for only a short period of time as a result of the loss of my wife. This psychiatrist was billing me for much lengthier sessions than the group's were, and that's across the board with all the people, and, in addition thereto, he was billing me for specific two-and-a-half-hour sessions of individual in-patient psychotherapy that did not take place.

Very simply—and I realize I'm restricted in time, so I'm keeping my eye on my watch—I reported him to the Ministry of Health and I reported him to the College of Physicians and Surgeons. I took an endless amount of time to go through the process with the legislation that Ms Lankin was the sponsor of way back in 1991. The 120 days is a farce under that legislation, even for the simplest complaint. The college, notwithstanding the fact that they had from me very detailed listings of this doctor's billings from the Ministry of Health's provider services monitoring control, saw fit to dismiss my allegations against this doctor as billing disputes. I could see where uninsured services might end up in billing disputes, but insured services are not billing disputes; the billings are either honest or dishonest. I want to make this fast.

Very simply, I then, pursuant to Ms Lankin's legislation, brought an application for a review to the Health Professions Appeal and Review Board. That matter has been reserved in decision by that tribunal now for 15 months—not on the allegations of billing, because we withdrew those pursuant to the legislation at the Health Professions Appeal and Review Board, but on the basis that it would be redundant to have the Health Professions Appeal and Review Board return it to the college through complaints to refer to discipline when he was already going to be disciplined pursuant to the conviction under the Criminal Code.

This doctor was then suspended by the college, and he was convicted but did not go to jail. This is the area where we talk about records and personal information. I'm aware that the College of Physicians and Surgeons people are here; I know most of them. I know what their submission is going to be; I know what the submission is going to be from the point of view of others who are representing organizations. Simply this: this psychiatrist created charting that indicated that I was a heterosexual pedophile with regard to my own daughters and wrote medical reports to that effect. So when it came to the criminal proceedings, I put in a victim impact statement, which I'm advised is the first victim impact statement ever filed in a criminal proceeding with regard to a doctor who was convicted of fraud in his OHIP billing. That victim impact statement was presented by the College of Physicians and Surgeons to the discipline panel.

Very simply, I suggested to the counsel who acted for the college at that point in time, "Why don't you do the following, if you're going to ask for a suspension"—which they ultimately got. I searched out 47(2) under the Freedom of Information and Protection of Privacy Act, which is an issue before you, which I fully understand, and very simply I held off bringing my application because I don't anticipate being asked to become Chief Justice of the Supreme Court of Canada at this age, or Canadian ambassador to Israel, so a security check would be of no major importance to me.

But I stand before you with a health record at the Ministry of Health which is totally and utterly false that says I was an in-patient at a psychiatric facility. I have a letter from the solicitor of the hospital where this particular psychiatrist has privileges which clearly indicates, as I knew, that I have never been an in-patient on any service from that hospital, nor have I ever been an in- or out-patient at any psychiatric facility.

I suggested to the college, as I suggested to the assistant deputy minister of health, the general manager of OHIP, "Why don't you assist the public under 3(2) of Ms Lankin's act, objects of the college, in the code?" Section 3(1) is the objects; 3(2) says in carrying out the objects the college shall preserve and protect the public interest. I asked the Ministry of Health to advise the patients of this particular psychiatrist who have fraudulent records at the ministry of section 47(2) of the legislation and, in addition thereto, to tell them what to do and how they fill out the form and how they go about it. You

know what's going on with that, with Cavoukian. I know you've had before you the other patients of Dr Scott, so I'm not going to repeat what you already know.

Very simply, the reports that indicate I'm a heterosexual pedophile, the charting that supports some of it, are at the College of Physicians and Surgeons; they're one custodian. It is now at the Health Professions Appeal and Review Board, and I will not mention names because of the fact there are civil proceedings pending. Very simply, there are mix-ups. You must look, in considering this bill, at the sections of the regulations under the Medicine Act with regard to professional misconduct, with regard to the issue of the capacity of a doctor to give out medical information about you, with or without your consent. You must look at the provisions of the Regulated Health Professions Act procedural code with regard to the capacity of the Health Professions Appeal and Review Board, that when they get documents from the college coming to them, they have the power to dictate whatever becomes public—but how many people see those records?

In my own situation involving the hospital—the only hospital I could have been admitted to as an adult, because this is the only hospital where this psychiatrist had admitting privileges—very simply, they wrote to me and said, "The hospital, under the provisions of the Public Hospitals Act, is the custodian of all in- and out-patient records." They asked me post-fact for an authorization. When I sent them the authorization, they told me their cupboard was bare. I believe that was risk management with regard to their position or their own possible exposure under the Public Hospitals Act. That's another issue.

There are so many ways all this information can go. I have to go public with it in order to commence a civil action, which I've done. The health pro board has it, the college has it, and I just want to tell you one thing about the college. I will say one thing about the College of Physicians and Surgeons that is definitely in their favour. They go much further, under section 23, again of Ms Lankin's act, under the code, to make available to the public information that is not available from the other colleges. But when you make a complaint against a doctor, you must give them a consent on their form. They then write to the doctor for the charting. In my particular situation, with no disrespect to anyone, there was no clinical issue; the issue was credibility. I provided them with the authorization; they obtained charting from various doctors, because there happened to be four involved in the situation—one who very briefly treated a child.

They had never been asked this before, but I said, "How do I know that what they provided to me on the basis of my authorization is exactly the same as they provided to you on the basis of the authorization I gave you?" They'd never been asked this before. "Please make it available to me." From one of the doctors' charting, there were two additional pages that involved not only myself and other patients, but did not involve the child who this particular physician was treating, and said—this particular physician had nothing to do with me; he simply

was treating the child. He wrote a report that went to the college that said, "Marvin Siegel is in crisis and he's going to break down any day of the week." Somehow it hasn't happened for almost six years since that doctor, who was not treating me, in whom I never confided, wrote that report. So these people can write anything, and in my situation—I appreciate I'm virtually running over-time—it's as follows: this particular physician, in order to destroy my credibility, in order to destroy my reputation, wrote charting and reports which were totally and utterly false. How do I get rid of them?

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I'm well familiar with McInerney and MacDonald in the Supreme Court of Canada, and I hope this bill does not knock out McInerney and MacDonald in the Supreme Court of Canada, which I assume some of you know of. It's the case that deals with charting. Has anyone got any questions on that one? I'll just assume you know what I'm talking about. McInerney and MacDonald provides for the patient's right to charts. The doctor can only refuse a chart on one of two bases: if, by getting the chart, the patient may be at some risk at his own hand, or if some third person may be at risk at the hand of the patient. But if that isn't the case, then if the doctor refuses a chart on one or the other of those two bases, or both, you can go to the superior court, which would exercise its superintending jurisdiction to decide whether the doctor's refusal should be upheld or he should be ordered to give you the documents. This particular doctor has never availed himself of that. The hospitals never provide additional charting.

There are various pieces of legislation you have to look at. You have to look at the regulations under the Medicine Act. I can recall when the omnibus bill was first passed—and I believe it has been incorporated into the Health Insurance Act now—there was a section, if my memory serves me, something around 26, that said, "When you receive an insured service, you are deemed to have authorized the release of your personal medical information for purposes of enforcement of the provisions of the act." What that means is as follows: another patient of the doctor brings some allegation against the doctor as to false billing. OHIP—Keith Mesham, OPP anti-racket squad, Ministry of Health, fraud investigation unit—now come in. They can look at my file. They can see that I'm being treated for HIV or AIDS or some other socially transmitted disease. Is the only protection I have if I pay a doctor directly? Is that is the only way I can protect my own personal health records? Is that the only way?

There are these various aspects of other pieces of legislation, and if I'm repeating stuff you've heard before, I'm terribly sorry. I've tried not to step on the toes of other custodians. I approach it strictly from how this situation has affected me. I have not yet applied. I've been in touch with Mr Baker, who acts for Dr Scott's patients, for Mr Murray and the others and Stanley Burke etc, who I understand have been before this panel.

I've basically run over my time. I could go on, but I'll be prepared to answer any questions you may have for

me. But this bill has to be changed if not totally knocked out. It's totally and grossly unfair.

I might just put this to you as well. In my own investigation, what I've done is this—and I can produce this for you. Risk management is a very important issue in all areas of health care at the moment. I became aware of a form that was put out by an American organization called Dental Risk Management. That form is basically a whole file for a dentist on a patient, but the key parts of it that concerned me were that not only do you give the dentist a total dental history but you give him a total medical history that involves hepatitis from A to Z and everything possible, and you sign an authorization on the bottom that, for his purposes in knowing, you authorize him to get your records.

There's one I just want to tell you about, and Ms Lankin may remember this. In January 1996—if you'll indulge me just for a moment or two, please—there was an article, a Canadian Press wire service story, that I called the Canadian Press Ontario desk on, and found out it was Tom Blackwell, who used to be a Canadian Press reporter here at Queen's Park. He's now Southam News at Queen's Park, the last time I heard of him. Very simply, he wrote an article that went out on the wire service. I saw it in both the Toronto Star and the Toronto Globe and Mail. What it said was "General Practitioner Does Heart-Lung Transplant Surgery in Patient's Home." The headline is enough to make one think. It involved a doctor, if I recall correctly, in Brantford. He alleged that he performed these services in the patient's home with a local anaesthetic. I don't know if the local anaesthetic applied to the residence of the patient or if it applied to the portion of the corpus where the local anaesthetic was injected, but very simply, he did it to test the system.

Let's just look at this from the perspective of this patient. We know the system. I will say this—because you people legislate this province in terms of health insurance etc—the people at OHIP, at 2195 Yonge Street, from Arlene Heins down, and others, have been so fantastic to me in explaining to me how the systems work.

The doctor goes on his provider number; he bills against a patient's health number. Let's assume this man whom he billed the heart transplant to was a young man with a family, going to apply for insurance, putting on a mortgage, the whole scene. The only way the doctor who billed falsely for the heart-lung could have billed against him was on his health number. However he acquired it isn't the issue; he billed on his health number. When he admitted that he was only doing it to test the system and the money would be held by his solicitor to be paid back to the ministry if they requested it, was that false billing removed from that patient's health record? What if he didn't know and he made applications for insurance?

I've covered this extensively in my own victim impact statement, but subsequently it got into the very first victim impact statement—I appreciate I'm out of time, and I'm virtually finished—filed by the Ministry of Health, by Dr Steven Ingle, who was one of the medical

consultants at provider services monitoring control in Kingston, at the criminal proceeding involving Dr Donald McDiarmid, who's before the discipline committee of the College of Physicians and Surgeons tomorrow on 51(1)(a), having been found guilty of an offence relative to suitability to practice. He deals with the impact on the system, the impact on other doctors and particularly the impact on patients.

How does a person know that a doctor puts in a false billing for you? If you apply for insurance and you don't know that that doctor put heart transplant surgery on your record, you are in theory making a false declaration on your application for insurance. And what a lot of people don't know is that downtown on University Avenue, not too far from us, there's a database that's run by all the insurance people, and if you make an application to company A and they turn you down, for whatever reason, company B can access that. What happens if he's involved in an accident? What happens if he dies and the insurer denies the wife, who may be the beneficiary and the executor of his estate, who has to then say, "Here's an authorization to search his health records"? "Oh, we're not going to honour that insurance policy, poor widow. Your husband made a false declaration on his application for the insurance. He didn't tell us about the heart-lung transplant surgery."

The Chair: Thank you, Mr Siegel. I did in fact indulge almost twice as much time because we had a cancellation in the slot after yours.

Mr Siegel: I picked the right slot.

The Chair: You certainly did. We appreciate your bringing this before us. It certainly raises issues that go beyond this bill.

Ms Lankin: I recognize there's no time to ask Mr Siegel questions. I would like to ask the Ministry of Health, if they're so inclined—it's just a request from a committee member—to assign someone to sit down with Mr Siegel and prepare a detailed summary of the various interactions he has had with these different pieces of legislation and their privacy protections so the committee could actually have a story template of what Mr Siegel has gone through and the various pieces of legislation that he is asking us to have consideration to as we're looking at this. I think it would be very hard for us as committee members to understand all that, but perhaps the ministry might be able to put it in a fashion that is usable for the committee.

Mr Wood: Perhaps I might be able to leave Mr Siegel with my card and he can contact us at our office—if you would, if you're so inclined. If you don't want to do that, of course, that's fine too. Perhaps I can leave you with my card. You can contact our office. Don't do it before tomorrow, because I'll have to tell them about this first.

Mr Siegel: I'll be busy attending the McDiarmid hearing at the college tomorrow, sir.

Mr Wood: We'll see what we can do to set something up for you.

Mr Siegel: Mr Chairman, may I have 30 more seconds, please?

The Chair: Thirty seconds.

Mr Siegel: Recently I had occasion to make a motion before the discipline panel of the College of Physicians and Surgeons on another doctor—not Dr McDiarmid or the one I was personally involved with. I have been called a vigilante with regard to health care, particularly the issues involving fraudulent doctors. I said to Dr Adams, the then, and still now, chair of the discipline committee of the College of Physicians and Surgeons, "Dr Adams, I've been accused of a lot of things, but I want to say one thing, and that is, I have a very, very wide acquaintanceship in the medical fraternity, a couple of doctors who I consider to be close personal friends. Most of the ones I know—virtually all of them—are honest, hard-working and, what I consider to be an achievement, everyday, in-and-out competent. But the sad side of the story is this: professionally I have acted for Mafiosi, one of whom is reported in the Supreme Court of Canada—the names aren't important. In my dealings with Mafiosi and criminals, many of them have been more honest in their personal interrelationship with me than some of the doctors with whom I've had professional dealings in the over five years since my wife died."

The Chair: Thank you, Mr Siegel. I appreciate your taking the time to come before the committee today.

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CANADIAN INSTITUTES OF HEALTH RESEARCH

The Chair: Our next presentation will be from the Canadian Institutes of Health Research. Good afternoon and welcome to the committee.

Ms Patricia Kosseim: Good afternoon. I am accompanied today by Matthew Furguele, a research officer from our ethics office at CIHR, and Dr Don Willison, an epidemiologist at McMaster University who has been intimately involved in many of our ongoing initiatives in the area of privacy and confidentiality of data. On behalf of the Canadian Institutes of Health Research, I would like to thank you for this opportunity to comment on Bill 159.

CIHR is Canada's leading health research agency, effective since June 7, 2000, that encourages interdisciplinary integrative health research pertaining to all aspects of health. The objective of CIHR is "to excel ... in the creation of new knowledge and its translation into improved health for Canadians, more effective health services and products and a strengthened Canadian health care system."

To fulfill this objective, CIHR is mandated by Parliament to, among other things, exercise leadership within the Canadian research community and foster collaboration with the provinces and with individuals and organizations in or outside Canada that have an interest in health or health research; promote, assist and undertake research that meets the highest international scientific standards of excellence and ethics; and foster the dis-

cussion of ethical issues and the application of ethical principles to health research.

It is in this spirit that we have come here today to offer our views on Bill 159 and, more specifically, its research provision at section 32.

We will begin by briefly describing some of CIHR's ongoing initiatives in the area of privacy and confidentiality of data, in order to frame the perspective which we bring to bear on this issue. We will then proceed to address two specific points in relation to the research provision at section 32; namely, the role of the research ethics boards and the need for harmonization of standards.

As you know, there is a compelling need to address real and legitimate public concerns for privacy and confidentiality of personal health information. As technology advances and the manipulation of data becomes increasingly sophisticated, policies and guidelines must evolve accordingly in order to ensure that appropriate safeguards are in place and that fundamental rights to privacy and confidentiality are respected.

There is also a compelling need for health researchers to access data at varying levels of potential identifiability in order to study fundamental questions in areas of biomedical research, clinical research, health services research and population health. The health of Canadians, the viability of their health care system and ultimately the state of their economy depend on it.

The governing council of CIHR identified very early on, as a top priority on their ethics agenda, the need to develop a balanced policy position that takes into account both the societal need to access data for health research purposes and the individual right to privacy and confidentiality. Part of the ongoing initiatives in support of this priority included the publication of a compendium of all Canadian legislation respecting the protection of personal information in health research, along with a soon-to-be-completed international supplement.

In June 2000 a workshop was held entitled *Personal Health Information: Balancing Access and Privacy in Health Research*, which was attended by 45 participants with a wide cross-section of experience and expertise. Among their recommendations was the need to catalyze dialogue and mutual understanding between policy-makers, legislators and the health research community.

In that vein, CIHR, in partnership with Health Canada and the Canadian Institute for Health Information, and with the collaboration of Industry Canada and the Office of the Privacy Commissioner of Canada, has prepared a series of Q&As on the application of the new federal act to health research. The aim of this initiative is to help inform health researchers of the potential implications of the federal act, apprise them of the issues and begin to engage them in the current debate.

In a parallel initiative, CIHR has struck a working group of health researchers to prepare a series of concrete case studies as a means of describing, in a language more familiar to them, why data is indispensable; how the data is actually collected, used and disclosed in practice; and

in what form and whether and how consent is obtained. We hope this latter initiative will provide the evidence-based scenarios necessary to assist policy-makers, legislators and privacy commissioners in appreciating the inherent complexities of health research.

The need for these case studies was apparent when, last February 8, in response to a question by a member of this committee on the possible exception for epidemiological research, given the need to track individuals on a longitudinal basis in a manner that would not unduly bias results, the privacy commissioner answered, "It might be. I would have to say I've heard that argument made and I've heard a lot of anecdotal evidence that not having the full sample somehow badly skews epidemiological research. Not to say it is not out there, but I have not seen the persuasive evidence that this is in fact the case. I have not had somebody point to, 'The following studies that were of real importance turned out to be badly flawed because ...,' for instance." It is hoped that the case studies currently under development will help advance this dialogue.

Finally, all the results of these ongoing initiatives will feed into the work of a soon-to-be-created CIHR task force on privacy and confidentiality of data. The mandate is to develop a CIHR policy position during the course of this year. The purpose of this presentation is not, by any means, to pre-empt the conclusions of the task force. Rather, we are here today to provide some interim comments during what is and continues to be a learning period for us all.

We now turn to our specific comments regarding section 32 of Bill 159. Subsection 32(1) provides that "A health information custodian may disclose personal health information to a researcher, being a person conducting a research project or program, only if a research ethics review body designated by regulation has approved the project or program in accordance with this section."

CIHR supports the requirement for prior ethics approval by a research ethics board or REB. REBs are indeed the appropriate oversight body for assessing the proposed collection, use and/or disclosure of personal information for health research purposes and determining the conditions under which it may be done. Independent, multidisciplinary REBs have been established at a local level in academic institutions across this country for several years now; in some cases, well over two decades. They embody a broad range of perspectives and an enormous wealth of hands-on experience in reviewing the ethical acceptability of research protocols. They are composed of at least two members with expertise in the area of the research under review, at least one member knowledgeable in ethics, at least one member knowledgeable in the relevant law and at least one community member.

REBs have acquired the degree of specialized knowledge necessary to understand the inherent complexity of research proposals involving various disciplines and to recognize and promote best practices as they begin to

emerge. They are well immersed in the issues relating to both the protection of individual human subjects and the societal need for research. They are intimately familiar with the guiding ethical principles of the Tri-Council Policy Statement on Ethical Conduct for Research Involving Humans, published in August 1998 by the then Medical Research Council of Canada, since replaced by CIHR, the Social Sciences and Humanities Research Council and the Natural Sciences and Engineering Research Council.

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The ethical principles underpinning the tri-council policy statement are: respect for human dignity, respect for free and informed consent, respect for vulnerable persons, respect for privacy and confidentiality, respect for justice and inclusiveness, balancing of harms and benefits, minimization of harm and maximization of benefit.

REBs have unique experience, not only with each of these principles but also in applying them in a proportionate and flexible approach to achieve overall balance. REBs are specially placed to play both a review and an educational role. They review research protocols with the aim of determining their ethical acceptability from the point of view of the research subject. They also provide an ongoing consultative and educational function for the research community.

REBs, therefore, are a valuable resource and effective outreach tool. CIHR would encourage the drafters of Bill 159 to consider mechanisms, *ab initio*, of involving REBs in the process of implementing the bill. Rather than emit regulations that may or may not prove to be workable or feasible in practice, there may be ways of consulting REBs across the province as a means of informing that process in the early phases of the implementation of the bill.

This leads us to our second specific comment, which pertains to subsection 32(5) of Bill 159: "When determining whether to specify that a researcher is required to obtain the consent of the applicable individuals, a research ethics review body shall consider the matters that are prescribed by the regulations." In light of this broad wording and the possibility of regulations, we would like to emphasize the importance of living and evolving standards in harmony with other applicable standards in research ethics. The tri-council policy statement itself reflects a groundbreaking commitment to common ethical norms that transcend disciplinary boundaries across the social sciences and humanities, the natural sciences and engineering and the health sciences. They reflect shared fundamental values and equality of respect for the rights of human subjects, regardless of the researcher's discipline.

In 1998, when Quebec adopted its Plan Ministeriel en Éthique de la recherche et en intégrité scientifique, pursuant to article 21 of the civil code of Quebec, expressly recognized was the importance of harmonization with already-existing standards, including international ethical norms on research and scientific integrity and the tri-council policy statement.

Ongoing efforts continue, with a view to harmonizing or at least facilitating compliance with both tri-council requirements and the international harmonized conference good clinical practice guidelines for clinical trials. The latter guidelines were adopted by the therapeutic products program of Health Canada in September 1997 for the registration of pharmaceuticals for human use.

More recently, the presidents of the three federal granting councils, the then Deputy Minister of Health, David Dodge, and the president of the Royal College of Physicians and Surgeons recognized the need to fortify the legitimacy and support for REBs through some form of accreditation system by an independent, arm's-length body covering both public and private sectors. While the modalities for implementation may vary for different research communities, the need to afford all human subjects with the same level of protection regardless of the source of funding was recognized as a basic principle.

Finally, the challenge for harmonized research ethics standards is one that extends well beyond Canadian borders. There is a compelling and urgent need to provide a level of assurance comparable with international standards if collaborative research is to be fostered and encouraged. The trend, therefore, is clearly towards greater harmonization of standards and not the opposite.

Thank you for your attention. We'd be happy to address any questions you may have.

The Acting Chair (Mr Doug Galt): Thank you very much for the presentation. We have approximately six minutes left—two minutes per caucus—and I believe we start with the government side. Mr Wood.

Mr Wood: Do you have any problem with the concept of ultimate sign-off on research projects by the privacy commissioner, where personal health information is going to be disclosed?

Ms Kosseim: I think the point we're trying to bring forth is that the research ethics boards have the acquired specialization to deal with not only privacy and confidentiality but other important ethical norms that need to be considered in a balance. Ultimately, the idea of a privacy commissioner also providing ultimate sign-off is a matter of practical reality and whether the necessary mechanism can be put in place for a double sign-off. What the implications are is something that—

Mr Wood: I don't think it would be a double sign-off. Ultimately, somebody has to set the policy. The question is, is that a board set up under regulation or is that someone who has in effect been approved by the Legislature as a whole?

Ms Kosseim: I think the REB experience speaks for itself and that it's a valuable and certainly a rich resource and one this legislation has recognized, and we support that direction.

Mr Wood: You would resist the idea of the privacy commissioner signing off, would you?

Ms Kosseim: I don't think we would resist the idea. In fact, that is the situation in Quebec, where both REB approval and privacy commissioner approval are necessary. However, in Quebec the privacy commissioner's

role is very defined, and it's coherent in both the public and private sectors according to the same criteria in both instances.

Mr Wood: I'm going to try to slip one more question in if I can. Sorry about this.

Ms Kosseim: I'll let my colleague.

Dr Don Willison: I wonder if I can pose a question: whether the government would be interested in the possibility of REBs submitting reports to the privacy commissioner, basically accountability statements of what they have done over the past quarter or year, the decisions that have been made and some sort of summary that would help in that way. My concern would be the capacity of the commissioner's office to handle the volume of work, because it is huge, and the expertise that would be required to be brought on board.

The Acting Chair: Thank you very much. I'm going to move on to the official opposition. Ms McLeod.

Mrs McLeod: First of all, is it possible for us to receive a copy of the questions and answers you have provided in terms of the impact of federal legislation on research?

Ms Kosseim: Certainly. They are intended to be published very soon. As soon as they are, in the next weeks or month, we will provide you and the members of this committee with a copy.

Mrs McLeod: I suspect I won't have time to return to that, so I'll wait for you—I just want to focus on an issue you raised that hasn't come up before, and that's the regulations to be prescribed regarding consent, subsection 32(5). It is odd to think about why the terms under which consent would be required aren't set out in legislation.

I'm not sure if you have seen the proposed amendment to that section from the Ontario privacy commissioner. If you haven't, may I just read you what she has recommended: "When determining whether to specify that a researcher is required to obtain the consent of the applicable individuals, a research ethics review body shall consider all the relevant circumstances, including whether, (a) it would be reasonable to require the researcher to obtain consent from the individuals; and (b) the personal health information will be used only for the purpose of linking or matching information and in a manner that conceals the identity of the individuals, that keeps identifiers of the individuals separate from the information or that deletes the identifiers from the information."

I know you don't have that in front of you, so it's hard to respond to it, but is your sense that that's the direction you think would provide that common standard across all the jurisdictions where they're conducting research in Canada?

Ms Kosseim: To be fair to your question, I would have to read more carefully and in more detail the extract you just read. I'll let my colleague supplement, but I would probably need to digest that more carefully.

Mrs McLeod: That's fair.

Dr Willison: At first blush, it's reasonable. Again, I would have to—

Mrs McLeod: Mr Chair, may I ask on behalf of the committee, as a point of information, whether we could ask for a response from the presenters subsequent to today's session as to whether that particular amendment would meet the concerns they've expressed?

Ms Kosseim: Certainly, we'd be pleased to.

The Acting Chair: We move on to Ms Lankin.

1400

Ms Lankin: I also look forward to hearing your comments on Ms Cavoukian's recommended amendments and receiving copies of the Q&As on the federal legislation. I hope the work you're doing on the case studies is work that will be finished expeditiously, as well.

Ms Kosseim: Yes.

Ms Lankin: It is my pet question to every research group that comes forward. Explain it to me. I'm very sympathetic to ensuring that we can continue to do good, quality research. I just don't want to give free rein in legislation, even to a research ethics board, to make those determinations where it's not necessary. I want to make it as narrow in scope as is practical. If you give us the information of where there is reasonable and necessary research going on that requires identifiers and of what nature and for what purpose, we'll grasp it. But nobody's putting those examples on the table. That's really important work, I think.

Ms Kosseim: That's exactly the purpose for the undertaking. They will be an incredibly valuable and insightful tool for discussion, analysis and dialogue, and we will be pleased, once again, to provide you with a copy of it when it's complete.

Ms Lankin: Do you have a timeline?

Ms Kosseim: We are hoping for a draft by the end of March, and we would not be averse to the idea of distributing a draft discussion.

Ms Lankin: I think that would be very helpful. I have no idea what timelines the committee and the government will be on with respect to this bill, but it's important to the bill.

Could you also provide us—I'm not sure that we've received it yet, but if we haven't—a copy of the tri-council policy? That would be helpful.

Yesterday we did receive a copy of a document entitled the Declaration of Helsinki. Could you tell us, in your view, what standards are contained in the Declaration of Helsinki, its commonality or not with the tri-council policy, and is it an appropriate standard? It was argued that it errs on the side of protecting privacy. More so than the tri-council policy or not?

Ms Kosseim: I believe the tri-council policy statement is founded fundamentally on international guidelines such as the Declaration of Helsinki. I believe also there are recent amendments to the Declaration of Helsinki that raise interesting issues that would have to be looked at in particular to see their impact and their implications. But certainly at its inception, the tri-council policy statement was founded on the principles of those international guidelines.

The Acting Chair: On behalf of the committee, we appreciate your presentation. However, we're missing two names, if you don't mind, the other two members of your delegation, if you'd read that into the record for us.

Mr Matthew Furguele: I'm Matthew Furguele, a research officer with the Canadian Institutes of Health Research.

Dr Willison: Don Willison, assistant professor in epidemiology and biostatistics at McMaster University in Hamilton.

The Acting Chair: Super. On behalf of the committee, thank you for your presentation.

Mrs McLeod: Mr Chair, I just expand on my earlier question. Ms Cavoukian had another proposed amendment which would involve a form of lockbox. That may be addressed by your Q&A on the federal legislation, but if you could also give us some idea of how that might affect your work.

AIDS COMMITTEE OF TORONTO

The Acting Chair: I now call the next delegation forward, the AIDS Committee of Toronto. Welcome. On behalf of the committee, we look forward to your presentation. As you begin, please state your name for the sake of the record.

Mr Lee Zaslofsky: My name is Lee Zaslofsky. I'm the advocacy and media relations coordinator for the AIDS Committee of Toronto, also known as ACT. I'm speaking today on behalf of ACT. My presentation won't be that lengthy. We're not a terribly legally sophisticated organization. We rely very much on the HIV/AIDS Legal Clinic of Ontario for information on this kind of detailed legislation.

The AIDS Committee of Toronto was founded in 1983 by members of Toronto's gay community who were concerned about what we now call AIDS. They recognized that it could be a long time before governments began to address this issue, which seemed to appear out of nowhere, and whose causes were a mystery. So they formed ACT to focus the community's energy as it dealt with the epidemic, to provide support to those who were ill, prevention information to those who were not and to advocate for government and private support for work in this area.

Since then ACT has grown to be the largest AIDS service organization in Canada, with a wide range of programs that try to address the increasingly complex challenges that the AIDS epidemic represents. We are proud that the support of the community is shown by the 300 members, 800 volunteers and about 25,000 donors who last year participated in our organization. Our approach is based on partnership with the communities we serve directly and partnership with other AIDS service organizations that serve communities we do not serve ourselves.

From the very beginning, when AIDS was called gay-related immune deficiency—if you remember GRID—the issue of privacy was a major challenge for everyone

infected or affected by it. From the outset there was a heavy stigma attached to people living with AIDS that was compounded by the fact that in this country the first group that felt the force of the epidemic was the already-stigmatized gay male community.

In the succeeding years, ACT and the whole AIDS community have worked hard to ensure that Ontarians are better informed about the causes and nature of AIDS. This effort has had much success, but there is still, in much of the population, a powerful stigma associated with AIDS that makes it necessary for every person living with HIV/AIDS to be very concerned about privacy. It is absolutely essential that people living with HIV/AIDS keep as much control as possible over information about this serious health condition. Each individual must decide how much information should be shared and with whom.

The consequences of losing control over information about one's HIV status, as with some other health conditions, can be devastating and grossly unfair. People can lose their jobs, their housing, their relationships, even their lives, if the wrong people find out that they are HIV positive. Even the fear of losing that control can become a debilitating factor in people's lives. ACT's clients live with these challenges every day, challenges that come on top of the health issues that they must face.

That is why ACT was pleased that the government of Ontario was planning to propose legislation that, we hoped, would solve or ease many of the problems our clients face in relation to health information. A good law on this subject would be a major step forward in addressing some of the most difficult issues of HIV/AIDS and would reinforce Ontario's commitment to the privacy of HIV information as shown by the establishment of anonymous HIV testing clinics around the province.

Now the Minister of Health and Long-Term Care has presented Bill 159, the Personal Health Information Privacy Act, for consideration by the Legislature. We are pleased to have the opportunity to comment on it to this committee and we hope that you will give careful consideration to our concerns and those that others raise about this bill.

ACT joins with the HIV/AIDS Legal Clinic of Ontario, or HALCO, and other AIDS service organizations in urging you to recommend the withdrawal of the bill. Bill 159 does not adequately resolve the problems it was presumably designed to address. We agree with the Privacy Commissioner of Canada, Mr George Radwanski, who said to you recently, "As for Bill 159, I don't believe that a law that is so fundamentally flawed in virtually every provision can readily be fixed.... My suggestion would be to scrap it and start afresh in a new spirit."

If the government is not willing to adopt Mr Radwanski's, HALCO's and ACT's suggestion to withdraw Bill 159, ACT supports the recommendations contained in HALCO's brief. However, even with these amendments, the bill would represent a lost opportunity for Ontario to move to the forefront of those jurisdictions that care about the privacy rights of their citizens.

The Acting Chair: Thank you very much. We have about four minutes for each caucus, beginning with the official opposition.

Mrs McLeod: I appreciate your being here and adding to the testimony we received from the clinic yesterday.

One of the concerns that's raised is the breadth of access that this bill gives to, at this point, unidentified people, because of the regulatory power of the minister to expand the list of people who can be recipients of health care information and because of the ability of the minister to provide for direct disclosure. In the way the legislation is written, it's virtually whatever future ministers may decide. So whatever the intent of the current minister or ministry, the way the legislation is worded, there could be changes in the future that would raise concern. What alarm bells go off for you in that respect? What would be the fears of people living with HIV/AIDS in terms of their confidential health information falling into the "inappropriate or wrong hands?"

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Mr Zaslofsky: As you know, as I mentioned before, AIDS is heavily stigmatized in a lot of situations. Let me give you an example. Women are more and more becoming a group that is infected with HIV. It's still a very small group in this country compared to some other countries but it is growing and it's very alarming. Women face a lot of issues when they are confronted with having HIV: relations with their children must change; relations with their partner, their husband, could change drastically; relations with their own community could change.

We have worked with some women of Ethiopian background who have come to us and we said, "Why don't you go to someone closer to you in Scarborough?" They say, "No, we have to get out of that area because we might be seen going to ask for service. We are very afraid that if we reveal our status to our husbands, they will regard us as prostitutes," because of course it could never have come through them, "and they will abuse us and turn us out. Our community shuns people that are HIV positive, so we would be shunned. Our children would be taken away from us because we would be thought of as unfit mothers. So we come to an agency"—they call it a "white agency"—because, first of all, the service is going to be good because the white people get better service in our province, in their view, and, secondly, because it's out of their community.

When you look at the kind of fear that those women are experiencing just about revealing this to an AIDS service organization, you can multiply it when they have to consider, "Which doctor shall I go to? Shall it be the doctor that I go with my husband? I can't reveal it to my husband, so it can't be that doctor. What if I go to another doctor? Can I trust that doctor to keep this information? Can I trust him not to tell other people in my community?" All those concerns.

When you have a situation as envisaged by this legislation, which gives such broad license to collect

information, to transfer information, and leaves it to regulation by the minister to decide who and when and how this shall be done, obviously the problems that these women and many others like them are suffering from are multiplied many times over.

I'll tell you what the net effect of it is: they don't go for service. They say, "I can't trust the system. So rather than work through the 15 different acts and regulations over this, I'll stay away." This happens a lot, with men, women and everyone else.

Mrs McLeod: Am I out of time?

The Acting Chair: Just very quickly.

Mrs McLeod: It may be an unfair question, so I may just leave it with you, but we're going to hear tomorrow from the police association. One of the things they will be telling us is that when a police officer has been bitten, when somebody has been sexually assaulted and I think there's another condition, there should be access to an individual's health records. Can you comment on that?

Mr Zaslofsky: Yes. That's just rubbish, I'm sorry to say, this "bitten" business. I don't know where this is coming from, that being bitten is a risk factor for contracting HIV. The way to avoid contracting HIV is to adopt safe practices. This applies to people who are having sex, people who are doing drugs, people who are in policing, in the helping professions, such as dentists, and so on. That's the way to counteract it, not to say the only thing that I should worry about is someone who is HIV positive biting me or doing something to me. If you rely on that kind of prevention, you're going to enhance the spread of HIV.

It's the wrong approach to say, "I was bitten. Please, I have to know whether the person was HIV positive." You have to take precautions to avoid risks at the outset in dealing with people. Police, of course, do this in many, many cases. They don't wait to see whether the person who is waving a gun at them was licensed to have a gun before they do something. Of course, they have to take steps to deal with the risks that situation poses. They have to prepare for it and they have to deal with it at the time. That's what I would say is the—

The Acting Chair: Thank you. I think we should move on to Ms Lankin.

Mr Zaslofsky: Sorry to go so long.

The Acting Chair: It's OK.

Ms Lankin: I'm going to let you just continue on explaining your response, because the committee will hear these arguments made. In a former profession I was involved in, corrections, a lot of work went into developing universal precautions to put in place in correctional facilities. But at the time, it came out of a case such as this, and people raise issues of workers' rights. We heard it from one of the presenters from—I think it was Thunder Bay, or it might have been Algoma; I can't remember which—who talked about an orderly in the hospital and people demanding access to information about patient status.

Universal precautions is one thing. Are you arguing that if there is some kind of traumatic event, you're at a

highway accident and you're exposed to bodily fluids, there is no access to records, or people should just be tested on their own? What's your answer to what will be proposed?

Mr Zaslofsky: Yes, people should be tested on their own, even if the person that has just bled upon you—and of course, that's not a risk in itself. You would have to have an open wound or something on your skin for their blood to mix with yours and so on. So there's a low risk in any case. But even if that risk were there, you would still say the way to deal with it is to look and see whether you actually caught the illness, not to look and see whether the person that you're dealing with had the illness. That's not the way to do it.

Ms Lankin: Thanks. I think that answers that.

I want to take this a step further, then, because I fully understand the case you're making and that others have made with respect to the lack of privacy protections in the legislation as drafted. Somewhere between there and what exists today, which has all of the concerns that you've mentioned that clients of yours express, it somehow works most of the time. We're getting more protocols in place, more sensitivity. Are there specifics in the way the world works today that need to be addressed, or is it simply that the legislation as it's proposed gives up many of the protections you think you've already put in place today?

Mr Zaslofsky: Yes, I think that's really the problem, that the legislation seems to be, if I may say so, very closely focused on what shall or shall not happen with these custodians of health information. The real problem is the information and the real problem with the information is the right that the person has to own it. I think the Ontario government has to recognize that right and has to proceed from that basis. I think this bill is going in the other direction and saying, "How shall we protect people that we define as custodians of health information from the various kinds of liability and inconvenience that may arise for them?"

I think there's too much of that in the act. Obviously, you have to consider it. There's too much of that and too little of saying, "What about people that are even now being deterred from seeking service and who worry about things like what the police association will say?" because it gives them the feeling that society may be moving in a direction where all this is going to be opened up to everybody. If something happens, let's find out if he's HIV positive. That would be a real catastrophe in the lives of many of the people in this province, not just for the individuals themselves but for their families and all the rest of it.

We're concerned about the trend this bill seems to manifest. We're very concerned that the Privacy Commissioner of Canada has such a low opinion of it and will say to Parliament, "I don't regard this as similar enough to federal legislation to recommend that you recognize it." I think that's very disturbing. For people who are sensitive about their privacy issues, that is very frightening.

The Acting Chair: We'll move on to the government side.

Mr Wood: Would ACT be satisfied if we passed an act substantially similar to the federal Privacy Act?

Mr Zaslofsky: No, I think we agree with the HALCO presentation that was made to you yesterday, in which—I forget the name of it, but there is a very good model for privacy legislation that came out, I believe in Minnesota, which would be much better than the Canadian act. The Canadian act is better than this one, so I'd rather have that standard than this one, but it too has its flaws. I'm sorry I'm not expert enough to explore that with you.

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Mr Wood: We've heard from some of the other submitters that there are some forms of research that basically cannot be done seeking consent. This is basically research where you have a small sample and it's not practical to research that topic and get consent.

If you are satisfied that those forms of research did exist—and that's an if you may not accept, but for the purpose of your answer I'm inviting you to accept that—

Mr Zaslofsky: Yes, I understand.

Mr Wood: If that's right, where would you come down? Would you come down on the side of not doing the research or doing it basically by taking the information without the consent of the patient?

Mr Zaslofsky: I think where we would come down is, don't do the research unless you can get the consent. But I think we also have to be creative and innovative and figure out how we can make it possible to gain informed consent for these things. I'm not familiar with the type of research you're referring to, but conceivably there could be ways developed to do that.

Mr Wood: But would I take it that your position is an absolute one; if you don't have consent, you should not do research?

Mr Zaslofsky: Yes, I think so. Our concern is that the information that relates to HIV, in particular, belongs to the person who has the HIV, and that should be the principle that you proceed on. You can't use something that somebody else owns unless you ask them.

Mr Wood: Those are my questions.

The Acting Chair: Thank you very much for your presentation. On behalf of the committee, we appreciate your presence and input.

Mr Zaslofsky: I appreciate the opportunity to speak to you. Thank you.

PRIVACY MANAGEMENT GROUP

The Acting Chair: Our next delegation to come forward is the Privacy Management Group. Would that delegation like to come forward? We understand you also have a PowerPoint presentation, and we think everything's set up to go.

Mr Christopher Comeau: However, it seems my laptop was damaged on the way here.

The Acting Chair: Oh, dear.

Mr Comeau: Perhaps we can get going. We've provided paper copies of the presentation and I can talk to them.

The Acting Chair: Certainly. Whenever you're ready you may start. As you do, please state both your names for the sake of the record. We have a total of 20 minutes. Use however much you want for presentation. The remaining time will be split between the three parties for question and statement purposes.

Ms Jeanne Bickle: My name is Jeanne Bickle. I'm an executive vice-president with the Privacy Management Group, and I just want to say thank you so much for the opportunity to be here. We value so much the fact that the Ontario Ministry of Health and Long-Term Care has initiated privacy legislation in the health care arena for this province. We applaud you.

Mr Comeau: I'm Christopher Comeau. I'm also an executive vice-president with Privacy Management Group. We're a Toronto-based corporation and specialists in the provision of privacy management solutions.

We've come this afternoon to talk to you specifically about issues of consent in privacy management and to give you additional comments on the legislation that's being proposed.

What we'd like to do is give you a relatively unique point of view on what the impact of having more extensive use of consent in the legislation might be, how that would play out with health care providers throughout and share with you some of the information that we've gleaned by being in this area over the last year or so. We'll probably support comments that you have, I would assume, already heard about flaws in the legislation and from other privacy leaders who feel that there is a need for an extensive rewrite of the legislation. That is our position as well.

I'd also like to give you some insight into what we feel are some important consent mechanisms that can make it possible to have more extensive use of consent and still have that as an achievable, manageable process in the provision of health care services.

If you just quickly slip to slide 2 in your decks, you'll notice that we have this quote that says, "A problem cannot be solved by considering it at the same level at which it was created," and in the last 12 months, by consulting extensively throughout industry, health care, finance and the various officers of privacy commissioners across the country, we found that there really is an extensive amount of miscommunication—or perhaps ill-perceived attitudes—about what consent impact there is in terms of trying to get consent from individuals and what is really required in order to institute privacy. So throughout this presentation I'm going to try and take it from a truly different point of view.

Slide 3, you see, is our main stance at PMG. Of course, we believe that privacy is a fundamental right of the individual and it's all about trust. It's about the trust that the nation has in its governors. It's about trust that the nation has in all manners of people who provide services, including health care, and we feel that in order

to maintain that trust individuals need to have some measure of control. That control is provided at its finest when there is a consent mechanism in whatever service is being offered.

We feel that the legislation being proposed must not circumvent consent in order to achieve other expedience. Privacy enforcement demands that we have legislation of the nature or with the intent of truly protecting personal information. That legislation is vital. We believe that it needs to be written, but it needs to be written in the right way, and when it is put in place, there has to be an oversight body that will allow that to be enforced.

What we want to correct is the perception that confidentiality, in and of itself, as it is talked to in other legislation is sufficient for privacy. In the security arena—and my background is as a systems security person—we talk about confidentiality and the preventing of unauthorized people to see information. That is a vital component of privacy. But privacy is not about preventing people from seeing the information; it's about letting the right people see the right information at the right time, and a consent mechanism is essential for that.

We also want to talk about how consent is, in fact, manageable and indeed there is an electronic approach.

On slide 4 you see four key viewpoints, starting from the centre right. Essential to all of this are the patients—the people—and ultimately all of us are patients at one point or another. So this is about every single human being who will be impacted by this legislation, without exception, at some point in their life. These people want control because your personal information is the most intimate aspect that you have that you tend to share outwards with society.

On the left-hand side you see health care providers, who I believe are truly interested in protecting the trust that their patients have in them and safeguarding that intimacy, and they do need policies for privacy management. They need tools which perhaps, I must admit, they don't think they have right now but which I'm here to say are available. They need a governance process whereby they know that they're enforcing their own policies and that their tools are working for them.

At the head of the chart is government, of course. We're looking to you for the right legislation, the right leadership, the attitude that you are embracing the privacy of the citizens to make sure we continue to maintain that trust and that you provide some oversight mechanisms so we know and can truly believe that's the case.

At the bottom you see that industry is interested in this problem, because we're part of society and we believe that there are solutions. Some of us have taken ownership of this problem, or at least an intense interest in this problem, to come forward with realistic solutions.

So privacy to us is about the interaction between these four things. We have deeply discovered it's not about coming up with a simple answer. It's about coming up with something that truly deals with all four of those points of view simultaneously, with each person, each

organization playing their own intimate role in the solution.

Slide 5: how do we go about getting consent in a dynamic, electronic world when what we have always done in the past was relatively calm? We got people to sign the bottoms of forms and documents, filed those consents in filing cabinets and occasionally looked back from time to time to see what they may have said. In an electronic world where we have actually stopped and counted the number of health care transactions going on—and of course as you would expect they're in the tens and hundreds of millions—how do we know we have consent for all of those processes? There has to be a process in itself for privacy management that is defined, and although it seems fairly simple on this slide, we've spent a lot of time talking to people about, would it or would it not work? We feel that it would.

There is a great need for education to talk about the things like the difference between confidentiality and privacy. There's a need to help people put standards and guidelines in place in their own internal governance systems so that it's a reliable, useful manageable way to achieve privacy.

The integration of consent into health care practices and into health care mechanisms is a technical challenge, but as you'll see, there are solutions available. What we have then is a privacy management solution that can actually be a bridge between infrastructure—processes that currently exist—and all manners of health care applications.

There will always be exceptions. There will always be unusual situations in which procedures have to be brought forward for the common good of society or for special protection of individuals in very exceptional circumstances where they may not be able to act well on their own behalf. I don't wish to address those types of exceptions during this, but I do wish to address the vast majority of health care services and transactions that could be addressed through an effective consent management system.

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In the next slide you see that there are benefits to consent. It's not perhaps the best approach to go out into the world and tell everyone that only because of legislation you are forced to do things a certain way, because, as you might expect, there would be some resistance. What we find is that when you go and ask somebody what it is they need, it makes your life so much simpler that it's very useful to operate in that way. When we have choice and consent as part of a mechanism to understand the needs and preferences of individuals, we actually make the complex more simple.

In the business world or in the financial approaches that various health care providers will look at, we know that having the trust of patients is going to make things better. It's a more useful and a more practical way to do business. We know that by having consent, you'll be able to share information in more ways, because you have permission to do so, and you can dynamically achieve

benefits by that by cross-linking systems or having enterprise-wide solutions that may not be possible in other means. It just makes good economic sense to do it that way.

Finally—you see the bullet—we're able to take a whole new approach. We can actually provide patients with what it is they want in large measure as opposed to trying to convince them that what they want is what we have to offer. It's a fundamentally different point of view. I think it is human nature to embrace those things which are well intended for you and to resist the ones that are trying to be forced upon you. So in many ways the benefits reduce the complex to something more simple and more achievable. Our experience in the marketplace is that there are many organizations that see fundamental advantages to consulting with their clients, with their patients, about their personal needs, choices and preferences.

What is the consent process? You're looking now at slide number 7. Here we've had to break it down into a really totally new way of looking at it, and from a technology point of view we had to go and look at new technologies. A lot of people think a consent record is something you could put on a piece of paper, or create a very complex chart with columns and lines and rows that indicate all kinds of various options about consent. Well, consent depends an awful lot on the event for which you're going to ask it. We've found that the complexity of that situation does not suit the bingo-card approach, as I call it. We've had to go out and examine, and were lucky enough to find, in this case, that there exist some very useful types of mathematical tools, new algorithms, which allow consent to be created in new ways and to make it very dynamic.

Referring to this slide, the first process that any organization does when they're creating consent is to try to understand what options are available within what series of events. That's a business analysis process and it can be done. Then there has to be a mechanism by which individuals can register their consent, and that means we have to create what we call a pervasive environment. We have to provide it to them in every single way that they might want to do that. Whether it's on simple technology or more advanced technology, depending on the user, connected to a network or wireless, it doesn't matter; that's all achievable right now.

The third bullet, consent maps, is a technology that's now available where we can create a mathematical expression that represents a very complex consent matrix for one individual and reduce that from a technical point of view to a very tiny file that can be stored in a number of places, attached to a process or a document, or even given to the individual in certain circumstances. It just depends on what we want to do. Now we have a tool that exists, that's available, that allows us to move that consent wherever it needs to be, and we're away from these big databases and big charts and wondering what we're revealing simply by having a consent record in the

first place. We now have this little, highly portable tool and it makes for a different way of looking at consent.

The fourth piece is that there has to be software available to all the providers of services who are holding personal information on behalf of the clients, who can put in these little plug-and-play software modules that will use these consent maps as the key to either allow a process to occur, because it has been consented to by the individual, or disallow the process because it has not, and provide a record by which the patient in this case could view what disclosures were made. It's a more granular approach.

Every one of the things I've talked to you about requires a different technology, with different roles by different people. That's why I mention this aspect of interaction between a number of parties in order to get a solution. If you think any one person is going to come up with the answer, what we've found is that that's just too hard to do. On the other hand, there is an easy way: by sharing the responsibilities.

On page 8 you see an electronic consent management approach that's broken down into some ordinary building blocks. By discussing this with some of the key privacy legislators and leaders, we found that this is a tool that is useful to various health care organizations—first, a clear methodology by which people can understand what privacy is, how to implement it, where the risks are, what risk management strategy to put in place, and come out with a plan. It's a process, but it's nice when there are templates and guidelines to guide you through it.

There needs to be an architecture, and I'll ask you to just look quickly at the centre of the slide that talks about the five key components of electronic privacy. All five of those components have to be provided separately, and you'll notice that security is only one of them. In the time I have available, I can't discuss that in any greater detail but there is a lot of complexity behind that itself and the flexibility that it brings to the solution. Then, of course, some software that can be deployed the way I said, and service providers who are interested in providing consent services to consumers and health care organizations. There are people out there who are willing to help you make it happen.

I'll just skip slide 9 because I don't believe it's in your deck at the moment.

Finally, let me sum up by saying that in a consent management operation we have government that's providing legislation, direction, oversight of its legislation and maintaining integrity and trust with its citizenry. We need this to happen. We need legislation to protect personal health care information.

Organizations themselves, the health care providers, then can go through all the things I've talked about in the last few minutes in terms of going through a process, embracing consent, realizing there's a way to do it, come up with a realistic, manageable, achievable plan—with a little effort, but it can be done—get some tools, put the tools in the right place, deploy the solution, and it can be managed.

Citizens, on the other hand, which is slide 11, are simply there through a variety of means to register their consent, to let us know what it is they agree to, to let us know what it is we can do to provide them with what it is they need and to view that process on an individual basis so they can exercise their rights.

In conclusion, slide number 12, what I want to re-emphasize here is the point that privacy is not fully addressed by confidentiality. It is a much more dynamic, much more intimate process than just that, although that is a part of it.

Control of personal information has to be in the hands of the patients, of the citizens, and the method by which that control is given to these people, to all of us, is by providing a consent mechanism. We believe the legislation has to be strengthened, has to be rewritten in such a way that consent is used extensively, as has been mentioned, I'm sure, by a number of other privacy leaders in this arena.

We believe there must be an oversight organization to provide governance and means by which all of this can occur. I've shown you in just a few minutes that there are structured methodologies available, that there are unique and different kinds of technologies, which may be what some people have thought of before, that make this manageable in terms of delivering a solution to health care providers so they can do their role in a consent management process.

Overall, I'm hoping this information will be useful to you as you continue to review this and that you will realize there are more options available and that we need stronger consent mechanisms in this legislation. Thank you.

The Acting Chair: We have approximately three minutes left, Ms Lankin, starting with you.

Ms Lankin: That's one minute for each caucus?

The Acting Chair: Approximately.

Ms Lankin: I appreciate your presentation. I don't really have any questions. I think you've presented a technology option to build in more consent. You've said that it is possible, technologically speaking. You may never have seen the silos of technology inside ministries of the Ontario government if you're suggesting that, but I'm sure that's true. I think part of what's not answered for the committee yet is that balance, those few exceptions that you didn't speak to where the common good, either in terms of management of the system or in terms of research information, needs to override the consent principle, and that's what I think we're struggling with.

Mr Comeau: We have looked at that in the delivery of a privacy management solution that included consent. In the initial design phase, where organizations are creating what we call a consent options matrix, those exceptions are identified as part of the things we know about how we have to do business. They are dealt with seamlessly and appropriately with the technology. However, it is fundamentally a human decision about what would be done in that case. So we record that decision and we act accordingly.

1440

Mr O'Toole: You have quite an interesting presentation. Part of my background was data security at one time in my life. I just have a couple of questions for clarification. On page 3, "The proposed legislation must not circumvent consent." I suspect we're hearing that consistently. What would you propose to do in a public sense if people deny consent? Let's say that something as small as 10% or 15% of the population, just out of peculiarity, denies consent, and you're trying to deliver a public policy area. That presents some challenging, as you called them, matrices of assumptions as well.

Then in a general, oblique sense, the whole idea of data mining, just a comment on that. Data by itself today is the power. The individual names and identities are kind of minor. If you can get some generic stuff—how old, where you shop and the kinds of things you're pre-disposed to do—that's marketing. That's already going on, actually. It's not invasion of privacy. How do you deal with this in this kind of complex matrix? Would it be purely in the health care provision mode or as a privacy thing? Could you produce data that told them most people over 40 sleep four hours a night or whatever?

Mr Comeau: What we have found by looking at the marketplace outside health care is—we have been approached as an organization with a certain mastery in this area—that those organizations feel they would have a tremendous market advantage by including a consent type of mechanism in their marketing pieces; ie, if they tailor their data-mining piece, not by what their marketers may have thought was the creation of a new and innovative product, but by actually asking their client about preference and about certain things, and then got that consent as part of being a responsible corporate citizen, if you will, that would give them a tremendous advantage in the marketplace. So they have their own spin on consent, and they like it.

Mr O'Toole: Yes, that would have to be defined.

The Acting Chair: We'll move on to the official opposition.

Mrs McLeod: Something you said almost in passing concerns me a bit, and that is, if I understood it correctly, that a non-electronic system makes a more informed consent very difficult to manage because of the dynamic conditions under which consent might be required. I guess the reason it concerns me is that I suspect we're a long way away from having fully electronic records in the health care field. How far away are we from having electronic records for, say, doctors' offices?

Mr Comeau: I don't really feel I'm an expert in commenting on that, but I do know there are some strong opinions within the ministry on when an electronic health record would be available. I do know there are certain subsets of a complete electronic record which are available now and that there are already millions of types of transactions which this would apply to today.

I do want to clarify that regardless of what electronic process may be available, the right answer is always the

simplest one, and if a paper-based consent would be appropriate, I have no objection to that.

Mrs McLeod: I suppose there are some areas where it's absolutely reasonable to expect that consent could be given through electronic means and that by almost expecting or requiring that it would be possible to have stronger consent for things like research or fundraising, for example.

Mr Comeau: Right. The advantage of having an electronic consent mechanism is that now it can be vastly reused as an enforcement tool in any context in which it's appropriate, as opposed to a paper-based consent which is not an enforcement mechanism; it's really just an accountability process that you would refer to after the fact.

The Acting Chair: On behalf of the committee, thank you for your presentation and for providing us with some information.

BORDEN LADNER GERVAIS

The Acting Chair: Our next delegation is from Borden Ladner Gervais LLP. Come forward and state your names for the record.

The Chair: Good afternoon and welcome to the committee. Please proceed.

Ms Daphne Jarvis: Thank you.

Mr O'Toole: Mr Chair, they gave me the wrong book.

Mr Gerretsen: Maybe you've finally got the red book.

The Chair: You're rattling the deputants. John, gentlemen, please.

The floor is yours.

Ms Jarvis: Good afternoon. My name is Daphne Jarvis. I'm a partner with Borden Ladner Gervais. With me is my colleague, Jacinthe Boudreau, also with the firm.

Borden Ladner Gervais is a law firm in which a number of us, about 15 of us, specialize in health law and count among our clients, for example, the Health Care Insurance Reciprocal of Canada, to which we're lead defence counsel, which puts us in the position of defending medical malpractice law suits, including lawsuits where there may be issues of breach of confidentiality or, the reverse, that insufficient information was provided.

We also provide day-to-day counsel and advice to a huge range of health care providers, including public hospitals, psychiatric hospitals, children's mental health centres, community health centres, community care access centres, long-term-care facilities and, of course, individual health care providers: physicians, nurses etc.

Our expertise is derived from the fact that when health care providers are experiencing problems when it comes to information issues, they will come to us. Hence we have some insight into what the problems are.

We've presented numerous times at conferences and seminars on these issues. For example, here are some materials from a day-long conference we presented on

Bill 159 just last month, in conjunction with the Ontario Hospital Association—just so you know our background and where we're coming from.

We've provided a written submission to you and thank you for the opportunity to be here today. Just in passing, I'm briefly going to highlight the things we like about this legislation. First of all, we like the fact that there is a bill before you. The list of institutions I've provided to you for which we've done work is wide and broad, and currently all governed under a hodgepodge of legislation, if any. It is often extremely difficult to provide consistent advice in those circumstances.

We are also very pleased to see the provisions with respect to protecting the confidentiality of quality-assurance information. In fact, our own Ontario Court of Appeal, in a case we've cited in our submission, has recently recognized the degree to which it is actually in the public interest to preserve the confidentiality of that information.

We're going to address a few areas where we think some amendments should be considered. The first two are somewhat related to each other, and that is with respect to the requirement for informed consent to youth disclosure of information and also with respect to the definition of capacity to provide an informed consent.

I think it's extremely important for you to gain some insight into the practical realities in an institution such as a public hospital in dealing with requests for release of information. In a health records department of a public hospital on any given day, there are dozens and dozens of requests that come in for release of information from the hospital's health records. For the most part, those requests are received in writing. It would be extremely rare that the individual whose information is contained in those records is actually sitting face to face with the person organizing the disclosure of those records. The records assembled in a hospital come from numerous health practitioners, a number of regulated health practitioners, not just physicians and nurses but social workers, OTs etc. The request is usually in writing indicating, "I, So-and-so, would like you to provide a copy of the health record in your institution to me," or, alternatively, to somebody else.

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I would like to contrast that with the concept of informed consent, which is a concept that has arisen and developed in the context of medical malpractice lawsuits which, over time, has developed a principle of what would an ordinary and reasonable patient want to know or need to know in order to provide true consent to an invasive procedure such as surgery on their body. The person who is advising them as to the risks, benefits, consequences of consenting or of not consenting is the person who will be engaging in that intrusive medical act and who is medically trained and can answer all questions as to what medical consequences there will be and won't be.

That concept of informed consent, in our view, very badly translates into consent for the purpose of collec-

tion, use and disclosure of information. There is not that interface, and to expect there to be such an interface between an individual and the health provider or institution is simply unreasonable and impractical, and it will result, we fear, in chaos. We've pointed out in our paper that there is no other provincial or federal legislation currently in force pertaining to personal information that specifies that a consent be informed in respect of it.

In summary, we've recommended that the requirement of an informed consent be removed from the legislation but remain—obviously there must be a consent, it must relate to the specific information, it must be given voluntarily and not obtained through misrepresentation.

The same sort of concern arises with respect to the definition of "capacity," which requires that the individual who is consenting be capable of appreciating the reasonably foreseeable consequences of giving or withholding consent to the collection, use or disclosure of information. Again, how it is that it is perceived that the person who is making a disclosure decision would be able ascertain the capacity of a person to understand those things is beyond, we believe, the reasonable expectation on a health care custodian.

We realize that the bill enables there to be a presumption of capacity, but it also goes on to say, unless the health information custodian "has reasonable grounds to believe that the individual is incapable with respect to personal health information." We don't know what that means. We believe, for example, that it probably means that a health care custodian would be entitled to presume that a person over the age of 16 would have such capacity and that a person under the age of 16 may not have such capacity. But within the records themselves, there may be indications as to what the capacity of the person is. Does that mean you expect a health care technician in a hospital's health records department to read a record to try to gain an understanding as to what a person's capacity is? They may be looking at records that are years and years old, that do not reflect the current capacity of the patient who is requesting the information, and that is a person who has no insight, nor should we expect them to have insight, into what the reasonably foreseeable consequences are of the disclosure of those records. They may be for non-medical purposes or they may be for medical purposes. It may be for legal purposes, it may be for purposes of obtaining benefits etc.

It's simply unreasonable to expect, in a huge health records department of a hospital, that there are people there who can foresee consequences of whether the disclosure is made or not made and are able to assess whether or not there are reasonable grounds to believe that the person may not have that capacity. We would hope that it is not expected in that situation that the health records custodian be fixed with knowledge of what is actually contained in the records. That's unreasonable.

In our recommendation we would say that the definition of "capacity" should be revised to read, "An individual is capable with respect to personal health information if the individual is able to understand that the

consent is for the collection, use or disclosure of personal health information.”

I’m going to move on in our comments to subsection 29(1), which is the provision that permits disclosure of health information from one health provider to another without patient consent. I know there has been some discussion in the committee as to whether or not there ought to be a lockbox provision included in that paragraph. In our view, that is a policy decision and not a legal decision. We won’t comment much further on it, but I did want to highlight two things for you.

I can certainly say that the ability for health providers to share information among each other is badly needed, particularly in this era where much of the health care delivery is collaborative these days, when we’ve got patients going from hospital to home, and a lot of things in between, and where organizations are banding together to provide a continuum of care. The fact that there may be two different corporate entities involved in the provision of that care should not be providing blockages to the ability to share information.

Again, just looking at the practical reality, I’m not sure how a lockbox provision could possibly function when you look at the amount of information that we’re talking about. Let’s use our example of a woman who in the past has had an abortion and who wishes to lock that information. That’s not just information that is contained in a discrete health record that was made at the time the abortion occurred. It may be information that she has repeatedly disclosed over time to various health care providers as she is providing a medical history in other contexts. For someone to say to a health care provider such as a public hospital, “Please share my records to here, here and there as I direct but nothing with respect to that therapeutic abortion I had back in 1972,” is going to impose on a public hospital a task that may be undoable and will inevitably, we believe, result in inadvertent disclosure of such information. It is probably preferable that the person simply have that in the back of her mind as she is making disclosure decisions and have the information disclosed to her personally first.

You may be aware through the newspapers of the recent completion of an inquest in Kitchener, Ontario, into the death of a gentleman by the name of Bill Luft, who, suffering from a mental disorder, murdered his wife and four young children and then killed himself. In that inquest there was evidence heard from physicians who were involved with Mr Luft at various stages, who were unaware of the involvement of other physicians either concurrently or in the very recent past. Bill Luft had essentially imposed a lockbox on his physicians, indicating that he did not wish there to be information-sharing about his mental illness between them.

In that case, you should be aware that the jury made the following recommendation. They said, “Bill 159 is currently before the Legislature and addresses the access of patient information between physicians. We would like to recommend that this aspect of the bill be encouraged. This would allow for better care given to the pa-

tient by knowing some of the past illnesses that have occurred and ensure that another provider is not duplicating care.”

You might want to note that in that case the lockbox imposed by Bill Luft did not simply pose a risk to the quality of health care that he received and the risk to him; it also, in retrospect, might have posed a risk, may have been a contributing factor to the clear risk it posed to his family.

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On that section, we would point out that there is a need to broaden the ability to share information from one health care provider to another to include not just a health care custodian, but employees or medical staff appointed within a health care custodian. Often it’s unreasonable in our view to expect the communication always to go through hospital administration. There is often a need for caregiver-to-caregiver communication directly.

I’m going to move on to the provision which relates to controlled disclosure, what we’ve called “Controlled Disclosure in Public Interest,” which includes the ability to provide information to police who are in the course of an investigation or who are pondering an investigation, or where there is a present or ongoing risk to an individual’s safety. I have to tell you that this area is one in which our legal advice is sought probably right up there with consent to treatment issues. It’s a very frequent legal issue and it very badly needs clear language brought to it that will permit health care providers and the police to very clearly understand where the lines are drawn.

The ability to disclose information where there is a present or ongoing risk to an individual is not new. That has always been part of our common law and, really, all that the act is doing is codifying it and making it clear that it applies across the board. There is a provision which allows for a disclosure of information where the health information custodian suspects on reasonable grounds that an offence may have been committed. Again, if this provision is going to stand, we point out that it needs to be dropped down a bit so that it would permit disclosure, not just from a health care custodian but an employee of the health care custodian or a person on staff of the health care custodian. Often these situations, again, are face-to-face situations between a health care practitioner and a police officer, and they need to make snap decisions.

We realize this is a policy issue and we don’t take a particular position as to how free-flowing the information ought to be between health care practitioners and the state in that sense, other than to stress it needs to be made very, very clear. You need to be aware of some of the examples that we face that are happening day to day in real life that are throwing these problems up to health care providers. It’s not just freewheeling police officers strolling through hospitals looking for health care information.

We’ve had cases lately in Toronto where there is gang violence happening, where teenaged kids walk or stumble into the emergency department of a hospital. They

come by cab or their mother drives them. In one case in particular I can tell you a kid had been clearly kneecapped. He'd had a gun put to his knees and he'd been kneecapped. His instruction to the hospital was, "Do not tell anybody that I am here. I do not wish the police to know of my presence and I refuse to authorize you to disclose anything to police officers." There happened to be a police officer present in the department for another reason who the cab driver saw, and the cab driver disclosed to the police officer the presence of this individual in the hospital.

It was agonizing, the pressure that was brought to bear on health care practitioners to provide further information to the police as to who this kid was, where he'd come from, where he'd been, what he was saying as to what had happened, who was with him—all of these things. You need to consider whether the police did not have a very good point when they said, "Come on. This is very serious. We need to know this stuff." Because for all we know—you don't know this, the hospital doesn't know, but what the police know is that there may be other gang members who are poised to come into the hospital to finish off the job.

We have incidences of domestic violence. We have women who will come into the emergency department clearly with a stab wound, with a shot wound, with tire tracks on their bodies, who say, "Please, I don't want anybody to know." They may be unconscious. There may be a desire to call the police to let them know they have an unconscious person who has clearly been assaulted. Who is their substitute decision-maker? The husband who is standing in the emergency department saying, "Oh, well, she fell down the stairs."

Again, it's a policy issue. Do you wish to restrict the ability of health care providers to bring those sorts of situations to the attention of the police in the absence of patient consent? You've got to give really clear thought to that.

It's also important for you to bear in mind that it's not the answer, it cannot simply be the answer, to say that this is information that is disclosable after some sort of court process, once there's a search warrant or there's been some sort of court review or judicial review that authorizes the disclosure of that information to the police. Often, it is an emergency and often the information that the police are wanting is not something that is in a paper record; it's not something physical that they can seize by way of a search warrant. A search warrant does not authorize people to speak to a police officer; it authorizes police officers to gather physical things. This legislation, Bill 159, clearly indicates that personal health information is governed by this legislation whether it's recorded or unrecorded. That's why. Because you need to know and need to understand that a lot of this information resides in the minds of the health care providers, in their memories and what they've seen and what they've heard, and it's not necessarily immediately recorded nor is it necessarily ever recorded into a hard document that can be seized.

Often the ability to subpoena someone or summons someone to witness is relevant to a court proceeding that may not happen for years down the road and the information is required much prior to that, so you need to bear those considerations in mind as well.

I'll move on to one of the other authorized disclosures, which is to—

The Chair: I should point out, actually, we've gone a bit over time already, so perhaps summary comments in the last minute or two?

Ms Jarvis: It's a related comment with respect to disclosure to children's aid societies. The provision would appear to permit disclosure to a children's aid society so that it can carry out its statutory functions, which are quite broad. We'd point out to you that that appears to contrast significantly with relatively new legislation brought through under the Child and Family Services Act, which does impose a court-supervised process for disclosure of information from a health care provider to a children's aid society.

As a matter of interest, the Luft inquest jury was asked to comment on to what extent there should be free flow of information from health care providers to a children's aid society, and they chose not to make the same recommendation as they did with respect to free flow of information between health care providers. I thought you'd be interested to know that. Again, we take no particular position, but we simply urge that some clarity be brought to permit health care providers to know to what extent they are free to disclose information to a children's aid society, absent some sort of court process or consent, and absent an immediate concern about suspected child abuse.

The last thing we would address is in the paper and I won't bother orally addressing it. It's a fairly minor point.

The Chair: Thank very much. We appreciate your detailed presentation and your taking time to come before us today.

Ms Lankin: I'm wondering if there is a mechanism by which, if over the next two days there are any cancellations that we're aware of and should the will of the committee agree with my suggestion—we invite these presenters back. It's a very unique and different perspective that's been offered that the committee hasn't heard before. I would really appreciate the opportunity to both put some questions myself and hear other committee members' questions. They may not be available, but—

The Chair: As you know, the Chair is in the hands of the committee members. We, in fact, have some time because of an earlier cancellation. I am always loath to treat different presenters differently, but having said that—

Ms Lankin: What time is available right now?

The Chair: We have eight minutes available right now. If you'd like, we can split that between the three caucuses.

Ms Lankin: If there's general agreement around the room, I'd appreciate it. I think there is.

The Chair: Seeing that there is, the rotation this time would start with the government members, first Mr Wood and then Mr O'Toole.

Mr Wood: I'd like to ask you a couple of questions about the removing of "informed" from "informed consent." I gather that no other Canadian act takes that approach; no other Canadian act that's been passed requires informed consent.

Ms Jarvis: Not that I'm aware of.

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Mr Wood: I gather the CSA guidelines don't require that, or do you know that?

Ms Jarvis: I don't know.

Ms Jacinthe Boudreau: Are you talking about the schedule to the federal act?

Mr Wood: Yes.

Ms Boudreau: It does not require informed consent. No, it does not. I refer you to our material, section 4.3 of the schedule, which you can read later on.

Ms Jarvis: It requires knowledge and consent, which is different from informed consent. We need to be clear. We're not saying there shouldn't be a requirement that there's consent.

Mr Wood: The guidelines require knowledge and consent.

Ms Jarvis: Knowledge and consent.

Ms Boudreau: It's knowledge of how the information will be used by the body collecting the information, but it's very different from the requirements of Bill 159, which sets out detailed requirements for the informed consent, where the person must be knowledgeable of the foreseeable consequences of consenting.

Mr Wood: Are you aware of any foreign jurisdiction that uses informed consent?

Ms Boudreau: Personally, I'm not.

Ms Jarvis: I don't know.

Mr O'Toole: I'm quite intrigued by the legal entanglement here, and I mean that in a complimentary sense. Two points, if I may, Mr Chair. Informed consent—and it's a reasonable, foreseeable consequence, that sort of definition. I don't know how you'd pin that down in a health care sense. If somebody's going into some kind of exploratory surgery, what is informed consent in that case? Can you define that somehow? "You're possibly going to die"—is that general enough?

Ms Jarvis: If I'm considering to have my gall bladder removed, my surgeon is required to obtain my informed consent and that includes that my surgeon is required to tell me what the risks and benefits are, including reasonably foreseeable risks of having the surgery. He might have to tell me that the gall bladder could rupture and you could end up with a bad infection and you might even die. He or she may also have to tell me what the consequences are if I don't consent. "If you do not consent to this surgery then you are going to get progressively sicker and it may be that we'll never be able to make you well." That's all well and fine, and the surgeon is required to answer whatever further questions I have. That's what an informed consent is: how I can tell

you what the foreseeable consequences are if I refuse to disclose your health record to you or to give it to this gentleman over here whom you've authorized me to give it to. I may know that your purpose is because he's your new family doctor and he needs the information, but how I can tell you what the consequences are to you if you don't provide me with that consent etc, I don't know; it's not practical.

Mr Gerretsen: Just following up on that point and also the definition and presumption of "capacity," I take it that your basic point is that it sets out a criteria in the act that makes it look as if a certain criteria has been met when there's really no way the other person can know whether that's so or not.

Ms Jarvis: For the most part. If it's my psychiatrist and I talking about, "How much do you want to tell your children?" that's doable, but it's the very rare case where it's actually going to be possible.

Mr Gerretsen: I guess the way I look at it is that if a layperson were to read these various sections, you would get the impression everything is protected therein, when in actual fact that may not be the case at all. That's sort of my interpretation of it. Is that correct?

Ms Jarvis: I see your point and, yes, that's one possible interpretation.

Ms Lankin: I truly appreciate the work that you've put into this presentation. Your comments with respect to areas of informed consent and presumption of capacity just blew me out of the water, I have to tell you. You get used to the lingo and don't think beyond and just have an assumption that, of course, those would be the standards that we would impose on this legislation.

One question on informed consent: given that in the circumstances you set out it would not be practical that a person could give the foreseeable consequences, would that person potentially have liability? As a health information custodian who has sought consent and has passed on information perhaps to a third party and that's an insurer, and the third party cancels the individual's insurance policy and that was not explained as a foreseeable outcome of that giving of consent, could there be a liability back to the individual?

Ms Jarvis: Of course there are liability concerns, yes.

Ms Lankin: Just a comment. The other issue on controlled disclosure and public interest is really interesting, but I want to focus on the sharing of information between health providers and the Luft jury recommendations. I think it's very important you drew that to our attention. One of the things the committee is grappling with is the whole balance between the individual's control of their own private health information, that basic human right, and a whole range of other issues. What's in the best interests of the individual? There's a paternalistic aspect to that. You've drawn in, with the Luft recommendations, what's in the best interests of the family. Are there not other mechanisms of danger or immediate danger to self or others that would have resolved the circumstance in terms of the Luft case without saying that therefore you couldn't conceive of anything like a lock box?

Ms Jarvis: It's important to understand that the Luft jury was not saying they felt that would have prevented those deaths—

Ms Lankin: I realize that.

Ms Jarvis: —but they saw it as an issue.

The problem is that it's the putting together of all the information which allows risks to be assessed. So you can't say, "I think because there's a risk I need to see this information." Without that information no one even perceives that there is a risk.

Ms Lankin: A very good point. I wish we had more time, but I appreciate the Chair's indulgence.

The Chair: Thank you very much for the very detailed presentation you brought to us today.

ONTARIO PHYSIOTHERAPY ASSOCIATION

The Chair: Our next presentation will be from the Ontario Physiotherapy Association. Good afternoon and welcome to the committee.

Ms Caroline Gill: Mr Chairman and members of the committee, my name is Caroline Gill. I'm a registered practising physiotherapist and also a member of the board of directors of the Ontario Physiotherapy Association, the OPA. With me today is Signe Holstein, the executive director of the OPA.

Over the past 10 years, the OPA and our 4,000-plus members have not only seen but have also been part of significant changes in health care delivery in this province. Ten years ago, 80% of our members worked in publicly funded health care. Today it's about a 50-50 split: 50% public and 50% private. We see the trend to privately funded care continuing in Ontario. I remind you that there has not been an OHIP licence granted to a physiotherapy clinic since 1967 and our OHIP pool is capped. So when people need community-based physiotherapy, those who can afford it will understandably go to private clinics rather than brave the long waiting lists or the long drive to an OHIP clinic.

Physiotherapists have a unique perspective on our health care system. We experience at first hand the trend away from OHIP services and the implications of the growth of privately funded health care. That's why perhaps you can appreciate physiotherapists get a little frustrated at talk, such as around the last federal election, about resisting a two-tier health care system. We already have a two-tier system and it's growing by leaps and bounds.

Because of cutbacks, hospitals are releasing patients into the community with unprecedented levels of acuity, but public funding for community care has not kept up. So patients who have the resources to do so will naturally go into the privately funded community stream. More people are paying for their post-surgery physiotherapy, post-cardiac rehab, post-motor vehicle accident recovery using Visa, MasterCard or third party insurance coverage than ever before. This has significant implications for

patient records and is a large part of the reason we are here today.

Our fundamental issue with Bill 159 is that it's based on the assumption of a publicly funded health care system. That assumption, as I've said, is passé. We understand this bill is likely to die on the order paper. We think that's a good thing and we hope this committee's work will provide the context for a new bill that is actually in tune with the current realities of our health care system.

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Allow me to address some specifics. Physiotherapists are very active in a variety of health care delivery teams and in numerous care settings. We have primary access. Patients do not need a doctor's referral to see a physiotherapist. Having said that, I must tell you that almost 80% of our patients come to us via a physician's referral. The relevant point here is that interprofessional access to and exchange of health record information is absolutely essential if patients are to obtain quick and appropriate treatment.

Lifestyle information can be particularly sensitive and patients can be especially reticent to impart it if there's any risk of disclosure, yet we need that information in order to assess and treat appropriately. It's an issue for all patients. It's often a big issue for teenagers who are concerned about lifestyle information being disclosed to parents, guardians or others. That's why we're worried, as we say in our written submission, about the chilling potential of clause 42(2)(a), which could force practitioners to disclose that kind of information.

What you may not be aware of is the health record custodian role played by physiotherapists in private practice, nursing homes, home care, industry or corporate care and a range of institutional care venues. Patients share not only medical information but considerable lifestyle information with their physiotherapist in order to obtain appropriate assessment and treatment.

OPA believes personally identifiable health information should be used only to advance the quality of patient care. OPA believes that the assurance of privacy and confidentiality of health records is crucial to the physiotherapist-patient relationship. OPA also believes that access to personally identifiable health information for other applications, such as research, government planning or hospital fundraising, should be restricted, if not prohibited altogether. Information that identifies a patient should be released to third parties only in the most exceptional of circumstances.

The OPA supports the goals of Bill 159, but, from our perspective, some of the flaws in this proposed legislation have to do with the fact that it has been drafted without a full appreciation of the radically changed care delivery environment that's out there today. Less and less health care is delivered solely through hospitals or solely through physicians. On a rehabilitation team, most of the professionals are increasingly privately, not publicly, funded. Nursing homes are privately owned and operated. Home care delivery has been privatized, and there is a growing trend to close or downsize publicly funded

physiotherapy departments within hospitals in favour of private clinics in those same hospitals. We call this "private clinics in public hospitals."

What is also important to understand in the context of Bill 159 is the recent expansion of foreign ownership, particularly in the rehabilitation sector. Over the past few years a few foreign-owned corporations have moved aggressively to acquire OHIP and private physiotherapy clinics. So now one has to factor in the likelihood of health care records of Ontario residents being held in or transmitted to the US head office beyond the jurisdiction of any Ontario legislation.

We know. Our members now work for and report to foreign owners, or at least to those who report to foreign owners. What we ask you to consider is the Latin question, "Quis custodis custodes?" or "Who will watch the watchers?"

The provisions in this bill about information custodians are fine in a world of manual records, centralized and publicly funded health care delivery and domestic ownership. They are less relevant or enforceable in a world of electronic storage and transmission and in clinical environments that are increasingly private and controlled by foreigners.

Even encrypted health information can be violated by a custodian who shares their "public key" with a shareholder by simply downloading files to a laptop. Try and stop that when you do not have an audit trail that permits easy discovery of the privacy and access breach, or when the trail leads outside of Canada.

We are not being alarmists. We are gravely concerned about the security of personal health information when one considers the rapid and apparently unnoticed or unchallenged growth of private and foreign ownership in important components of the health care delivery system.

Recent experience just down the street from us today illustrates that privately owned clinics sometimes get into financial trouble and that owners of privately funded clinics sometimes engage in questionable conduct. Is this a trustworthy environment for sensitive health records information? We assert that Bill 159 is largely blind to those kinds of vulnerabilities.

Bill 159 should not be reviewed and considered solely within the context of shifting from a paper-based health record, one stored in the bowels of a hospital, to an electronic record to be stored digitally and safeguarded within a public institution. Bill 159 should not be reviewed with a belief that technology can solve privacy and access concerns.

The OPA would ask this committee to be the first to begin an earnest discussion of important considerations such as the security of health information within the reality of health care delivery in Ontario. The reality is that we function in a two-tiered system. About a third of all health care expenditures are made by individuals or private organizations and, as I said earlier, 50% of physiotherapists now practise in private clinics rather than in public institutions. Another reality is that care is delivered by considerably more practitioners than phys-

icians or nurses and in a range of settings beyond a hospital or doctor's office.

If the review does not take place within the realities of the new care delivery paradigm, then this legislation will be largely irrelevant in protecting the privacy rights of Ontario residents and health care consumers. It will take a very strong ethics review body, a body with real teeth and a body with a sophisticated understanding of both the limits of technology and the diverse environments in which the custodians will operate.

Physiotherapists know from their own education and practices that prevention is the most effective health care remedy. What we are asking of this committee today is to be sure Bill 159 is able to anticipate and prevent breaches to privacy, in addition to being able to punish those responsible for any breaches after the fact.

Is a fine of up to \$50,000 for an individual or up to \$500,000 for a corporation a sufficient deterrent? How much would a non-resident pharmaceutical or insurance or medical devices company pay for an up-to-date, market-specific and accurate database that personally identifiable health care information would create? Maybe a lot more than the maximum fine.

OPA is concerned that this bill apparently emphasizes access to health records over protecting patient privacy. Section 2 of Bill 159 has a long list of persons, programs or organizations who qualify as health information custodians. We believe as a principle that other than those who are directly involved with patient care, personally identifiable patient information should not be accessible by third parties, except in specific and exceptional circumstances that are mandated by legislation, and only then with informed patient consent. This would go a long way to making it easier to enforce access limitations and make it easier to audit access.

1530

Third party access should only be permitted in the most exceptional of circumstances and only after proof is provided that the required information does not already exist in other forms or from other sources. The OPA has concerns about the sweeping circumstances in which information obtained from a health record can be disseminated without consent from the patient. The provisions, as written in Bill 159, have the potential to violate the necessary confidentiality of patient-provider relationships and patient privacy.

The OPA agrees that health information should not be distributed unless knowingly authorized by the patient and that those who receive such information must take all reasonable measures to safeguard it effectively. However, the bill unnecessarily expands the instances in which personal health information may be disclosed without that person's consent.

For example, subsection 26(5) permits a health information custodian "that is a facility or organization that provides health care to use or disclose the individual's name and address for the purpose of fundraising activities without the patient's informed consent." OPA finds that to be a remarkable provision. It could lead to

health information being used for a range of commercial purposes such as direct mail and market surveys.

Further, section 27 outlines other instances in which health information custodians may provide patient information without patient consent; they are both dangerously broad and vague. Some of these are to government for the purpose of "planning or delivering programs or services of the custodian, allocating resources to any of them, evaluating or monitoring any of them or detecting, monitoring or preventing fraud related to any of them"; or for a research project or program.

We are also concerned that personally identifiable information could be used and disclosed to the Ministry of Health and Long-Term Care for planning purposes under clause 27(e) or for research purposes under clause 27(i).

In our view, the legislation should explicitly state that identifying health information will not be disclosed if anonymous information is equally available. If personally identifiable information is legitimately required, the proposed research ethics body should adjudicate the request for information.

We suggest that focusing on technology-related solutions to safeguard access and privacy is not enough. OPA suggests there is a need for a front-end information process that includes the following: requiring data gatherers to specify the purpose for data collection; limiting the data collection; limiting the use of data collected; ensuring openness and transparency; allowing for individual right of access and correction; ensuring data quality and security; and creating independent oversight.

Another issue is that Bill 159 will have paramouncy over the RHPA. Our concern is that this could lead to conflicting or inconsistent provisions under the two legislative regimes, with regulated practitioners caught in the middle.

The OPA supports the stated goals of Bill 159. Patient care and protection of privacy are a major preoccupation for health care practitioners. We put the challenge to you as policy-makers to not proceed with Bill 159 unless you are satisfied it answers the question, "Quis custodis custodes?" That question cannot be answered fully if health care policy continues to be made with blinders on as to the realities of a progressively privately funded and foreign-owned health care delivery system. That's the real test for Bill 159.

Thank you for this opportunity to outline our concerns regarding 159. The OPA looks forward to continuing a dialogue with the committee and the Ministry of Health and Long-Term Care on implementation of the bill.

We'd be happy to respond to questions.

The Chair: Thank you. That leaves us only about three minutes for questioning, so I'll give the time to the next party in rotation, which is Ms Lankin of the NDP.

Ms Lankin: Thank you very much. I appreciate the presentation. I think the points that you make around the organization of health care in Ontario today and the reality of the public-private delivery systems are important for us to consider.

I understand your general principles with respect to the bill, that it needs to be reoriented around patient confidentiality and not help custodian ease or management issues. But reading the bill, it would seem to me that most of the circumstances in which your members provide health services in the privately paid-for system would or could still be captured under this bill. They're regulated health practitioners so they come under the definition there. They're operating in places that could be independent health facilities, under that legislation, or could be designated under regulation within this legislation. Am I missing something? Is there a segment of the operation or the provision of those services that is completely apart from the purview of this legislation and therefore private personal health information wouldn't be governed?

Ms Signe Holstein: I think you're correct in that certainly they're still covered under the Regulated Health Professions Act, but there's a lot of health information held in privately owned, privately run, privately managed institutions—not institutions but non-institutions, and that's one of the problems.

Ms Lankin: Have you looked at the definition, for example, of "health care custodian," which really presents a lot of the responsibility and onus of the bill, and can you give us examples where there's an operation that would not be covered?

Ms Holstein: I honestly can't at this point, but I'd be more than happy to go back and try and find—

Ms Lankin: That would help, because one of the things the bill also does is provide the opportunity through regulation to designate certain things. We may need to look to that. But I suspect, through various mechanisms—independent health facilities, the health care practitioner, provision of health care—there are a lot of definitions there, and when you put them all together it may be that they're covered, or I may be wrong. We need to know that, I think.

Ms Holstein: I have to say I didn't really look at it in that specific an example, so I will do so.

Ms Lankin: Maybe you could look at it and also consult with the ministry and provide that response to the committee.

Ms Holstein: I'd be pleased to.

The Chair: Thank you very much for coming before us this afternoon.

CANADIAN MENTAL HEALTH ASSOCIATION, ONTARIO DIVISION

The Chair: The next presentation will be from the Canadian Mental Health Association, Ontario division. Good afternoon and welcome to the committee.

Ms Patricia Bregman: Good afternoon. I have two colleagues joining me. It's nice to be back.

I should tell you that we will have a more formal written submission tomorrow but we thought, in the meantime, there are actually some articles in here that you might find enlightening that relate to this. We added a

little bit about stress reduction and exercise, so if I see you cracking your jaws, I know you're reading our material and trying to relax a little while you're sitting here.

On my right is Dr Barbara Everett, who is the new chief executive officer of the Canadian Mental Health Association, Ontario division. She has a clinical background, so she will be doing a piece at the very end about some clinical issues. I think she would also be happy to answer questions that you may have as they relate to mental health information in a more clinical setting. To my left is Omar Odeh, who joined us a week ago as the manager of our knowledge enhancement centre.

1540

I'm going to do the primary part of our presentation. It's going to be somewhat different than what you've seen and, I hope, helpful.

I want to start by thanking the committee for once again adopting what was a very effective process for Bill 68. Those of you who were part of that process may not be aware, but we've been on record as saying that we found that process led to much better legislation. It was a really good process and, Mr Chair, we appreciate the contribution you made to that process. We hope that this process again—

Interjections.

The Chair: Let me just say thank you. One takes one's compliments where one can find them.

Ms Bregman: And to the rest of the committee. It relates to what the main part of our presentation will be at the end, which is a somewhat innovative recommendation about next steps that we hope you will take seriously as a solution to how we get this legislation to become good legislation, and that you'll take it in the same guise in which I think this committee has been working. I think all three parties deserve credit for really focusing on health information legislation as being important and something that we need to have happen in Ontario. Work needs to be done on it, but that having been said, we want to come here with some proposed solutions, not only in content, which we're not going to go into a lot of great detail on, but in process.

I also want to say at the outset—and I don't usually start with personal things—that you should know that I'm one of the few survivors of the Krever commission. I was the policy research analyst for the commission in 1978 to 1980 before I went to law school, and I'm probably one of the five people, in addition to Jutta Auksi, who also worked for the commission, who actually sat through every single day of the investigative hearings and read every single file seized. So I come at this with that history. In 1990 I went to the Ministry of Health and spent two years working on a previous incarnation of this legislation and as counsel to the freedom-of-information office. So I truly appreciate how far this has come in actually showing up as legislation.

I remember why we didn't have legislation, which is that the idea of patients having access to records was considered over the line; it wasn't going to happen. I

think we're starting from a premise of appreciating the fact we've gotten here and I think it's important to keep that in mind during our presentation.

There are four points, before I get to our proposed solution, I think we want to highlight as being of some concern, although I think remedial. One is the notion that legislation needs to cover more than simply the health setting. I understand the rationale is that this legislation is limited to the health setting and you're going to have other legislation that will later cover the rest of the employment setting, the insurance setting. To be honest, that was the argument made when the Freedom of Information and Protection of Privacy Act was passed and that was the reason that health information was not put into FIPPA at the time.

While I certainly think you have all of the best intentions in the world, I think it would be really tragic if people's health information outside the health sector remained vulnerable. What you may end up with is the patchwork you're trying to avoid, and I thought I could give you an example of what the problem is. This came not just from the patient but from the health care people in employment settings and insurance who presented to Krever. This is not a new problem. It comes because people are required to disclose significant information outside of the health setting to get benefits. It happens more and more that you need it to get your drugs.

If you want a drug plan, your employer is likely going to administer that plan and you're telling your employer, "I have this problem." If you have a mental illness and you've got schizophrenia—you were really sick, you're taking your medication, you're able to return to work—you have to disclose a lot of information to your long-term disability insurer, who will talk about return to work; to your employer, who will need to accommodate you in the workplace. It's important that people feel able to disclose that information.

What has happened in the past, and continues to happen, is that information is protected when the doctor has it. You consent to disclose it and that's the end of protection. There's more than one instance where an employee benefits coordinator, who may be a clerk in an office, has mentioned to your colleague that you having mental illness. We know what the stigma of mental illness is about. I think the government, and we thank them for this, is funding a whole project in the northeast mental health implementation project about removing stigma. That one disclosure may ruin that person's employment relationship for good. It may cause them to lose a job or to lose a benefit or to lose housing. It's something people will worry about. We don't want people being afraid to go back to work or apply for a drug benefit simply because, having disclosed that information, there is no current remedy. There is nothing that person can do. There is no law that prevents that disclosure right now.

Similarly, within the insurance industry—and for those who haven't read the Krever report, I will tell you that the insurance industry and lawyers were the biggest

offenders in terms of inappropriate disclosure. You disclose information to your insurer every single day, and every single one of us does it: when you get a mortgage, when you apply for a car loan. There's no law that stops them from disclosing that to whomever they want. They may say they're not going to do it, but there is currently on the books no legal protection.

The same problem of patchwork and no protection that this legislation is addressing exists outside the health sector. I can't urge you strongly enough to reconsider expanding it. If you subsequently put privacy legislation in place, great, you can do what you're doing with this legislation and say, "We'll repeal it, we'll amend it." But if there were one issue that I really think is critical, that's one.

The second one, which I know you've also heard a lot about, is the removal of the lockbox provisions. A lockbox provision was put in in previous versions. It's a matter of control. It's part of the culture of, "We control the disclosure of our information."

I've read all of the Hansards for this committee because I wanted to see what people were talking about, and I've seen the justification. Often it's, "If you don't do that, we'll have to retest somebody," or "We'll have to do the X-ray again," or the lab test. I agree with you: inefficient. But I guess what I want to bring you back to are two things. I don't know anybody, myself included, who wants to do a test again, and I find it hard to imagine that somebody would not consent to that disclosure. Whether it's a lab test or an X-ray, I don't have trouble saying, "You can disclose that," and people will consent. Nobody wants to do it.

What you have to remember is that much of the health information is not that lab test and that objective data; it is the subjective data that doctors write down. I'll give you an example. This came to us from a doctor during Krever's commission who said, "I have a request from a patient to disclose information. I don't want to," because what it said was that this patient went to see her doctor and the doctor wrote down, "The husband had called me and said that he didn't like having sex with his wife, and I can see why: she's big, fat and smelly." That's the kind of information that's in records. That's number one, very subjective. Not everybody needs to know that. Why should I as a patient be subject to that kind of disclosure? The second is the assumption that it's all accurate and good information. There is inaccurate information in these records that may be perpetuated because the patient doesn't know it's being disclosed and doesn't know it's there. I would think we would want the best quality information disclosed.

Again, I strongly urge you to look at reconsidering putting in some level of control back to the patient to say there's certain information that you just—if you're an in-patient in a psych unit, why does your whole record have to go to the ophthalmology unit when you get your eyes tested? That's what can and likely will happen, because nobody else but you, the patient, really has the

interest in sifting through the piles of records to decide what goes and what doesn't go.

I think you're really running a risk of jeopardizing health care and not improving it. That's why we distributed the *Network* magazine. There are a couple of articles in there about the links between physical and mental health. If you read the article by the woman who was mauled by a bear, it's really quite interesting, her experience as she went from dealing with the health profession as a medical problem to dealing with them as a mental health problem and the way in which people looked at her differently. We know that having a mental health history changes the way the medical profession perceives you. So I again would strongly urge you to look at that as a change to the legislation.

The third area that we wanted to raise is patient access. I do commend the government for putting patient access and informed consent in. It's an enormous improvement. This is a tiny change—and I actually mentioned it to Gilbert Sharpe outside—and it may just be a drafting thing. As I read the legislation, you not only have to pay to have your information photocopied; you actually have to pay to ask to see it and you have to pay if they show it to you, even if they don't photocopy it. I can't think of a bigger barrier to access, and I think you've got some internal inconsistencies. If you're giving informed consent, that assumes you see what you're consenting to. As I read the legislation, a health care provider could say, "I want you to consent, but you're going to have to pay me to do it."

1550

I'd really urge you to go back and look at those provisions again. I think it's reasonable to put in regulations to deal with photocopy charges. You may even have an argument to be made that where somebody repeatedly requests records that are hard to find, that aren't related to care, you may want to look at some way of controlling that. But for the standard requests when you go to the doctor to have it up front that you've got to shell out money, it just seems to me unfair and somewhat an unreasonable provision. Ironically, all of this is about moving into the electronic age, where information is going to be available like that, free of charge, cheap. That's the one provision I would urge you to look at.

Before I turn it over to Dr Everett, the recommendation and proposal we have: we've got as a starting point legislation that I think has a good foundation. It's hard to understand, and I'm sure you've heard that a lot. I've got a lot of experience. I couldn't tell you how this all works. But I think we can come up with a process that will allow you to achieve what you want, involve the stakeholders and move quickly.

Our proposal is that instead of just having the committee sit down with this, you throw the stakeholders who are prepared to put aside ideological battles into a room for a short period of time, time-limited, a week or two weeks, and what you walk in with is you all agree that you're going to walk in and the goal is to come out with legislation, to come out with a consensus where possible,

and if there's a disagreement you put it aside and you can deal with it later. What you would come out with at the end of the week is, where it's just a language thing, you get the language fixed; where there may be consensus that the policy needs to change—and I think there are some areas—you recommend to the government, "Here's the policy." What you can then do is really narrow it down to one or two issues where you may not have consensus, and then we come back to you on second reading with that discussion.

But my guess is we're prepared certainly to go on those terms and say that what we want is to come out with good legislation. We don't want to go and argue at great lengths about a whole range of things; we're prepared to put those arguments aside. And I think other stakeholders might be prepared to do it. You would benefit from the fact that we have the grassroots experience. We know from our constituents, the people we deal with, what they want to know. The question I get is, "Will the legislation apply to X?" If we can sit in a room with the people drafting it and the committee and policy-makers, I actually think we could fix probably two thirds to 80% of what's here without going through a very long process.

At the end of the day we may still say we don't like some of it, but I think Bill 68 worked because people were willing to put aside ideology to the point of trying to improve the legislation. If we can arrive at that, we're putting it forward as a suggestion and we're certainly willing to come and do what we can to assist you in achieving that goal in a short time frame and time-limited so it doesn't go on forever, rather than the consultations where you're going to be having every stakeholder at your ear telling you, "We want you to do this." Let us try and negotiate some of the differences away and see if we can come up with some consensus and then come back to you, be part of the process.

I'm going to turn it over to Dr Everett for her comments on the clinical side and to help you understand a little bit more on the mental health perspective.

Dr Barbara Everett: I won't take a lot of your time. I'm neither a legislator nor a lawyer; I'm a clinician. We're very straightforward: we want things to be made better, not worse. We want them to work for us on a day-to-day basis.

Legislation is a blunt instrument, as you're aware, in that it is incapable of predicting the exigencies and nuances of everyday lives and all the various and sundry iterations that occur at the front line as you interface with your clients.

Just a word of caution and thought: certainly in mental health, and I'm sure in other particular health care areas, but in ours especially, we are the holders of secrets. We hear the things that people want no one to know, and we can only be helpful if people feel free to tell us these secrets. One breach ruins a life. You can have your children taken away from you, you can lose your work. One breach, and it may not even be public; it's just one thing that's whispered from one person to another

because they weren't careful enough. I just want to leave you with that thought: the importance of the retention of people's control over their own information in our field is life-saving.

The Chair: That leaves us about two minutes.

Ms Bregman: We probably can't get questions.

The Chair: I think this time I'll give it to the government. Mr Wood, if you have any questions?

Mr Wood: Would you be satisfied if we passed an act that was substantially similar to the federal act?

Ms Bregman: I think we would want to look at it. If it's close, there are some changes we might like to see. We have not seen it. CMHA has not taken a position on it so I can only tell you personally. I think it would not be a bad start for information protection. I know that's the goal.

Mr Wood: In what sort of areas would you anticipate asking for change from the federal?

Ms Bregman: To be honest, I don't want to give you something off the top of my head. I could come back to you with that if it would be helpful.

Mr Wood: You might want to pass that along to the committee and to the minister.

Ms Bregman: Sure.

Mr Wood: On the issue of informed consent, are you aware of any other jurisdiction that has informed consent in their law?

Ms Bregman: It's controversial. I actually think it's implied in everything. I think if you did not include informed consent you would probably have a charter challenge. Because I'm involved in advising on a registry, I talk to the people who do the research side, for example, and there is a consensus that you should have informed consent as an ethical standard. I could go back and look at whether other legislation specifically puts it in; I've got a compendium. But I would strongly urge you and I don't see how you can do anything other than informed consent if you truly want to say that this is control and ownership of information. I think it's implied by common law, whether it's in the statute or not. If you move to take it out, I think you would have really serious concerns raised by a number of people around the table.

Mr Wood: The vast majority of consents are not informed consents. If I'm talking about across the whole spectrum of consents, the vast majority are not informed consents.

Ms Bregman: But by common law, you can't really consent if it's not an informed consent. This is something that a common law—I'm a lawyer by training. It's got to be an informed consent or it's not considered to be a valid consent in law. It may not be in practice, but that's something we argue about a lot, about how you improve it and make it an informed consent. There is no reason you can't get informed consent. It provides no barrier to proper disclosure of information. I think it goes back to the issue of trust. If you want people to feel confident in giving information, you've got to have informed consent. There's something about the term "consent in law" that

implies that it is informed. I'd be interested in seeing anything that tells me that it's not.

Mr Wood: Surely that's not the case. "Informed consent" has a very specific meaning with respect to medical consent. Most consents are not informed consents by that standard. Most consents given in law are not informed consents in that sense.

Ms Bregman: I'd be interested in seeing somebody who signs a contract that they wouldn't consider informed consent. I don't have the legal research in front of me but I'd be shocked if you could go into a court and say that you can give a consent without being fully informed and that it's a valid consent. I'd be very surprised if that stood up.

The Chair: Loath as I am to break up a debate between lawyers on a legal point, thank you very much for appearing before our hearings on this bill. I'm sure the ministry staff will take your offer to heart. Thank you for the time you've put into this presentation.

Mrs McLeod: Mr Chairman, could I ask a question?

The Chair: You sure can.

Mrs McLeod: We've had a number of presenters today who have expressed a concern about the silence of this legislation in relationship to the private sector, to the employer, to the insurance company. My question is—and I should probably know the answer but I'm not sure I do—if we proceed with Bill 159 and it's silent on the private sector aspects—our bill would have primacy over the federal legislation for the public sector, but does Bill C-6, the federal legislation, still come into effect as of next January for health information handled by the private sector for commercial purposes?

The Chair: Let's have the researcher get you an informed answer on that question.

Ms Lankin: Or a knowledgeable answer.

1600

ELECTRONIC CHILD HEALTH NETWORK

The Chair: Our next presentation will be from the electronic Child Health Network. Good afternoon. Please proceed.

Mr Andrew Szende: My name is Andrew Szende and I am the CEO of the electronic Child Health Network, or eCHN for short. I'll be using eCHN a number of times in my remarks. I am here to support the need for legislation that recognizes the existence of and the need for integrated electronic health records.

Just to give you a little bit of background about eCHN, eCHN is the offspring of the Child Health Network for the Greater Toronto Area, a unique linkage among hospitals and other providers of health care to infants and children. The Child Health Network was developed under the leadership of the Hospital for Sick Children. Its goal is to increase the coordination and quality of children's health care across the entire continuum of care, from home care to doctor's office to community hospital to children's hospital. In addition, it was the goal of the Child Health Network to reduce duplication and to

ensure maximum efficiency while delivering care of uniformly high quality.

This is where electronic transmission and storage of health information comes into the picture. If we want children to move seamlessly through the health care system from one provider to another, then it is obvious that the information must follow the patient. Until eCHN came along, there was no way for this to happen. As anyone who has sought care at more than one hospital will know, the right hand rarely knows what the left hand is doing. You can walk down University Avenue and visit Mount Sinai Hospital one day and the Toronto General Hospital the next day, but there is no way for your health information to move from one site to another unless you carry the sheets of paper with you.

The electronic Child Health Network was established to change all that. It is a unique and pioneering endeavour that has attracted attention from around the world and its success depends on a public and governmental understanding of the extraordinary importance of the safe, effective storage of electronic health information. The development of eCHN began four years ago as a partnership of the Hospital for Sick Children, St Joseph's Health Centre in Toronto, the Rouge Valley Health System, Orillia Soldiers' Memorial Hospital and St Elizabeth Health Care, which is a home care provider.

We have developed a system which integrates electronically the patient charts of the various newborn and pediatric services in the greater Toronto area. Any child who is seen by health care providers at more than one location can have an integrated chart from all the different locations, with all their different information systems, available in a single view on a computer screen. Furthermore, this can happen even though each of the participating institutions has completely different computer systems.

Consider the example of a child who is taken to the Centenary site of the Rouge Valley Health System in the east end of Toronto or to St Joseph's Health Centre in the west end of Toronto. After performing some laboratory and/or radiology tests, the doctors and the family decide to transfer the child to the Hospital for Sick Children. The health care providers at Sick Kids can see the results of previous laboratory and radiology tests that were performed at Rouge Valley or at St Joseph's. If necessary, the charts may be called up while the child is in transit. Not only that, but the child's pediatrician can see the child's chart as new data is added at Sick Kids.

After a while, the child is transferred back to Rouge Valley or to St Joseph's. Now the health care providers at both hospitals can see the operative notes, the discharge summaries and the results of further tests from any one of those sites. In addition, the family pediatrician can call up these same charts on a computer monitor in his office and can continue to monitor the child's progress and explain to the family exactly what is going on.

If the child requires rehabilitation or treatment for a chronic condition, he or she may be transferred to the Bloorview MacMillan Centre. Again, the health care

providers there can see the integrated chart from the different information systems at any or all of the other sites. If necessary, consultations can take place among all the different health care providers at the different sites and the family pediatrician, all of whom could see the same integrated records at the same time. If the child requires further care at home, perhaps from a nurse provided by Saint Elizabeth Health Care, the integrated health chart is available to her too.

I would like to emphasize that this is not just a dream; this is reality: eCHN is the most advanced integrated electronic health record system in Canada today. We keep working on it; we keep trying to expand and improve it every day.

Here is what we do currently. The data in the integrated chart travels through a private, point-to-point, fibre optic network. It is not part of the Internet. It goes from one or more information systems at each hospital to the server that integrates the data for the hospitals, and then to the monitor where the doctor, nurse or other health care provider can see the single integrated chart. It is up to each hospital to decide which doctors and nurses may look at the integrated charts. This is the same way hospitals currently administer both electronic and paper charts. Once a health care provider is identified, he or she is given a user name and password for eCHN only. No one else can get to see the data in an integrated chart. No hospital administrators or registration clerks get to see anything, because they do not have the passwords. Those who do have passwords can sign in and call up any chart. However, they may look only at their own patients' charts. This is similar to what happens with paper charts. The difference is that it is much easier for their colleagues, their administrators or the parents of the children to discover if they have looked at a chart without having a good reason for so doing.

We keep a complete audit of every chart in our system. We are using the most up-to-date electronic systems available to protect our patients' privacy. Our health care providers currently have access to about 70,000 children's electronic charts. If any parent or administrator wishes to do a spot check to find out who has been looking at a particular chart, he or she can request one readily. This way it is possible to monitor who has looked at a child's record. Any user found looking at a chart without permission could be held accountable. This privacy protection significantly exceeds any privacy protection ever offered by traditional paper charts.

There are many other advantages to having an integrated electronic health record. Paper charts can and do get lost. Furthermore, they can be in only one place at one time. It is much less likely that an electronic chart will be lost or misplaced the way paper charts are sometimes lost or misplaced.

Unlike the situation with paper charts, it is impossible for an unauthorized user to sneak into the system to snoop at a child's chart without being detected. Only authorized users get access to the charts. If they sign in, the audit trail tells us which charts they have looked at. If

a user signs in but does not use the system, the system will automatically log him or her out. This protects us from the possibility of someone sitting down and accessing files from a terminal that was abandoned by another user. When a user stops or logs off, all previous pages that had been downloaded to that terminal are purged from that terminal. Again, it is difficult for someone to come along and look at pages that may have been called up by a previous user. If that were to happen, the person who signed in with his or her password can be held accountable. Again, this is more secure than the current paper system.

We make available this integrated chart only if the parents have signed an explicit consent form at each institution. If the parents do not give consent at any institution, the data from that institution will not be included in the integrated chart. We at eCHN have done everything humanly and technologically possible to protect the privacy of the individual child and to make available more information in a more timely fashion to the health care providers who need that information. We believe this electronic system saves unnecessary duplication and improves the quality of health care in Ontario. The eCHN system ensures that when your child requires health care, all relevant information is available wherever the care may be provided.

To conclude, I would like to emphasize that we at eCHN are using the most sophisticated technology to integrate various existing electronic records, such as X-rays, laboratory results and discharge summaries within individual hospitals into eCHN's integrated electronic chart. The health of children will be improved if we can provide an integrated health record that is available to those health care providers chosen by the child or the family, regardless of where the pieces of the record originated. This is why there is an urgent need for legislation that recognizes the existence of and the need for integrated electronic health records.

1610

The Chair: That leaves us a little over two and a half minutes per caucus for questioning. This time we'll start the rotation with Mrs McLeod.

Mrs McLeod: Thank you for your presentation. I appreciate it's not a dream but a reality for a fairly small targeted group of individuals being served right now. Does it extend beyond the initial groups that were involved in your pilot?

Mr Szende: It extends to only one new institution that we've added recently, and that is the Bloorview MacMillan Centre. So it's the first five that I mentioned, plus Bloorview MacMillan.

Mrs McLeod: The limitations in terms of expanding it are directly related to the infrastructure that's needed because it is a private point-to-point system?

Mr Szende: It is. There are some challenges. We are working with a number of other hospitals within the GTA. At the moment, we are looking at some of the larger hospitals that are considering joining the network. Two are Sunnybrook and Women's, and Credit Valley.

Some of the others are trying to work this into their strategic plan because they do have to make some internal changes to join.

Mrs McLeod: Does it require a dedicated information manager to enter the data?

Mr Szende: No, it doesn't. The system takes the data from whatever information systems an individual organization may have and simply copies the data. The data gets fed into a server, but the data continues to reside in the originating hospital. It continues to be owned by and controlled by that hospital, updated by that hospital. The updating simply happens automatically as ongoing downloading.

Mrs McLeod: Is there time for another question?

The Chair: Very briefly.

Mrs McLeod: Very briefly? I don't know that the answer can be.

The last sentence of your brief: what in Bill 159 either helps or potentially hinders the work that you're doing?

Mr Szende: Basically, we can continue to do what we are doing with or without 159. The reason we decided we wanted to come and speak to you today was simply to illustrate a living lab of how electronic health records can be used to serve the system and how you can deal with issues as they come along with policies that protect the privacy of the individual.

One other thing, and this may come out later: if you don't allow people to share the information that they have, in the way that we don't think that we can, it simply means that some doctors, when they're looking at a patient's chart, will not have all the information they could possibly have on that patient and therefore the decisions that will be made may not be as good as they may otherwise be.

Ms Lankin: It's terrific to see you back here again. I remember the beginning of this project and its hopes—and others, not the same, but I'm thinking southwestern Ontario, the University Hospital-based network in the greater London area. I think what's interesting is you've started from the premise that consent is required. In effect, you've allowed the parents and the families in the circumstance to lockbox an institution if they choose to.

If you translate this into the larger systems issues that we're looking at and this bill, which allows for the transfer of information between health practitioners, and you take it the step that we're all envisioning of some kind of smart card technology where your health record is on a chip and you're carrying it around, the concept of being able to have filing cabinets of either institutional visits or type-of-practitioner visits and being able to close some of those drawers at the appropriate time, on one level it seems reasonable in terms of personal control of information. From a systems management point of view, which you've had a lot of experience with over the years, it's contrary to what we're trying to get to in terms of efficiency, best utilization, best health outcomes etc.

Do you have any comments on that in your experience with allowing a lockbox in your own system?

Mr Szende: I think that we are using the lockbox and I don't see anything wrong with it, simply because of the different levels of security that are needed for different parts of the system.

One approach to this might be to build in various levels of security, which is quite possible. The technology allows it with the technology that we use and that other people use. You can invent as many levels of security as you wish so that you make available certain types of data to certain people, and less and less, depending on how sensitive the information is. Maybe some data don't get made available to anybody at all. I guess the important thing to consider here is that the technology will allow you to do it almost any way you like.

Ms Lankin: I wanted to ask one other question that shifts—

The Chair: Very, very quickly.

Ms Lankin: OK. What you're doing is really interesting. We would like to know if it's successful. We would like to know what the health outcomes are for the patients who are in there. We'd like to know what the cost efficiencies, the management efficiencies are to the system. We'd like to know if it's a cost-effective technology because we want to export it through health economic development measures.

Obviously, research has to be done. Researchers will tell us perhaps they need identifiers to follow those people through. Is that a reasonable proposition for the system, that we should have access to that, or should we have to ask those families for their consent for that information to be viewed for research purposes?

Mr Szende: My view on that would be that it would be reasonable to use that information in an anonymized form. I certainly would not recommend using any of this information in a way that the patient could be identified for research purposes. We are deliberately not making any of this available for research purposes to anybody; it's strictly a clinical tool at the moment. But if it gets scaled to a larger population, then it becomes of value to researchers. I'd put very strict policies around who you would give it to and under what circumstances, but certainly not in an identifiable form.

Mr Wood: How do you maintain the clinical integrity of the chart if some information is not on it?

Mr Szende: When people log on, we have two warnings for clinicians. One is a reminder about their confidentiality responsibilities as physicians or nurses and the other is that we warn them that this is not a complete chart. This deals with some of the sensitive information that is not there. Rather than flagging that some information is not here, which is sort of indicating there's some information here that you probably would want to know but it's so sensitive that we won't let you see it, we simply offer this general warning to people that this is a partial record. It covers the four areas that I mentioned. If you need further information, then you have to dig further to paper records or by inquiring to specific departments of hospitals. We are particularly concerned, ob-

vously, about things like psychiatric information, which is not included.

Mr Wood: Mr O'Toole wants to ask some questions. I'd like you to try, in 30 seconds, to describe the benefits that have been identified to the patients to date from this system.

Mr Szende: The benefits are simply that the decisions that are made by the clinicians take into account more information than would be the case without it.

Mr O'Toole: Informed consent is the repeated question this afternoon. I'm wondering, in a very lay sense, if I bring one of my children into the hospital that's attached to this system—of course I want the X-rays and the tests done. It goes down the stream and into the system. How does the parent, custodian, whatever, stay informed about this new scientific thing that we decided here in Toronto? Do you understand? The informed part means you have to tell them all the possible outcomes, or if you don't do the following, these are the possible downsides, risks. That becomes an onerous burden, that informed consent. If you could just comment on that. You do have informed consent, you say?

Mr Szende: Yes.

Mr O'Toole: I'd like you to describe that in a policy, because I don't understand it. I find it almost ambiguous. It's a conundrum. Do you understand?

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Mr Szende: I agree.

Mr O'Toole: If I knew, then why am I asking? If I was a parent, I'd say yes. Do you understand that? I want the child to live.

One thing is, how do I know who's using what system where? You said you have a user ID number at the end. They log on, they key in a patient record number or whatever it is.

The Chair: I think you're already up to about four questions implicit in there, Mr O'Toole. If he could respond, we're already over the time.

Mr O'Toole: It's an ID issue, really.

Mr Szende: First of all, as far as consent is concerned, we have a little brochure that describes what eCHN is. The registration clerk gives that to each parent to read when they first come into the hospital, and then there is a form that they sign. We have given questions and answers to the registration clerks to try to explain what this is for. I've heard some of your previous conversation. I don't know to what extent that message actually gets through to people as to what this is for, but we hope that it does.

We explicitly explain that the information for eCHN will be made available to the clinicians at the eCHN member institutions. So when people consent, that's what they're consenting to. At the other end, when a clinician calls up a record, he or she simply logs in and calls up the records that are available on his or her patients.

Mr O'Toole: Thank you. I appreciate the system, by the way.

The Chair: And we appreciate your coming before us here this afternoon and making your presentation.

Mr Szende: Thank you very much.

ONTARIO AIDS NETWORK

The Chair: Our next presentation will be from the Ontario AIDS Network. Good afternoon and welcome to the committee.

Mr Stephen Squibb: Good afternoon and thank you very much. I'm Steve Squibb from the Ontario AIDS Network. We appreciate the opportunity to speak before you today.

The Ontario AIDS Network is the provincial association of 52 not-for-profit AIDS service organizations, or ASOs, and a network of people living with HIV/AIDS from all across Ontario. It's estimated at the end of 1999 there were approximately 20,000 people across Ontario living with HIV/AIDS, and new infections are increasing at an alarming rate. I guess that right now there are probably in excess of 21,000 people living with HIV across Ontario.

Our member ASOs provide a wide range of services including care, treatment, treatment information and support services for PHAs. In addition, the ASOs are the cornerstone of the public HIV/AIDS information awareness and prevention programs across the province. We are also committed to advocating for appropriate policy and legislation that will protect the rights of PHAs and their families, and will ensure that they have equal access to state-of-the-art care, treatment, support and all health and social services.

Much of what we'd hoped to present to you today has already been very well articulated by people with appropriate legal expertise. In order to avoid duplication and to save time, our submission is very brief and is based on the experience of our members and PHAs gained over the past 20 years or so observing and experiencing the stigma and discrimination which accompanies HIV/AIDS. It's our intention with this submission to support the more detailed analyses and recommendations that have already been submitted to you, including those by Ontario's privacy commissioner, the Privacy Commissioner of Canada and the HIV and AIDS Legal Clinic Ontario.

The HIV/AIDS community recognized long ago in the struggle to address the discrimination, stigma and social injustices faced by PHAs that our present laws don't provide adequate protection of personal health information. Much of that stigma, discrimination and social injustice is caused by inappropriate access and/or disclosure of our health information to and by people without our express consent. These are also perpetuated by our lack of appropriate mechanisms to stop and to seek redress for these violations and breaches, and to gain access to our own personal health information records and correct any inaccurate information that may exist in those records.

The key areas of concern that we'd like to see in health information privacy legislation in Ontario have not been adequately addressed, we believe, by the proposed

Bill 159. Those which we believe may arise if the proposed bill is passed into legislation are as follows.

The law needs to recognize that we each are owners of our personal health information, not the government and not any other party who may come to be in possession of any part of it; our right to control access to and disclosure of our own personal health information; our right to access and to correct our personal health information records without being frustrated by unreasonable barriers or costs; our need for an effective and easily accessible means to remedy any violation of our privacy rights or breaches of confidentiality.

The impacts we see on those most vulnerable: in a just society, the concerns of the most vulnerable are more important than money or cost savings. We believe that most people in Ontario are concerned with protecting the privacy and confidentiality of their own personal health information and that they alone have the right to decide who may have access to it and for what purposes.

However, the sensitivity of personal health information is probably felt most profoundly by those who have seen or experienced how their health status can be used against them. PHAs and their families are among those who are most likely at highest risk of adverse effects from violations of their right to control access to information about themselves and their health status.

In the early days of AIDS, we know it was commonplace for PHAs to be placed in isolation in hospitals and subjected to insensitive and sometimes inhumane treatment. Often people were denied appropriate care and treatment. Caregivers wouldn't even enter rooms to deliver food or to clean them. We saw and heard of people being abandoned by friends and family, fired from jobs, refused medical care, denied housing and other services. We still all hear of these and worse things happening in other parts of the world and some people assume it doesn't happen back home here in Ontario. But evidence of this fear and stigmatization and the adverse effects on the lives of PHAs still exists right here.

Our members still talk today of their daily efforts to advocate on behalf of PHAs or counsel PHAs who are facing evictions or unjustified lack of access to housing. Others are facing hostile work environments or fear that potential employers will deny them access to employment or fear that if they attempt to return to work when they are able, they will face unjust termination of employment and loss of benefits.

In some areas of the province today, PHAs receiving home care and requiring blood tests are being charged to have blood drawn in the home and transported to labs, even though non-PHAs get the service free. This is clearly discrimination based on ignorance and flies in the face of universal precautions widely accepted as the standard when dealing with blood products, whether or not they are known to contain infectious agents.

We hear from many of our ASOs that some PHAs will only access HIV/AIDS-related services in communities other than their own in order to protect their anonymity. Some PHAs have their prescriptions filled outside of

their own communities for fear that staff at their local drugstore will learn of their status and divulge the information to others in the community. We've probably all heard of cases, some of which have been documented in the media, of children with HIV/AIDS or children living with family members who are infected who are harassed at school and refused admittance to school or daycare.

I can tell you from my own personal experience that for many years after I was relatively sure that I was HIV-positive, I didn't get tested for fear that the information would get into the wrong hands and would be used against me. I was afraid that I might lose my job or that my children would be afraid of me or afraid for me, that they would be teased or ostracized by their peers. I was afraid that my friends and family might judge me immoral or careless and turn against me, afraid that my career and my ability to support my family would suffer if I couldn't take business trips outside of Canada.

If people don't feel that they have control of their own health information, they are less likely to get tested and to seek treatment. And if they do seek treatment, they may be reluctant to participate in research programs unless they can have absolute assurance and control of who can access their information and for what purpose. This affects the well-being of our entire community, not just those individuals who are PHAs.

This was recognized many years ago in Ontario when anonymous testing was introduced. This was successful in encouraging many people to test in order to help our education and prevention efforts. But what is the use of anonymous testing if we can't get anonymous care and treatment and we can't control access to our own health information? Without this trust, people are reluctant to test or to access care and treatment.

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HIV/AIDS isn't the only stigmatized disease and it's not the only health condition which would give rise to an individual's concern to protect the privacy and confidentiality of their personal health information. Anybody with a potentially life-threatening or debilitating disease would quite naturally want to protect that information from falling into the hands of unscrupulous employers concerned only with how long they can work you before you go on disability or concerned about their insurance premiums if you're on disability for a protracted period of time, or from other private sector recipients of their health information who may wish to sell or trade or make use of it with some profit in mind.

They would also want to protect themselves and their families from the kinds of discrimination and social injustices experienced by many who are perceived to have a highly contagious disease, or one that can be acquired through some behaviour which others might link with a lifestyle judged inappropriate.

In conclusion, as we stated in our introduction, we support recommendations previously submitted to you. Most specifically, we support the following recommendations which we've paraphrased here from the submission to these proceedings by the HIV and AIDS Legal

Clinic Ontario, which we believe would address our concerns.

(1) Abandon Bill 159 in favour of a general personal health privacy legislation that will cover the public and private sectors.

(2) Use as a template for a general personal health privacy legislation the model draft legislation created by Professors Lawrence Gostin and James Hodge of Georgetown University Law Center.

Thank you once again for this opportunity to bring our concerns to you today.

The Chair: Thank you very much. That leaves us about two minutes for questioning from each caucus. This time we will begin with Ms Lankin.

Ms Lankin: In listening to your presentation, I'm struck by how far we've come and how far we have yet to go. I was thinking about how in 1992 we didn't even have practical practice standards for dealing with patients with HIV/AIDS and the whole anonymous testing, and now coming to terms with these issues of privacy and understanding the impact that it has.

As an aside, I had a very close friend who died of the disease who refused to get tested. This was just prior to anonymous testing coming into the province. Those are real life consequences.

One of the things you've stressed that we've not talked about a lot is the issue of penalties if privacy is violated. I recognize that part of your presentation goes to the whole issue in the sense of a lockbox. We're grappling with that and it's very difficult. But even today there are rules, there are guidelines, there are professional college ethics about how information is to be controlled, and yet there is no effective mechanism when there is a breach of that. Have you given some thought to what it means to have an effective and accessible mechanism to remedy breaches?

Mr Squibb: Yes. In fact, the brief you've already received from the HIV legal counsel of Ontario covers that fairly well and has some very specific recommendations around that. Some of the things they identify are where people are being charged to access their records, if they can access them at all. Often they are still being denied access even though they've spent an awful lot of money trying to access them. I think there was an article in the Toronto Star today about some poor man who has managed to access his record and find incorrect information. After spending \$14,000 on legal costs, he hasn't been able to get the government to authorize the changes to that information. That's really what it means.

Very often people who may have been at high risk for catching HIV or AIDS because of their socio-economic circumstances can't afford to pay anything to get access to records or to access a process that might achieve some redress. Very often, after people become infected and sick they lose a lot of their social and economic status and are facing the same barriers.

Mr Wood: We've heard earlier from some of the presenters that there are certain kinds of research that, because of the small sample size, you can't do by way of

getting permission. For the purpose of your answer, I'd invite you to accept that as a fact, even though you might not feel that way. But if we reach the point where we've satisfied that was the case, do you think we should say we will, for that purpose, permit access to those records, or would you stand on the view that if the person doesn't consent, the information shouldn't be used? That has the effect, of course, of we've either got to say we will allow some limited access with proper supervision and oversight and so on, or we've got to say that research can't be done in Ontario. If you get to that point, which side of that question would you come down on?

Mr Squibb: I will take your word for that because I'm not a researcher.

Mr Wood: We don't necessarily agree with that either, but for the purposes of your answer I'd invite you to accept that premise: we've reached the point where we find that to be the case; which side of that rather difficult question would you come down on?

Mr Squibb: I would say that in providing informed consent for the use of my information I would want to have been made aware that it may be used for research, and if it's not research that I can be made aware of today, that at least such research would be done in an anonymous way that I couldn't be personally identified from use of that information for those research purposes. I also would take comfort knowing that there are rules and regulations and ethical standards that researchers have to abide by and that if somebody does inappropriately access or use my information or divulge that information I have some mechanism for redress.

Mr Wood: Thank you. Those are my questions.

Mrs McLeod: I take very strongly from your brief that if we can't fix Bill 159 it would be better not have Bill 159 with things like directed disclosures, which would really fundamentally challenge the confidence in the confidentiality.

We heard earlier today that in the Krever commission testimony the biggest offenders of inappropriate disclosure were insurance companies. As you've noted, insurance companies and employers aren't addressed in this bill. If we don't proceed with Bill 159, if we don't have Ontario legislation, the federal legislation for health information comes into effect as of January 1. Would that legislation provide significant protection in the areas that are of greatest concern, perhaps the greatest concern, to people living with HIV/AIDS in the sense that it would deal with the private sector employers and insurers?

Mr Squibb: You've got me at a disadvantage here because I'm not intimately familiar with the federal legislation, and people with HIV and AIDS and the HIV community are anxious to have Ontario have personal health information legislation in place. The issue really is that this bill only covers the health care sector and doesn't include the private sector and so, in effect, we'll have different legislation that applies to different people.

Mrs McLeod: That's fair enough. I guess the concern we're repeatedly hearing is the fact that this legislation shouldn't go ahead without there being legislation that

applies to the private sector as well, because of the potential violations and misuse of health information in the private sector. That's a dilemma we face, knowing we want legislation but we don't have the companion piece.

Mr Squibb: Right.

The Chair: Thank you very much for coming before us here today.

SCHIZOPHRENIA SOCIETY OF ONTARIO

The Chair: Our next presentation will be from the Schizophrenia Society of Ontario. Good afternoon and welcome to the committee. Please proceed.

Ms Janice Wiggins: Good afternoon. Thank you, Mr Chair and members of the committee. My name is Janice Wiggins and I'm executive director of the Schizophrenia Society of Ontario. As you know, we are a non-profit, charitable organization comprised mainly of volunteers. We are the only province-wide, family-based organization dealing with persons with schizophrenia and their families. I'm here today of course to talk about Bill 159, and we specifically have three significant issues that I'd like to take you through today.

The first one is ensuring that family members who act as substitute decision-makers have ease of access to information. It is imperative that substitute decision-makers acting for incapable persons are able to access information in a comprehensive and timely manner. This provision is found in section VIII of the bill and appears to cover this particular matter. SSO recommends, however, that the words "substitute decision-maker" appear in this section and in appropriate paragraphs throughout Bill 159 for greater clarification. You can find it obviously in the bill in the front pages, in the explanation, where the words are explicit: "substitute decision-maker." However, our organization is very used to dealing with those words and the recommendation from us is to include them where appropriate.

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Second, ensuring that information that now moves only between schedule 1 psychiatric facilities can be shared between institutions and community programs: it will be imperative so that this continuum of care is established and very consistent. That is, personal health information must be provided to a health information custodian in order to continue the best possible treatment for the individual. You will find this in subsection 46(1) of the first reading.

Third, avoiding multiple proceedings with respect to persons with schizophrenia and personal health information: for example, the one proceeding under the Health Care Consent Act, heard by the Consent and Capacity Board, on the question of capacity to consent to treatment and personal health information disclosure is very appropriate, we felt, to consolidate it in one spot.

On a related point, SSO agrees the jurisdiction over records should not be divided; that is, the psychiatric records are dealt with through the Consent and Capacity Board. We support legislation that designates the Con-

sent and Capacity Board as the body that deals with issues relating to the release of health records.

While my presentation today is very brief, we certainly welcome the opportunity to comment on Bill 159. We appreciate its complexity and offer our collective expertise in any further consultation and development of legislation.

I want to thank you very much for your attention today and I would welcome any questions.

The Chair: That certainly affords us lots of time for questions, over four minutes each, and this time we'll begin with the government.

Mr Wood: I thought it was a very clear presentation and very helpful to us. We have no questions, but thank you very much for coming.

Mrs McLeod: Janice, you've addressed primarily the substitute decision-maker with some comfort around the provisions that are provided for access to information if you're clearly the substitute decision-maker. Do you see problems with having a lockbox on information for people who are capable of giving consent to control of their own health information?

Ms Wiggins: The lockbox has been a long-debated issue and at this time I really don't have a comment upon it.

Mrs McLeod: Let me take a situation that I raised in the Legislature. An individual with schizophrenia recognizes the diagnosis of paranoid schizophrenia. He had committed a violent act and has at this point in time spent more time in jails than he has spent in hospitals, repeatedly being put on a bus, having been discharged from either his jail or his hospital setting, and with no kinds of supports at all. I know the primary reason why that happens is because there just aren't supports there, but are there transfer-of-information issues that would prevent that individual from getting the help or the support if it was available?

Ms Wiggins: Yes, I think that has been a very significant difficulty. We've heard from parts of the province where the information is not transferred at all and not in a timely manner if it is done in fact. A concern of course we have is that the most immediate form of treatment is available so that the person's condition does not continue to deteriorate, nor are they, as you've put it, put on a bus and shipped outside the community where they might indeed be residing.

Mrs McLeod: I struggle with this, and we've had another incident in northwestern Ontario, as I'm sure you're aware. It would not in that situation have been appropriate for the police officers to have been provided with that individual's health information—I don't think so.

Ms Wiggins: No.

Mrs McLeod: But in the interests of public safety, do you see overrides to that protection of the confidentiality of the information?

Ms Wiggins: Actually, there's a very fine and delicate balance between the public's safety and the individual's safety. To this particular juncture, I don't see a way

around the information—perhaps on a very limited basis, again, dealing with the police information. I'm certainly not suggesting that we open up all records to everybody and anybody who might be in a position of authority, but wanting to recognize instances where it's very necessary to do so.

Ms Lankin: I recall, Janice, the discussions through Brian's Law around the provision and creation of CTOs that compelled sharing of information in order for a CTO to be an effective tool in the community. Of course, the concern raised at that point in time was that this information was being compelled to be shared with organizations that were not covered under any kind of privacy legislation, and in some cases they would now be and in some cases perhaps they won't be. There are individuals who will be drawn into that CTO world who will be covered in the little inadequate clause we put in that bill, but who will not be covered under this. Does that pose a problem? How do you see the facilitating flow of information but with protection of where that information goes and how it's utilized?

Ms Wiggins: From my reading of Bill 159, I understand there are protections in place, there are appeal mechanisms in place. It certainly goes without saying that there could stand to be some tightening up of it, to make sure that only those people who are authorized and health care custodians have the transfer of information, and of course that it is with the informed consent of the individual or the person who is a substitute decision-maker.

Ms Lankin: I've not looked at this so I don't know the answer but have you looked at whether or not those people who are brought into the circle of shared information under a community treatment order would become recipients as defined under this legislation and therefore governed by the provisions here?

Ms Wiggins: Again, through the reading and translation that we've been able to do, it does appear that they would be protected under this particular piece of legislation.

Ms Lankin: I want to come back to the provision of lockbox. I understand that you don't want to comment on it as a concept, but with the client group you deal with—individual patients and their families—one of the things we know and have heard about is the nature of the disease, where people for periods of time are capable of making treatment decisions and other decisions and at other points in time are found to be incapable of making those sorts of decisions.

The concept of rapidly changing conditions of capacity I think challenges us with respect to how people give direction about informed consent or knowledgeable consent for disclosure. Have you given any thought to whether there are issues? I'm thinking now from the point of view of families who come to us and tell us often that the law is such a barrier to get the help they need for their family members in this circumstance. Can you see any problems that we're creating in this bill with respect

to that issue of changing capacity and consent for disclosure?

Ms Wiggins: I don't see any at the current time, given the interpretation of the law as it stands right now. Again, as we've emphasized today, with access to timely information, you're quite right that the condition of the individual changes rapidly. Schizophrenia is a chronic illness. Sometimes a person is capable, sometimes they're incapable. There do seem to be protections under the provision for the Consent and Capacity Board. To my understanding, within a week's time, a Consent and Capacity Board hearing will be held. So at this particular stage, I would suggest that the legislation covers that issue as well.

Ms Lankin: Great.

The Chair: Thank you very much for coming before us this afternoon.

CLEMENT BABB

The Chair: Our next presenter will be Mr Clement Babb. Good afternoon and welcome to the committee.

Mr Clement Babb: My name is Clement Babb. I live in Burlington and I appear here as a private citizen. I am quite worried about Bill 159 because of the flawed record of the present government in maintaining privacy. I'll mention two things which I think I regard as merely slips; perhaps anyone could make these two mistakes.

First of all, a few years ago, the Minister of Health had to resign because a staff member released information about a doctor's salary. Again, I think this was not a deliberate thing; perhaps a slip. Also, I'm worried because last year young offenders were named in public. Probably this was just a mistake but not something that should have been done, and we would not like to have that done more.

There are two perhaps more serious flaws, and that has to do with this: information thought to be private by ordinary people who had accounts with the Province of Ontario Savings Office was released to a major firm for polling purposes—I think this is a terrible thing to do—and records from the Ministry of Transportation were released to another private firm, to me flaunting any reasonable sense of propriety.

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I'm worried that once the bill is enacted as law, it can be circumvented by the adoption of regulations that we, the people, will not know about. I'm worried in general because I don't want anyone messing unnecessarily with my health records or those of my wife, son and daughter. To me, far too much emphasis is being placed on something magical called a database and that extensive and intensive information is absolutely essential for research. Lots of information doesn't necessarily have to be used for much research. And I don't have too much faith in a wide variety of agencies to whom private health information might go. I would like to strike the phrase I've used here, "charitable agencies," and simply say, for example, the many university-based departments and

think-tanks dealing with health, health care and health administration.

In conclusion, I appreciate the chance to express my views. It's been a sobering experience for me to see the terrific contributions that others have made to your difficult job.

The Chair: If you wish, you've left us time for questioning. We've got just under two minutes per caucus. I'll start off with the official opposition.

Mr Gerretsen: You've probably put in layman's terminology what many people feel about this kind of legislation in general and how people are concerned about having their information shared with individuals or organizations and other people who doubt, perhaps, their knowledge. Was there anything in particular about the legislation that's being proposed here that you have any major concerns about?

Mr Babb: Specifically, I am not really equipped to handle the terrifically complex stuff that's in here. As I came on the GO train, I thought of this very question to myself and was a little bit hesitant to keep coming because I wasn't able to do the proper analysis of the legislation.

Mr Gerretsen: It's certainly important that individuals like yourself come forward and express their views on a piece of legislation like this. I know there are many different groups that look at it from different perspectives, but it's always interesting to hear an individual's viewpoint as well. I, on behalf of my caucus, thank you for coming here today.

Ms Lankin: Equally, let me say that it is appreciated. Most people are not going to have an in-depth knowledge of this bill and even members of this committee are still trying to figure out an in-depth knowledge. What's important is that, as elected representatives of the people, we know what people's concerns are, we know what their worries are, we know what they want the bill to do. Then we get the advice from the experts and try and put that together to achieve the goals of the public.

I share a concern that you've identified, that much of the bill could be circumvented by changes in regulation. There's got to be a way that we can make it more transparent. Health information privacy is something that is obviously of key importance to people. We've got to make the bill spell out more what people's rights are and what they can expect, and take some of that stuff out of regulation. I think that's a really key point.

The other question I wanted to ask you is, I've been struck, going through this process, how we're focused on what doctors and hospitals and nurses and other health care practitioners and long-term-care facilities do with our information. We have very high expectations of them. But I hadn't thought often before how we sign away all sorts of rights to information to insurance companies to get our insurance, or to employers. We do it, yet we hold one sector up to this high standard and over here we don't. Now we're even passing needed laws to be even better in this sector, but this other sector is out.

One of the things that's been said to this committee is, "Rewrite this bill and talk about the individual and their personal health information, irrespective of what sector it is in and what the rules around consent and disclosure would be." Could you tell us what you think about that? Do you ever think about your health information that's in an insurance company and expect that they give it the same privacy as your doctor or not, or do you want to be able to?

Mr Babb: Insurance companies worry me. It has been in the back of my mind for some time that they get access to records; polling companies and so forth, the same. I have no real problem with OHIP as an insurer having information under substantial safeguards. I worry about, and something about this was mentioned, foreign-based companies whose scruples may be better or worse than ours.

I don't know. Just in general, it bothers me that insurance companies or some other private agency can get information relative to health, and then apply this to some other sphere. I'm not sure that I answered your question adequately.

Ms Lankin: No, it does. I think it's a genuine concern that we all have and we don't know much about. The committee's got to figure out whether we can deal with this here or not. Thank you.

Mr Wood: We've heard earlier that for the purposes of research, there are some specialized areas of research that you can't do by getting consent. So they either have to access the database without consent to do some of this specialized research, or they can't do it. For the purpose of your answer, consider that to be right. We haven't concluded for sure it is, and you may not have concluded that either. But suppose we reach the conclusion that that's the case. If we're going to release it, it would be under the supervision of an ethics committee, maybe under the supervision of the privacy commissioner. So there'd be oversight as to what's done, if it was going to be released. If you or we got to the point where we either had to say you can do this specialized research, and this information is released without consent under supervision, or we're just going to say you can't do that kind of research in Ontario, which side of that decision would you come down on?

Mr Babb: I think I would come down on the side of not doing the research at all. I have a feeling, and I have to say this is just a feeling, that much research that is done can be done by other means than what you are describing, because if something is very important to be done, then the researchers could design their research to get around the constraint that you've brought up.

Mr Wood: I think that's a very fair comment. The problem is, if we reach the point where we conclude that there's some research that they really can't do without access to those data—certainly your point is right: a lot of it can be; no question about that. But if we get to the point where there is some research that can't be, what do you think we should do: say, "No, sorry, folks, you can't do it," or, "Yes, under supervision, you can do it"?

Mr Babb: I'd say don't do it. I just want to expand. One thing that bothers me is the fact that research institutions, in medical research or health administration or pharmacology etc, are really steeped in and financed by a lot of private companies, in addition to government money. In one instance I wanted a person to come to Burlington from a health administration department in a university. He wouldn't come because he was really compromised by the fact that he was the point man for grants coming from private companies. So he wouldn't compromise himself to do that. I don't blame him. I just think it's a fact of life. I'm not absolutely certain on that.

The Chair: Thank you, Mr Babb. I appreciate you taking the time to do what very few individuals do: come before us here to today. We appreciate your input.

Mr Babb: Thank you very much for having me.

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ONTARIO OCCUPATIONAL HEALTH NURSES ASSOCIATION

The Chair: Our next presentation will be from the Ontario Occupational Health Nurses Association. Good afternoon and welcome to the committee.

Mr Brian Verrall: Thank you very much. My name is Brian Verrall. I'm a former chair of the association and I'm now the executive director. I'd like to thank you for having us here. I'd like to commend everybody on the committee for, if nothing else, their fortitude with the information that is passing through.

The Ontario Occupational Health Nurses Association thanks the Ministry of Health for the opportunity to present and respond to Bill 159. We, as an organization, represent over 1,100 nurses in Ontario who are responsible for occupational health and safety programs in varied and numerous workplaces in both the public and private sectors. The health and safety of our workers are paramount, and confidentiality of medical information is critical.

In its previous submissions to the Ministry of Health on July 31, 1996, February 1998 and October 2000, the Ontario Occupational Health Nurses Association expressed its points of view regarding personal health information legislation and made certain recommendations. The association commends the Ministry of Health for taking into consideration many of its recommendations.

A tenet of occupational health nursing is confidentiality. In fact, in our scope of practice and code of ethics it's stipulated, "It is understood that the occupational health nurse protects the rights to privacy of the client and confidentiality as required by law and professional standards."

As health care practitioners and health information custodians defined in the Regulated Health Professions Act, occupational health nurses are bound by rules of confidentiality. Medical information must be properly disclosed, ie, informed consent or required by law. Otherwise occupational health nurses can be disciplined by their regulatory body, the Ontario College of Nurses, for

breaching confidentiality, thus resulting in possible loss of their licence and, therefore, their livelihood.

The Ontario Occupational Health Nurses Association, in its last correspondence to the Ministry of Health in October 2000, was concerned with the ministry's statement, "Personal health information related to an individual collected for the purpose of labour negotiation or employment of individuals" would not be covered under the privacy legislation, and requested that the implications of this statement be considered and amended. The Ontario Occupational Health Nurses Association, in reviewing Bill 159, does not see an amendment.

Under part II, subclauses 7(d)(i) through (iii), on page 13, the association notes that the act does not apply to "personal health information relating to an individual that is collected or created for the purpose of a proceeding or anticipated proceeding relating to labour relations ... negotiations or anticipated negotiations relating to labour relations affecting the individual or to the employment of the individual, or meetings, consultations, discussions or communications about labour relations or employment-related matters in which the individual has an interest."

Occupational health nurses are often privy to very personal and highly confidential information that is voluntarily relayed by clients during routine employment health assessments. Although we, as occupational health nurses, do not elicit or expect to be provided with the extent of information, we are nonetheless bound by strict rules of confidentiality once that information is learned. It is not uncommon for the occupational health nurse to be asked by their employer for medical information. Some employers view access to medical information, including the employment health assessment, as an expectation of regular business practice.

A significant professional and ethical struggle then ensues between the employer and the occupational health nurse, who must by law maintain the client's medical information in strictest confidence. Termination of occupational health nurses' employment for their refusal to release confidential medical information for legitimate reasons has sadly occurred far too often.

It is our association's view that information collected for employment purposes must be protected by legislation in the employment setting. It appears that the proposed legislation would permit disclosure of information collected for purposes of employment and labour relations. The Ontario Occupational Health Nurses Association therefore cannot support Bill 159 in its entirety without amendment, and it strongly urges the Ministry of Health to consider and review the implications of part II, subclauses 7(d)(i) through (iii).

Legislation must protect individuals' concerns and rights to privacy of health information held by employers. Effective occupational health is predicated on complete and reliable medical health histories where clients must be able to trust that their medical records will be kept in strict confidence. Without this assurance and trust, clients will not be forthcoming about their true

health status, which in turn may affect their health and safety and that of their fellow workers in the workplace.

The Department of Health and Human Services in the US Congress passed regulations on December 20, 2000, that protected the privacy of health records. Provisions in the regulations included barring employers from receiving "protected health information," protecting against unauthorized use of medical records for employment purposes and establishing a firewall between an employer's manager and health care division. The Ontario Occupational Health Nurses Association requests that the Ministry of Labour consider the adoption of these items from the recent US regulations.

The proposed legislation should encompass confidentiality of all health information, including employment health screening programs. The Ontario Occupational Health Nurses Association wishes to emphasize that personal health information related to an individual collected for employment and labour relations must not be omitted in Bill 159.

Thank you once again for giving us the opportunity to comment and contribute to the proposed legislation. The association welcomes continued dialogue and would be happy to meet with representatives from the ministry for further discussion regarding this issue. Thank you.

The Chair: That leaves us with just over three minutes per caucus for questions. We'll start with Ms Lankin.

Ms Lankin: I appreciate the recommendations you're making. One of the things the committee is grappling with is whether this legislation should affect all health information or whether it should affect the health sector. It's now written to affect the health sector. Your petition is for us to look at protecting health information irrespective of where it is.

I come from a labour relations background, from a union negotiator position. I recognize fully the points you're raising and I think these standards that have been discussed in the past through the US Congress are a very good place for us to look if the government chooses to look at the broader issue.

I'm going to ask you for a moment to suppose—we're still dealing with the health sector—that we're unable to take on the job of looking at health information irrespective of where it lay. When I saw the provisions in the act, the exemptions around labour relations and negotiations, the red flag went up and I asked what it's about.

Think of a circumstance where there's a grievance arbitration going on. Perhaps the issue is abuse of sick time, and the records, not personal health information in the nurses' records but the attendance records, the reason for illnesses, those sorts of things, our personal health information, are gathered by the employer. It's for the purpose of a labour relations exercise. And the third one I think of is an employee relations committee circumstance.

When you go to the table as a union and you're attempting to negotiate on behalf of your members an increase in benefit plans and/or particular protections or

changes in the health and safety provisions in the workplace, you want to look to incident rates of certain things. You want to gather data on how many people have had back accidents. You want to be able to talk about that at the table. In a way, it means looking at absentee files, looking at workers' compensation files; it doesn't mean talking about the individual at the table.

Is there a legitimate role for exempting some of that information being collected and used solely for the purposes of negotiations or employee relations or labour relations meetings?

Mr Verrall: Going back to Mr Wood's question that he's asked three or four people today about doing without research, I think the information can be used, but if we put it in a scenario about the honourable member Frances Lankin and her attendance in the House, she should be dismissed for irregular attendance and not necessarily for a sickness absence. As soon as management says to the employee, "We're going to reprimand you because you're off sick too much," it puts a whole new sickness attitude into the frame of the individual.

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Ms Lankin: That may have been a bad example. Think of the negotiations. I'm talking about dismissal for sickness, but think of the negotiations around benefit plans or whatever. I'm just trying to find whether there are some circumstances where the collection of this information is valid to both parties in a workplace to have access to discuss.

Mr Verrall: It's certainly very valid. I think it's very useful. In my other life I'm also a researcher and I can understand the need for this information, but I can also understand the need for confidentiality. That information can be used without identifying the individual. It's done every day and it can continue to be so.

Mr Wood: I was actually going to spare you the research question but since you have had a bit of experience in the field and you heard the question I asked earlier—

Mr Verrall: I'd like you to repeat it, though.

Mr Wood: If we reach the conclusion that there are certain kinds of research that have to be done without consent, because of a small sample or for whatever reason, we are going to have to decide either that we're going to authorize that by law so the research can be done, or we're going to have to decide that it can't be done in Ontario and say, "Sorry folks, that kind of research can't be done in Ontario." If we reach that point, do you think we should come down on the side of permitting the research, with proper supervision and review, or do you think we should say, "No, that research can't be done in Ontario"?

Mr Verrall: In my opinion, I think the research should be done provided there are safeguards in place; that there is an ethics committee which would eliminate taking body samples or whatever, to do research without consent; and that there is a committee involved to make sure that no one can be identified. This type of research is being done every day, and we can find out who will

benefit from whatever we're looking at without identifying who that person is. So I think, yes, we have to do it.

Mr Wood: What do you think about the necessity of oversight by some public official like the Information and Privacy Commissioner, for example? Do you think that's needed for the ethics committees?

Mr Verrall: I think ethics committees have to be made up of a good cross-section. We take it back to the business world where you have a board of directors; many times people will have an outside or a public member. I think the more people we get on an ethics committee from various organizations and walks of life, the better that ethics committee will be.

Mr Wood: What do you think about some public official having the final sign-off on research?

Mr Verrall: Absolutely not. It has to be a committee decision.

Mr Wood: You don't see a role, for example, for the Information and Privacy Commissioner in that?

Mr Verrall: I do not. I think it must be a commission. I think one person, depending on how he or she feels that day, could make the wrong decision.

Mr Wood: My last comment, which is not a question, actually, is, you make some interesting points here that may or may not be dealt with in this particular bill, but if they aren't, we would invite you to stay tuned and continue to make your submissions on those points, which are important points to be considered regardless of whether or not we're able to address them.

Mr Verrall: I can assure you we will be there.

Mrs McLeod: I was interested in your reference to the Department of Health and Human Services of the US Congress and their resolution. Do you know how they would define "protected health information" in terms of information that's barred from employers receiving it?

Mr Verrall: I can't specify that. I found this on the Web just recently and I threw it in there because I know it is legislation that has just been enacted. I've also been chair of the American association, and I realize it's not Canadian to be American, but I think there's certainly a lot of things we can glean from what they've done. You would certainly have to look at the political scientists to interpret any bill from either side of the border.

Mrs McLeod: Have you had a chance to look at the federal legislation as it applies to private sectors?

Mr Verrall: No, I haven't. We deal basically with the Ministry of Labour in our job and this is a periphery thing once we get into medical confidentiality. I'm not aware of the labour.

Mrs McLeod: I'd be really interested, if you have an opportunity to look at it at some point, as to whether or not it would in any way deal with the situation of employers having access inappropriately to confidential health information. Obviously one of the concerns we are hearing repeatedly is the concern that the legislation before us today doesn't deal with employers or with the insurance situation. Do you think there is some health information that should be denied to employers, or to insurers for that matter, in such a way that, even with

consent, that information cannot be required as a condition of employment?

Mr Verrall: I believe there is information that, if given to the employer—and the employer, being an individual, is not capable of interpreting that information—can be detrimental both to the company and to the employee.

Mrs McLeod: How do we protect the employee, the potential employee, given the fact that all of the efforts of the legislation are to deal with the issue of access to information without consent? But the employee can be in a vulnerable position where they feel as though they have no choice but to give consent. Do we need to protect that situation in our legislation as well?

Mr Verrall: I think precedent has been set with the Ministry of Labour in their act respecting silica asbestos and some of the other designated substances. At one time, before the last two or three governments, you were required to have a medical if you worked underground in the mines. That request was for a pulmonary function test and a chest X-ray. That was a requirement that you must have in order to maintain your ticket, so to speak. The information was between you and a physician, and the physician was requested and required by law to state that you were fit to work, period. So the message would go, "The honourable member Lyn McLeod is fit to sit in Parliament," period. That's it. You could have all kinds of physical and mental problems, but as long as it doesn't relate to your ability to do the job as outlined, then it's really superfluous information.

Mrs McLeod: We don't have that protection in Ontario law now.

Mr Verrall: The Occupational Health and Safety Act does state that if you're working with some of these chemicals, you do require a fit-to-work statement from a physician, so it would come back that the individual is fit to work with asbestos silica, isocyanates, lead, many of the designated substances.

The Chair: Thank you very much for coming before us here today.

ROYAL COLLEGE OF DENTAL SURGEONS OF ONTARIO

The Chair: Our final presentation of the day is the Royal College of Dental Surgeons of Ontario. Good afternoon and welcome to the committee.

Mr Irwin Fefergrad: My name is Irwin Fefergrad. I am the registrar of the Royal College of Dental Surgeons of Ontario. I'm joined by Peggi Mace, who is the senior manager of communications. I'm grateful for the opportunity to speak with you and perhaps help you wade through some of the difficult portions of this legislation.

I thought it might be important to outline to you who we are and what is a college. We are a college that has been in existence for 133 years. As a college, our responsibility is essentially to regulate the profession of dentistry. We're not an association, which means we do not represent the dentists. We essentially are here to protect

the public interest. The Regulated Health Professions Act in fact empowers us to do so, and that is a fundamental, basic requirement and responsibility that we have to the public of Ontario, to protect their interests as a college.

We're not an educational facility. We don't create medical records or offer any health care treatment. Essentially, what we are is a body that's been empowered by the Legislature to have delegated powers and delegated authorities. The Legislature has decided that it wishes us, the college, to carry out functions that might otherwise be carried out perhaps by the state, perhaps by the police. But in its wisdom, the Legislature has said, "We are content to delegate the responsibility that we might otherwise have to you as a college."

I'd like to outline for you some of the items that we deal with with respect to protecting the public interest so that you have a concept of what colleges do, and particularly our college.

The regulations provide that it is professional misconduct if there are billing falsifications, billing for services not rendered, offences of a sexual nature to a patient, rendering unnecessary services, prescribing drugs for improper purposes, breaching confidentiality of a patient, abusing a patient, failing to comply with an order of the college or of a court, charging excessive fees, false advertising, rendering services which are considered to be below the standard of practice, and breaching other laws relevant to the provision of dental care to the public. That's just some examples. So you can essentially see that the scope of authority which the Legislature has given to the college as a self-regulator is quite vast and quite expansive in order to carry out our mandate of protecting the public interest.

In fact, the Legislature has gone further. The Legislature has said that in order for us to continue to protect the public interest, we must also have certain powers and authority to fulfill our mandate. Consequently, the Regulated Health Professions Act gives us that power, and these powers include the power of subpoena, the power to investigate, the power to issue a warrant, essentially, and many investigative tools that one might think an enforcement agency might have.

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But it's more than that. In addition to the investigative powers, the Legislature has set up, through self-regulation, a tribunal system. Self-regulation means that our dentists who have breached the statute appear before a court: a self-regulated court, but a court nonetheless. That court has been given huge powers and authority to discipline our members, and by our members, I mean our dentists. They include a very court-like type of authority and powers such as suspending a certificate to practice; revoking a certificate; publication of the name of the dentist and results of what transpired during the hearing—in fact, the hearings are open and available to the public, just like a court, and there are full transcripts available; fines up to \$35,000 under the statute, payable to the province of Ontario, Minister of Finance; costs; remedial courses; supervision, which are essentially pro-

bationary types of orders; terms and conditions on a member's certificate—you can't treat children for a period of time until you satisfy probationary terms, for example; and, in the case of sexual abuse, requiring the dentist to, by order, fund a therapy program for the victim.

All of these types of remedies are determined by a panel, by a tribunal, following a formal hearing. As you can see, the structure of the statute gives the college the self-regulatory authority not only to investigate, but also to discipline. That's what self-regulation is really all about. As you can see, the remedies are very, very serious. The powers to investigate are very, very serious. Normally, this would not be delegated to a self-regulatory body, but it is in the case of dentists and 20 other health care colleges.

The current statute, the Regulated Health Professions Act, has been around for some seven years or so and is currently under review. The Minister of Health has sought advice—the previous and current ministers—from HPRAC, the advisory council. Essentially, what HPRAC is doing is receiving submissions. It is receiving submissions from stakeholders. It has met for numerous hours with colleges. It has met with different associations. What it is asking is, has self-regulation worked? How can it be improved? What are the ways that, in the interest of protecting the public of Ontario, the statute can be addressed? Given our experience of the last seven years, what are some of the changes that could be brought in?

It seems to me and to our college that because we're in a timely process of reviewing self-regulation and the powers that the Legislature has given, it makes a lot of sense that the purposes—which we support, frankly—that are set out in PHIPA, very important principles, be folded into one consistent statute, especially when that statute now is under review. I don't come before you advocating for any group. I'm not here speaking for the dentists. I'm not here speaking for any self-interest group. I'm here speaking for the public of Ontario. What worries me as the chief regulator for the dentists, for the public of Ontario, is that there are conflicting sections, good as it is intended, in the PHIPA legislation which will interrupt and will harm the process of self-regulation. What will happen is that the ability of colleges which have been given the authority to self-regulate—and in our case, it's been 133 years—will be impeded. The public will not be protected.

I'd like to give you some examples. I know you're dealing with a very, very difficult concept. I know you're trying to essentially service many, many areas in dealing with the legislation, but I'm going to suggest to you that you ought to consider taking the principles that you have in PHIPA and addressing that in the context of self-regulation, because otherwise there will be some problems. Let me give you two or three examples that might assist by way of illustration.

PHIPA proposes that there will be provisions allowing amendments to health records. Our members, our den-

tists, by and large, are very law-abiding. We're not speaking of those. We're speaking of those who come before us in our process. It's not unusual, in those cases that come before us, to have a billing record altered. It may be, for example, that a patient and a dentist wish to collude. "Hey, Doc, I'm going to be laid off or my job is terminated next week. Can you backdate all the services you've got to perform for me and my family so I'm covered under the policy while I'm still working?" And the doctor says, "Sure, I'll do that."

The college gets wind of it. The insurance company typically would do some investigation and would inform the registrar—me, in this case. I'm faced with this dilemma: essentially the primary pieces of evidence we have, in a very formal legal process that we have, are the charts and records of the practitioner. That's essential for us. Under PHIPA, there is an ability for the dentist to say, "Gee, I made a mistake. Sorry, I'd like to amend that," or for the patient to say, "I agree with him. Yes, there is a mistake."

I'll give you a few other examples that I think could happen. These are not outrageous examples.

What I worry about is the case of a dentist who has breached a sacred trust—being able to bill an insurance company, being able to get paid from an insurance company, is a fundamental trust, and we're here as a college to ensure that that trust in fact continues. Our job is to stop that activity, for a bunch of reasons: to say to the public out there, "We're here to protect you"; to say that we don't condone any activity that smacks of any kind of fraud. But how do we do that in the face of an ability of the primary piece of evidence to be presented to a committee to say, "We erred. There was a mistake"? The burden of proof then becomes very difficult for us to discharge. As I am sure you are all aware, especially the lawyers around the table, the Divisional Court and Court of Appeal have said, "Because self-regulation challenges the right of somebody to earn a livelihood, the burden of proof is very, very close to the criminal law burden of proof—beyond reasonable doubt." We will have trouble to establish and discharge that burden.

I worry about being able to do that. I also worry about the consequences. It means that the ability to collude or the ability to use a very important vehicle that should be in legislation—allowing patients to have access to records, allowing patients to change records in circumstances that warrant it—will in fact frustrate self-regulation if the provisions aren't put together and aren't made consistent in the Regulated Health Professions Act.

There are lots of other examples that I could get into. I'd like to take it a step further and look at the situation where the custodian decides, for whatever reason under the statute, that the custodian won't amend. There are provisions to go to the commissioner. I can tell you that there are also—and there have been discussions in the health care sector—numerous ways to drive a truck through the PHIPA legislation so that people who are errant, people who need to come and be made accountable for their actions—dentists, in our case—will be able

to parade through Divisional Court, will be able to take the procedures you've got here that are intended to give to Ontarians what they really should have, but yet frustrate a discipline process. So there is that conundrum.

I want to suggest to you that if HPRAC and this committee were able to meet and talk and able to dialogue—we'd even help you—there are ways to draft, through the RHPA, the appropriate protection so that self-regulation isn't jeopardized and that the purposes of PHIPA will be incorporated. It won't be in PHIPA. It will be in other legislation that Legislatures and numerous governments have decided makes sense and has been in place for many years.

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One or two other examples to show you why I'm a little nervous about PHIPA being in isolation of the RHPA, the Regulated Health Professions Act.

One of the provisions is that before one can use or disclose personal health information, a health information custodian—in our case that's the college, some staff person—shall take steps that are reasonable to ensure that the information is "accurate, complete and not misleading." That is not our job. Ladies and gentlemen, we are investigators.

If you take us outside of the RHPA—let's look at the criminal justice system—can you imagine if you gave the police double and triple responsibility, if you said to the police, "Your job is not only to investigate, not only to present as objectively as you can the fruits of your investigation, but you also must make a determination whether what you have gleaned out of the records is accurate"? My God, just think of the potential abuses. Think of the arguments around potential bias. The RHPA is a brilliant piece of legislation. It is very specific in saying what the particular job descriptions are. Our job is not to do that. That's the job that the Legislature for many years has given to a tribunal, a trier of fact.

For example, how is an investigator supposed to determine if there is forgery on a bill? How is an investigator supposed to determine whether a particular radiograph applies to one patient or another? That's not the job of the investigator. The job of the investigator is to receive the complaint and, as objectively as possible, collect all the information and present it to a tribunal, to a statutory committee that the Legislature has set up. It is that committee's responsibility, that committee's duty under the act, to make the judicial determination. That's what the Legislature has set up.

What I worry about is that I can see a situation where we receive information of perhaps falsifying a record, of perhaps a dentist forging a patient's signature on a consent. Who knows? Then we're into a whole debate as to, is it a forgery or isn't it? I come back to the original principles. Why am I here? I am here to protect the public interest of Ontario. How does that accomplish that? I want to suggest to you that it doesn't. In fact, with the best of intentions, it will frustrate that, and I worry about that.

It's not only the Legislature; it's not only the statute. Courts have been on the colleges' backs now for years. Those of you who have read decisions will know the courts have said, "Be very careful how you investigate, because if you screw up on your investigation by demonstrating some bias, then we will throw out the fruits of that investigation, whatever it is all about." So the very section, subsection 24(2) of PHIPA, that establishes the responsibility of the custodian to verify accuracy, to verify complete information and non-misleading information, flies in the face of what the Legislature has set up—it's contradictory—and what the courts have said. I would imagine that many defence lawyers would love to leave this section in, because it presents defences that now don't exist, and I worry about that.

I have a note here that says "Wrap up." I guess I'd better get there.

I want to take some questions from you. I'll stop there. There are many other examples.

I just want to conclude by saying you have an HPRAC, a minister's advisory council, that has been set up and set up for the purposes of advising the minister as to how to make the RHPA even better. By the way, the RHPA, as some of you around this table will know better than I do, took 10 years to come into actual enactment.

Ms Lankin: And eight Ministers of Health.

Mr Fefergrad: Do I hear a former Minister of Health over there?

It was a very detailed study and a brilliant piece of legislation that came in, and we now have several years of experience with it and we're analyzing it.

My submission in conclusion is, let HPRAC do its work. This legislation is important. The principles are important. Let's try to work together and try to bring those principles into the RHPA.

The Chair: Thank you very much. We've got just over four minutes per caucus. We'll start with the government.

Mr Wood: This is going to be a comment, not so much a question, or I guess an invitation. I think it might be helpful, at least to me and perhaps to the committee as a whole, if you were to consider that we might in fact have PHIPA override the RHPA. Let's assume that we're going to reject your recommendation 2 and that we are going to do that.

Mr Fefergrad: It wouldn't be first time I've been rejected; it's all right.

Mr Wood: It's happened to me lots of times, so don't worry. If we did that, what sort of alterations would we have to make to Bill 159 or whatever act we ultimately put through in order to accommodate some of the concerns you've raised? You may not want to respond to that now. You may want to think about that and just give us a memo which could be put into the ministry and to the committee, or you may want to offer some comment now; I don't know.

Mr Fefergrad: I can give you a memo and I can tell you that this college is committed to work with whatever group is necessary to accomplish the ends of PHIPA. I

have to tell you, the lawyer part of me says, in reading PHIPA, it can't be done. You cannot carve out pieces and amend PHIPA and make it work when you've got the RHPA.

I can tell you that you will be faced with a situation that will have Walkerton pale by comparison. You've got not only our college; you've got every person out in Ontario who depends on and who trusts self-regulation. I think the way to accomplish the ends of PHIPA is really to take a statute that we have experience with and look at it and try to accomplish within that statute what the goals and purposes are to PHIPA. I don't believe it can be done through PHIPA, although I'm very happy to look at the legislation again and try to work with it.

We tried. The federation, as you may know, sat around the table. It's very difficult to take one piece of legislation that is geared for a specific purpose and make it overriding to another piece of legislation that is intended to protect the public of Ontario, and then say, "How can we remake PHIPA? How can we take in a hem here and pull the sleeve in over there and tighten the waistline in over here? Will that work?" Ontarians deserve better than patchwork. Don't do it.

Mr O'Toole: I just had a quick question. This may be right off the wall, but it's the last part of the day. In all cases where self-regulation seems to have primacy, and I respect that self-regulatory framework, where does the interest of the consumer, in this case the patient, come in and their right to appeal or have access?

Mr Fefergrad: That's not an off-the-wall question; that is actually what we are all about. A patient who complains is a party to our proceeding. That's what the structure of the act is. When a patient writes a letter, calls the registrar, sends an e-mail, sends a fax, writes on the back of an envelope, has an issue—and if English isn't the first language, we'll get some help—our duty, our responsibility, is to investigate each and every complaint.

We have no authority, and that's why the act is so good, as a college to say, "We don't like this complaint," or, "We don't think this one makes any sense." Our job is to do an investigation, keep the complainant informed and bring it to the statutory committee. I have no authority whatsoever to take a complaint and tear it up. The complainant is not only involved in the process, but in the event the complainant is not satisfied with the decision of the complaints committee, the complainant has a right of review to the Health Professions Appeal and Review Board and is a party to that proceeding.

I urge you again: the act is a very cleverly thought-out statute. It took a lot of courage to come into being and it's working. Your question is not at all off the wall. Our responsibility is to see to it that complainants are in fact kept informed of the complaints process, and they are. If we don't do our job, we should be taken down to account by HPRAC.

Mr O'Toole: Who watches the watcher? Isn't that the original question?

Mrs McLeod: I don't want to oversimplify just because it's the end of the day. First of all, I'm convinced.

We've heard it from I think almost all, not 23 of them yet, but a lot of the regulatory colleges.

Ms Lankin: The rest are coming.

Mr Fefergrad: We all have a share.

Mrs McLeod: I don't need any more convincing we've got to deal with a problem of the lack of consistency between—

Mr Fefergrad: You know what's strange, at the risk of interrupting you? We haven't conspired; we've come here independently.

Mrs McLeod: If you haven't, please do.

Mr Fefergrad: And imagine if we had.

1740

Mrs McLeod: I think where you've left us with this presentation is that the HPRAC legislation is good legislation, that we do need health privacy legislation nonetheless, and that we need to make sure that the two things are consistent and that it's a very difficult task to do.

Mr Fefergrad: Yes.

Mrs McLeod: Let me take a shot at it, without attempting to oversimplify. We take the colleges out as health information custodians. At this point, I believe—I may be persuaded otherwise—that health privacy legislation should have primacy and that there should be exclusions written into the health privacy legislation where other acts are to supersede it. So we take the colleges out as health information custodians, and then we write in a specific exclusion under the health privacy legislation to recognize the primacy of HPRAC in terms of the regulatory responsibilities of the colleges. Why wouldn't that deal with the problem?

Mr Fefergrad: That might. It's late for me too, actually. Could I give some thought to it and perhaps reduce some thinking to a memo? That might work.

Mrs McLeod: Thank you. Then I guess my second question, if I'm not erring on the side of oversimplifying everything—

Mr Fefergrad: No, it's great for me. I understand it.

Mrs McLeod: You've said we need health privacy legislation. What gaps need to be addressed by having health privacy legislation that goes beyond what the regulated health professionals are putting into practice now?

Mr Fefergrad: That's a big one. Do you mean in terms of our mandate as a college?

Mrs McLeod: No. I think the regulated professions under HPRAC are doing a good job, and the way in which the health professions are dealing with their responsibilities is—the review is going to identify some areas where there need to be improvement etc, but by and large you don't hear huge numbers of complaints. So where are the gaps, in your view, that lead you to say that we need to have consistent standards and rules? Is it for the various custodians, those who are recipients of health care information, that have dealings with individuals in health care settings and aren't one of the regulated health professionals or health providers? Is that one of the places where we need to get consistency?

Mr Fefergrad: It's one of the areas; it's not the only one. That's actually a very complex question. I'm not ducking it, but I'd love to have some time to think about it and not just wing it. Will that be all right?

Mrs McLeod: Sure, I appreciate that. The reason I pose it is not in any sort of rhetorical way. It's because I think we're all really struggling with the sheer complexity of this legislation.

There is a default position, and the default position is to simply stay with HPRAC Ontario and the federal legislation in terms of the commercial sector takes over, and what else do we need? It's an issue that we're really struggling with right now: what do we have to do to get really good health privacy legislation in Ontario, and what is it we're trying to achieve in doing that?

Mr Fefergrad: With your permission, it's a very complex question. I wouldn't mind taking some time and reducing it to a memo, if that's agreeable to the Chair.

Mrs McLeod: I would appreciate that very much. Thank you.

Mr Fefergrad: I'll do that, then.

The Chair: We'll move now to the NDP. Ms Lankin.

Ms Lankin: In 1991 and 1992, I used to lose a lot of sleep to nightmares about the RHPA, whether it was, like, monster-controlled acts or scary scopes of practice or whatever. I'm having flashbacks. In these last couple of days, it's sort of like, oh, God, here we go again.

I think Mrs McLeod summed up where I'm getting to my thinking. As a general principle, I believe that whatever privacy information legislation we end up with needs to have supremacy. There should not be whole acts that are exempted and given primacy over it. But where there are absolute conflicts—and that's what you keep saying: where there are conflicts, we can't live with that—identify them, and we can amend this legislation to give RHPA primacy in that area, as opposed to exempting the whole regime.

That may not be satisfactory, but I think it's what Mr Wood was getting at and it's what Mrs McLeod has asked you for. We've asked, so you know, a number of the colleges to put their minds to that, so there perhaps is a coordinated, dare I say colluded, response that might come forth.

Second, you should know we've also asked that HPRAC be contacted and that HPRAC not delay in any way the review they're doing. But this is a significant issue, and perhaps they should be also turning their mind to this and advising the committee. The ministry has also, if this sets your mind at rest, testified before us—just a five-minute interlude today—in response to a number of the colleges' submissions that certainly none of the fears you raise are their intent. So I think there's a willingness to work through this.

The questions is how we best do it. What you've been asked for would be very helpful to the committee, and once we determine our recommendation back to the ministry about the scope of the legislation and the direction we want to go, it would facilitate our committee's suggestions to the ministry about how they handle what

is obviously an issue that's got to be dealt with. I think we're all convinced of that.

Mr Fefergrad: I'm delighted to take a shot at it if it helps you.

Ms Lankin: I appreciate that.

The Chair: Thank you very much. We appreciate your taking the time to come before us this afternoon.

There being nothing else before the committee, we stand adjourned until 9 o'clock tomorrow morning.

The committee adjourned at 1746.

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Also taking part / Autres participants et participantes

Mr Phil Jackson, manager, population health strategies unit,
Ministry of Health and Long-Term Care

Clerk / Greffière

Ms Anne Stokes

Staff / Personnel

Mr Andrew McNaught, research officer,
Research and Information Services

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Mercredi 28 février 2001

**Standing committee on
general government**

**Comité permanent des
affaires gouvernementales**

**Personal Health Information
Privacy Act, 2000**

**Loi de 2000 sur la confidentialité
des renseignements personnels
sur la santé**



Chair: Steve Gilchrist
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LEGISLATIVE ASSEMBLY OF ONTARIO

ASSEMBLÉE LÉGISLATIVE DE L'ONTARIO

STANDING COMMITTEE ON
GENERAL GOVERNMENTCOMITÉ PERMANENT DES
AFFAIRES GOUVERNEMENTALES

Wednesday 28 February 2001

Mercredi 28 février 2001

*The committee met at 0905 in committee room 1.*PERSONAL HEALTH INFORMATION
PRIVACY ACT, 2000
LOI DE 2000 SUR LA CONFIDENTIALITÉ
DES RENSEIGNEMENTS PERSONNELS
SUR LA SANTÉ

Consideration of Bill 159, An Act respecting personal health information and related matters / Projet de loi 159, Loi concernant les renseignements personnels sur la santé et traitant de questions connexes.

CARDIAC CARE NETWORK OF ONTARIO

The Chair (Mr Steve Gilchrist): Good morning. I call the committee to order, as we continue our hearings on Bill 159, An Act respecting personal health information and related matters.

Our first presentation this morning will be from the Cardiac Care Network of Ontario. I'd invite them to come forward to the witness table. Good morning and welcome to the committee.

Dr Chris Morgan: My name is Dr Chris Morgan, and I am the vice-chair of the Cardiac Care Network of Ontario. My colleagues with me are Mr Rob Forbes, to my left, who is our director of informatics, Mr Mark Vimr, who is our chief executive officer, and Jill Ross, who is our director of projects and operations.

I am a physician, but I am here to discuss the specific issues of the status of persons or agencies who hold disease-specific registries of health information. I would also like to touch on the issue of patient consent as it relates to the formation of these registries.

In about 10 minutes, I would like to briefly review the history of the Cardiac Care Network, how we use personal health information, what we perceive as the implications of the legislation for the Cardiac Care Network and perhaps suggest a recommendation for how the Cardiac Care Network and perhaps other disease-specific registries may be dealt with specifically under the legislation.

Very briefly, in the late 1980s you may remember there was a public perception of a crisis in cardiac care, that patients were dying needlessly while awaiting cardiac surgery. There was no objective way to assess patient urgency, leading thus to unequal access to care.

There was an issue around appropriate resourcing of cardiac care, and there was no formal system in place to assist either patients or physicians in accessing care. The Ministry of Health at that time did commission an investigation of cardiac surgery. It was centred on a specific institution but in reality examined the cardiac care system in the province. In its final report, it recommended the formation of the Cardiac Care Network. The mandate of the Cardiac Care Network, which was formed in July 1990 as an unincorporated body, was twofold: first, to provide liaison and coordination of cardiac surgical patients throughout the province; and the second important matter was to advise the Ontario Ministry of Health on matters relating to cardiac surgery.

To meet this mandate, as our initial strategy we formed a standardized system for the triage of cardiac patients in all of Ontario's cardiac centres. That involved the development of an accurate, reliable database using standardized terminologies. We also used that database not just for patient care but for advising the ministry on system-related issues. In each hospital providing advanced cardiac care, there is a regional coordinator. Mostly, these are cardiac care nurses, although they're not exclusively cardiac care nurses, and they are the patient interface. They coordinate the collection of clinical data, they facilitate communication between physicians and patients and their families, they in some instances facilitate referral between institutions and they work with physicians and hospitals to monitor patients who are on the waiting list. They also provide an important role as an information source for patients and families. They are employees of the cardiac centres. They use the data at the institutional level as a management tool for patients.

In addition, the data which is collected at an institutional level is downloaded to a central registry at the Cardiac Care Network on a regular basis. This database, which was initially for cardiac surgical patients but has been extended beyond that, was implemented in 1991 and now holds many thousands of patients. It was designed as a waiting list management system, and every patient in the province who is referred for a cardiac procedure is now registered. It calculates an urgency scoring system and so on.

0910

While the data is currently held in the hospitals and downloaded to a central registry, we actually envision as

part of our information technology that the data will be entered directly into the central registry, where it may be accessed by individuals from the hospital. So an agency such as CCN will be holding information with personal health information identifiers included. We use the data for management of patient care, for monitoring and evaluation of access, for research and planning, for issues of funding and accountability and for communication with many stakeholders.

Currently, our use of personal health information is limited to the monitoring of individuals who are on waiting lists so as to assist the providers in delivering care in an appropriate time span. We do disclose data to appropriate researchers—most importantly, the Institute for Clinical Evaluative Sciences, or ICES—after approval and review by our informatics committee. So we do have internal processes for that. We do have anonymous and aggregated data, which is used to monitor utilization and access on waiting lists, and we provide population-based analyses to assist the network in providing clinical and planning advice to the ministry. Our data are credible. There is confidence in the data because it's jointly monitored by a number of bodies. They are objective in that they are subjected to independent data analysis, and they've been used by many bodies, including the CCN, the ministry, JPPC, district health councils, the restructuring commission and so on. Our data has in fact received national and international recognition as being a model for a disease-specific registry.

We are expanding our data management to include procedures such as pacemakers and to include a new pilot project in cardiac rehabilitation. What is a bit of a step forward is that in the cardiac rehabilitation it's not just going to be a registry, but it's also going to be used somewhat as a management and evaluation tool.

What do we perceive as the implications of the legislation? In order to continue to advise the minister and fulfill our mandate, we believe that we will need to continue to collect personal health information. As a person who maintains a registry of personal health information that relates to a specific disease or condition, we consider ourselves to satisfy the definition of a health information custodian, and similarly, as an adviser to the minister as a system monitor, we presumably would meet the criteria of a health information custodian. We are supportive of the intent of the legislation, and we are preparing to comply with the provisions of the bill. We understand the need for strict rules and procedures regarding the collection of the data, the protection of the information, the necessity for consent where prescribed, the use and disclosure of this information and the needs of patients to access their own records.

However, there are a number of issues. CCN is an unincorporated entity. To a degree, we do not have standing as an independent entity. Our role is changing. We're not just a registry any longer; we're beginning to take on roles around the monitoring and provision of care. In our opinion, in the legislation—the draft that we have seen—the definition of a “registry” of information is not entirely

clear. I think it's also important to note that there are a growing number of similar provincial networks. For instance, there is Cancer Care Ontario, which is specifically named in the legislation as a custodian of health information, but there is also a joint replacement registry and so on. We would perhaps be looking to recognize that all of these custodians would have similar status.

So we are a little bit unclear about our particular status in the future under the law. We recommend to you, respectfully, that CCN and similar health networks, as are deemed appropriate by the Legislature, should be explicitly prescribed as health information custodians and that we be encouraged in and permitted to continue with our role to provide the tools to both providers and government promoting equity and quality cardiac care at the level of the patient, the provider and the system.

I'd just like to very briefly touch on the issue of consent. I think we all appreciate the importance of consent and informed consent, but it's important to balance that off without raising an inappropriate barrier to the collection of necessary information, our concern being that if the consent requirements are too arduous then the ability to collect comprehensive and complete data may be impaired.

Thank you for your attention. We'd be happy to answer questions.

The Chair: Thank you very much. That leaves us just under three minutes per caucus.

Mrs Lyn McLeod (Thunder Bay-Atikokan): I appreciate your concern with paragraph 12 of subsection 2(1), “A person who maintains a registry of personal health information that relates to a specific disease....” It is a little vague, particularly the use of the term “person.” But is there not a danger if the legislation becomes too specific in listing registries that it becomes difficult to be inclusive of the development of registries in the future?

Dr Morgan: Yes, I think that's a good point and perhaps the issue here is to make sure that current and future persons who hold these kinds of disease-specific registries are recognized in the act without perhaps naming each individual one.

Mrs McLeod: I think that was probably the intent of paragraph 12.

Dr Morgan: Yes.

Mrs McLeod: On the issue of consent, and not being unduly burdened by the necessity of consent to the point where you can't responsibly do your own work, there is a proposed amendment from the provincial privacy commissioner in which there would be a lockbox provision that records could be used or could be disclosed for the purpose of providing or assisting in providing health care to the individual unless the individual has instructed the custodian not to make the disclosure. I don't think that would unduly interfere with the work that you have to do, as I understand it, because I assume you get consent now anyway for people who come into the network. If you're a health care custodian under paragraph 12, you would be free to exchange information with people, given that consent?

Dr Morgan: There are probably two levels of consent we need to be concerned about here. One is the consent at the institutional level for the active management of that individual, and where practical today when patients enter the registry they're informed that such a registry exists and how it may be used. There's also a secondary level of consent. Does the individual consent to the use of anonymous health information for research and monitoring purposes?

I think our concern would be that if the consent process becomes very arduous and a significant number of individuals fail to consent to the use of information then the whole comprehensive nature of our data collection is lost.

Mrs McLeod: But with that lockbox it doesn't affect anonymous information, as I understand it.

Dr Morgan: It should not. I think that would be important to us.

Ms Frances Lankin (Beaches-East York): Could you give us a little more detail on what consent is sought now for someone to be entered into the registry? You said "where practical."

Dr Morgan: As you may recognize, there are a number of patients who enter the advanced cardiac care system under urgent or emergent circumstances. In a middle-of-the-night episode of care, the individuals who collect the data may not even be around at that time, so the data may be entered the next day or whatever, and it may not be practical to obtain consent under those circumstances. An individual walking in for a scheduled visit will be entered in the registry. They are informed of the nature of the registry and so on at that particular point. So under those circumstances specific consent is obtained, although it's not signed consent. But you can understand there will be circumstances where the urgency of a situation will not allow the consent process to take place.

Ms Lankin: I think all of us recognize the phenomenal success of the Cardiac Care Network and want to ensure that kind of co-ordination of service is there. I'm sure all the cardiac care patients in the province want it to remain successful, as well. I think we're trying to find, as you said, the balance that needs to be struck.

0920

You mentioned that you do research yourself: aggregate epidemiological numbers are produced; those are anonymized. You also mentioned that you shared information with ICES. Is any of the information shared with outside research organizations, like ICES, with patient identifiers?

Dr Morgan: Can I just turn to one of my colleagues? Rob.

Mr Rob Forbes: Currently we do provide ICES with personal health information which they in turn pseudonymize using their particular method for pseudonymizing records so that none of the people doing the research could identify the patient corresponding to their record. But CCN does provide personal health information to

ICES. We have not, to this point, provided personal health information to any other researchers.

Ms Lankin: And that was, as you said, after approval of your committee. Presumably there's an agreement in place with how they will treat the information when they receive it?

Mr Forbes: Yes.

Ms Lankin: Why is it, though, that you provide it with personal identifiers instead of anonymizing the information yourself first before you send it over?

Dr Morgan: One, we do have a specific agreement with ICES, with a specific contract. Two, ICES has, I believe, special dispensation.

Ms Lankin: Yes, I realize that. I'm just—

Dr Morgan: The third thing is they do extensive matching of records using other data sources such as CIHI and so on. Some of the information, address codes and things like that, are necessary for their matching.

Ms Lankin: Is there a particular aspect of the research that involves this data that requires matching? I'm trying to get some case examples before the committee so we can understand the important research that's being done that requires personal identifiers.

Dr Morgan: I think a couple of specific things: as you know, we produce an annual cardiac surgical report card on outcomes of cardiac surgery which is hospital-specific. We've also been trying to look very carefully at small area variations in disease throughout the province and I think that was highlighted in the last ICES atlas on cardiac disease. I think those are examples of why some of that information is necessary.

Mr Bob Wood (London West): I'd like to make sure I correctly understand the consent procedure you have now. If I have a cardiac event that makes me a candidate for entry into the network, you get my consent to go into the network; is that correct?

Dr Morgan: At the present time, we would obtain your verbal consent. We would explain the nature of the database and the fact that you would be entered onto it. That's if you walk in. If you come in an emergency or crisis situation, that opportunity may not be there, but you will be entered into the database.

Mr Wood: After that, do you ask for any other consent for research purposes?

Dr Morgan: Not at the present time.

Mr Wood: What ethics review is there of the research that is done with your data?

Dr Morgan: ICES has their own internal mechanisms for that. Our informatics committee, which is responsible for data management, approves any research requests, and that's a multidisciplinary body. There is no specific research intervention or manoeuvre here, as one might do in a trial of a therapy. So we do not subject this to an external ethics review.

Mr Wood: Would you have a problem if the legislation were to mandate doing that? Would that create a problem? Obviously it would be more work, but would that create an operational problem for you?

Dr Morgan: I wouldn't say that I would have a specific problem with that. Again, how high does it raise the barrier?

Mr Wood: Would you have a problem if the Information and Privacy Commissioner would have the ultimate signoff?

Dr Morgan: No, I wouldn't have a problem with that.

Mr Wood: The last question is this. You've expressed some concerns which I understand. Do you have specific changes that you'd like to see to the legislation as drafted?

Dr Morgan: No. I think we came here today just to raise some concerns rather than make a specific recommendation.

The Chair: Thank you for taking the time to come before us here this morning.

Dr Morgan: Thank you very much for hearing us.

COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO

The Chair: Our next presentation will be from the College of Physicians and Surgeons of Ontario. Good morning and welcome to the committee.

Ms Cathy Fooks: Good morning. My name is Cathy Fooks. I am the director of policy at the college. With me this morning is Dr Rocco Gerace, who is the president of the college and is an emergency physician from London, Ontario. To his right is Dr John Bonn, who is the registrar and a family physician and lawyer from Trenton. Dr Gerace will take us through the presentation, which I believe is just being disseminated now. It's in the package that you'll get. It probably won't come as a surprise to you, what we're going to say. Then we've reserved, we hope, about 10 minutes for questions.

Dr Rocco Gerace: We appreciate the opportunity to address you this morning, as the confidentiality of personal health information is an issue of great importance for us. I realize you've already heard from a number of colleges and the Federation of Regulated Health Professions and I do not want to repeat what those organizations have told you. We agree with the analysis and recommendations you have received thus far from them.

I have three objectives this morning: firstly, to describe for you how the CPSO currently uses personal health information and the safeguards we have in place to protect privacy and confidentiality; secondly, to add a few more examples to the ones you have already been given about Bill 159 and its incompatibility with our regulatory requirements under the Regulated Health Professions Act, or RHPA; and finally, to propose a different route to deal with the need for a legislative framework for colleges. We would be pleased to answer questions that you may have at the end of our presentation.

The college's job is to regulate the practice of medicine in Ontario. We are given this responsibility under the RHPA and in carrying out these responsibilities we are granted the authority to collect and use personal health information. Medical records are our window into

the medical practice of physicians in this province. Sometimes we use this information without the knowledge or consent of a patient. I'll come back to this point further in the presentation, as I realize it may cause some concern.

On the basis of reviewing medical records, the college has the authority to carry out a number of dispositions. It can order educational assessments and upgrading of a physician. It can restrict the clinical activities of a physician; for example, prohibiting prescribing of certain medications. It can suspend a physician from practice until terms and conditions are met. Ultimately it can revoke an individual's licence to practise.

This use of records is clearly not for the provision of direct patient care, but undertaken for a secondary and related purpose. The federal Privacy Commissioner said to you, "The principles of fair information practices require that personal information cannot be put to a second use, related or otherwise, without the consent of the person from whom the information was collected." We must respectfully disagree. In our view, there are other competing public interest principles that need to be balanced against fair information practices. Our role is directed at protecting the public from harm and improving the quality of medical care in this province. These public interest principles need to be balanced against privacy rights.

Let me describe briefly how we use personal health information and the safeguards we put in place to protect it. Section 36 of the RHPA provides for complete confidentiality of all the information we receive. I will quote the words in the act: "shall preserve secrecy with respect to all information that comes to his or her knowledge in the course of his or her duties and shall not communicate any information to any other person." This provision applies to council and committee members, employees and anyone we may use as experts or inspectors. There are a few exceptions; for example, we can convey information about physicians to other medical regulators, but this would not include identifiable patient information.

There are three key statutory processes under the RHPA that are dependent upon patient records. They are investigating patient complaints, registrar's investigations and quality assurance assessments. I have summarized these for you in appendix A, and I will go through them one by one.

First, investigating patient complaints: the public complaints begin with someone bringing a complaint about a physician to the college. We deal with approximately 1,400 complaints a year that go to the complaints committee. If we require medical records from a physician or a hospital, the patient or the patient's legal representative signs a consent form giving us access to those materials. A copy of that form is appended to this submission for your information. The complaints committee reviews that material and makes a decision about further action against the physician. If the case proceeds to the discipline committee, the hearings are required by law to be

open to the public. The complainant usually testifies. However, we have the ability to close portions of the hearing and we have the ability to order a publication ban. This means that news media may not identify individuals and the names are not used in the written decisions of the discipline committee.

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The second general area is registrar's investigations. Under section 75 of the RHPA we may investigate a physician if there are reasonable and probable grounds to believe that an act of misconduct has been committed. This type of investigation is usually triggered by information from a coroner, a hospital chief of staff or a concerned professional. We investigate approximately 50 of these types of cases annually. In these situations the notions of knowledge and consent don't hold. We can't ask permission in advance from a patient. The RHPA does provide us with the authority to enter premises and to "examine anything found there that is relevant to the investigation." This must remain paramount. In these investigations we have an expert review the care provided and it is the expert we use to testify at the hearing. Patient identifiers are removed.

Quality assurance assessments: the importance of regular review and audit for the improvement of delivery of health care is well established. In fact, Bill 159 recognizes this activity in hospitals. Again, we rely on records to assess the quality of care provided and we can't ask permission in assessing those records. Quality assurance decisions are not public documents under the RHPA, and all information received during that process is specifically protected from any other use.

Speaking generally then, does Ontario need legislation in this area? I think the answer to that is yes. The College of Physicians and Surgeons supports the need for comprehensive legislation to govern the collection, use and disclosure of personal health information. Should colleges be covered in a legislative framework? Absolutely. Should colleges be designated as health care custodians under Bill 159? The answer is no.

You have already heard a number of examples from other colleges and the federation of areas where Bill 159 would need amending so as not to impede the regulatory process. Let me add a few more. Section 21(7) of Bill 159 allows for an individual to revoke their consent to the collection, use or disclosure of personal health information. This may leave the impression that if someone brings a complaint to the college and then some time in the future revokes the consent for the use of the information, the college must stop its investigation or proceeding. The courts, however, ruled otherwise. They have said that the college must continue, once made aware of a potentially harmful situation. I quote Justice Rosenberg of the Ontario Divisional Court. He says, "It is important that the complaints committee understand that once the complaint is made the complainant should no longer have control of the proceedings and that the investigation must continue into the complaint"—and I emphasize—"whether or not the complainant asks that it

be halted." This does not imply that we would compel a patient to testify but it does mean we must continue with our investigation.

Section 33 allows for the disclosure of information for the purpose of eliminating or reducing a risk to an individual's safety. In 1998, the college passed a policy that allowed a warning to be given on the basis of a risk of serious harm to an individual or group of individuals. This policy included specific criteria that had to be met in order for the duty to warn to be permitted. These words were chosen carefully based on existing case law. Unfortunately, Bill 159 has narrowed the college's existing policy in this regard.

Section 40 provides strong protective wording for quality-of-care activities that are conducted in a hospital or by another prescribed facility, organization or person that provides health care. Unfortunately, colleges are left out of section 40. Why would quality assurance or quality improvement activities within institutions be included but not the same activities undertaken by the regulatory body looking at physicians across the province?

Finally, like others who have appeared before you, the CPSO also has general concerns with the broad regulation-making authority given to the minister in this act. It would potentially permit the minister to change some of the fundamental concepts of this legislation through regulation in over 30 different areas.

So where do we put the colleges? I don't want our concerns with Bill 159 to be viewed as resistance, nor are we proposing exempting colleges from new obligations in this area. It is time to legislate information and privacy practices for colleges. When the RHPA was drafted, the focus was on secrecy and confidentiality. The RHPA is very clear about how we protect the confidentiality of the information we receive. However, there is not explicit consideration of privacy; that is, how we collect and use the information internally. The concepts in Bill 159 provide an opportunity to spell out in law best practices in this regard.

The CPSO believes that codifying clear principles for the collection, use and disclosure of personal health information in a regulatory environment is a must. Our preference would be to include a new section in the RHPA specific to the purposes of colleges. It is the RHPA that spells out our processes. It is the RHPA that currently gives us the authority to view records. It should be the RHPA that spells out our information practices as well.

You have asked for a list of specific sections in Bill 159 that are incompatible with the RHPA. We will work with the other colleges to prepare that for you.

Having said that, we still recommend that rather than attempting to amend numerous sections of Bill 159 to fit a regulatory process, we can incorporate many of the principles of Bill 159 into the RHPA. For example, part IV, describing security, safeguards, the need for written policies etc, could be built into the RHPA. Furthermore, we would like the wording of section 40 to cover the quality assurance programs of the college. The wording

in section 40 is better than the wording we currently have in the RHPA.

There is the possibility that the RHPA will be opened later this year based on a separate review by the Health Professions Regulatory Advisory Council, or HPRAC. As one of the consistent recommendations to HPRAC was to change the ability of colleges to provide more public information about investigations and assessments, privacy protections will be essential. However, if that is not a viable option and we are to be a part of Bill 159, we are prepared to work to ensure that current provisions do not compromise our ability to regulate the practice of medicine effectively.

As I close, I want to re-emphasize that health information is so important that we need to get this legislation right. Being denied your right to privacy is a terrible thing, but being the recipient of really bad or unethical care is a terrible thing as well. Physicians specifically, and the college in general, have always held patient confidentiality sacred. Notwithstanding that, we ask that colleges continue to have free access to information with explicit limits on its use through confidentiality provisions and privacy protocols. We are legislatively mandated to be the watchdog of the practice of medicine. We must not be compromised in this role.

We would be pleased to answer questions.

The Chair: Thank you very much. That leaves us about two minutes per caucus. We'll start this time with Ms Lankin.

Ms Lankin: I have no questions, just a general comment. I appreciate the presentation; it's very clear. I appreciate Ms Fooks's attendance here the last couple of days. I think that's reflected in the presentation, so that's really helpful. I'm sure she has shared with you that the ministry has presented to us that it certainly is not their intent that there be a conflict or that anything within this act undermine the regulatory role of the colleges—I'm sure it's not the committee's intent either—and that we have asked for HPRAC to take a look at this.

I think your suggestion of working with the other colleges and the ministry and HPRAC is an excellent one. I would like to recommend that someone take the initiative, go ahead and get a meeting set up and get started on that because it would be beneficial for this committee to see a consensus approach come back from those three parties, as opposed to our trying to sort through it and figure out what the amendments should be.

Thank you again for your presentation.

Mr Wood: You have the power to compel production of documents, do you not? You can issue a subpoena for documents?

Dr Gerace: Ultimately, yes.

Mr Wood: Whom do you get the subpoena from?

Dr John Bonn: The authority is in the RHPA itself.

Mr Wood: Who actually issues the subpoena is what I wondered.

Dr Bonn: It goes out over my signature as registrar. I am empowered, with reasonable and probable grounds, to conduct a section 75 investigation. That gives our in-

spectors the powers of search and seizure of records. That goes out over the registrar's signature.

Mr Wood: One thing we could do is say, "OK, you continue to have that power but we're going to give it, say, to a court." So if you want to have access without consent to a patient's records, you've got to get, in effect, a third party to authorize you to do that. If we did that, just for the sake of discussion, would that create an operational difficulty for you?

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Dr Bonn: Extreme operational difficulty.

Mr Wood: Why is that?

Dr Bonn: Timing. Many times I will get a notice and have to act expeditiously in order to protect the public. We're talking about—

Mr Wood: How do you differ from the police, for example, in that regard?

Dr Bonn: I really don't have the information as to how the police will get a warrant on a quick notice.

Mr Wood: They can get them 24 hours a day.

Dr Bonn: I don't know if our college would have that ability, because we don't work daily with the judicial system like the police do. If you're talking about going before a justice of the peace or a judge of the court in order to get authority to investigate, I foresee all sorts of difficulties for colleges attempting to do one thing: protect the public. Our motivation is not to seek out information for any purpose other than to protect the public.

Mr Wood: Do you think you're different from the police?

Dr Bonn: No, sir, I do not. I think the field that we are working in is entirely different.

Mr Wood: Why? They do the same thing.

Dr Bonn: The milieu that we work in, hospitals and physicians' offices—my understanding is this is why colleges had been given this authority, because of their expertise and knowledge of the system. We have a unique expertise in health care as providers. I'm talking about the profession. The college has been given the responsibility of ensuring that the care provided is that which the public expects and which they are due. So we use that in a manner that is designed to expedite any concerns that there are about care.

As you know from previous submissions to this Legislature, we are constrained by the legislation as it is. To add another layer of authority that is required so we can do our job, I wonder whether we would continue to have concerns expressed in this Legislature and in the media about the time it takes us to do our job. That's my only concern.

Mr Wood: I would invite you to take a look at how the police deal with compelling production of documents and tell me how your work differs. I realize you haven't studied that in detail now, but that would be helpful, at least to me and perhaps to other people who are taking a look at this legislation.

Mrs McLeod: Although we haven't moved into the official amendment process yet, I think there is a growing

realization, as Frances Lankin has indicated, that we need to look at changes to the way in which Bill 159 is drafted to deal with the colleges if we give primacy to privacy legislation over other acts, which some of us believe we should, to specifically exclude the RHPA from the provisions. But you've raised a number of issues today that then need to be addressed that the other colleges, by and large, haven't brought forward.

I concur with Ms Lankin's suggestion, Mr Chair, that we ask the RHPA review to start to look at some of these issues, because I understand it's in its next-to-final stages in terms of the preparation of their report.

I did want to ask about the issue of registrar's investigations. You've indicated that patient identifiers are removed in testimony in those investigations. Is it required by law that the patient identifiers be removed or is that a practice of the college?

Dr Bonn: It's a practice of the college.

Mrs McLeod: Is that something that should be specified in law in terms of the privacy rights of individuals?

Dr Bonn: I see no downside except for the logistics of removing all patient identifiers in documentation that is presented to our committees. Our committees will literally get bankers' boxes of materials relating to patient files, especially if there is hospital care involved. The actual logistics of removing patient identifiers would be quite overwhelming, to put it mildly.

Mrs McLeod: So it would just be in the testimony.

Dr Bonn: Yes.

Mrs McLeod: Is there a requirement on the college, through the RHPA, to notify patients who are involved in the investigation, who are affected by your investigation of a fraud?

Dr Gerace: There is not.

Mrs McLeod: If misconduct involves mistreatment in some way, then the patient surely has a right to know that. We've been dealing with issues of non-correction of inaccurate health records, for one thing, but there could also be treatment implications for patients who have not been properly handled. Where does the obligation of the college back to the patient come in this kind of investigation?

Ms Fooks: That's exactly the point. Currently we are not required to do it. Our point to you is, there are a whole series of issues that were not considered in 1993, because by that stage people were sick to death of the RHPA, after 12 years of study, that have really come to light now that we've worked with this legislation.

This is a personal opinion now, not a college position, but I personally think that nobody considered the privacy issues. They just assumed that as soon as information came to the college we would use it and keep it confidential, which we do. But we're in a new era, so I personally think that colleges need to be required to go back, whether it's 159 or RHPA. We'd prefer RHPA for simplistic reasons.

Mrs McLeod: So you would put that as a privacy issue?

Ms Fooks: Yes.

The Chair: Thank you for coming before us this morning.

CENTRE FOR ADDICTION AND MENTAL HEALTH

The Chair: Our next presentation will be from the Centre for Addiction and Mental Health. Good morning and welcome to the committee.

Ms Jean Simpson: Good morning. I'm Jean Simpson. I'm the executive vice-president and chief operating officer at the Centre for Addiction and Mental Health. With me today to make the presentation and to answer your questions are Dr David Goldbloom, our physician-in-chief, Dr Franco Vaccarino, our VP of research, and Gail Czukar, our general counsel.

The Centre for Addiction and Mental Health was created in 1998, a successful merger of the Addiction Research Foundation, the Clarke Institute of Psychiatry, the Donwood Institute and the Queen Street Mental Health Centre. The centre is a teaching hospital fully affiliated with the University of Toronto. It has been recognized by the World Health Organization as a centre of excellence, one of four in the world. It is also the largest mental health and addiction facility in Canada.

The centre brings together internationally recognized, biological, clinical and social researchers, a pre-eminent treatment facility, a broad range of professional training, as well as a province-wide network of community program staff. As a result, we have a unique capacity to focus our research on the most pressing needs and also to take the research result and translate it into knowledge and action. The centre is also working on addressing the issue and the elimination of the stigma that's associated with mental illness and people suffering from addiction problems.

We really appreciate the opportunity to be here. I'm here because at the centre we recognize that health information is a very important issue. We staunchly defend confidentiality. We also recognize the need for health information for good clinical practice, for research, for system planning, as well as for accountability.

Before I turn it over to my colleagues, I would just like to mention that we are presenting our draft submission. We have not had the opportunity to take this for approval to our board of trustees. We anticipate doing this over the next two weeks and we will then submit an approved document for your use.

Gail Czukar will give you an overview of the centre's issues. Dr David Goldbloom and Dr Franco Vaccarino will address the clinical issues and the research issues respectively.

Ms Gail Czukar: In general, the centre supports the need for legislation to govern information in the health system. We want information to be used to improve the understanding of mental health and addiction problems and to alleviate those problems. However, we believe that use must be balanced with patient confidentiality,

and we don't think Bill 159 in its current form achieves that balance successfully.

Patient confidentiality is not only an essential precondition to successful treatment, which I think you've heard from others before you, it's an issue of basic human dignity and respect. People with mental health and addiction histories are stigmatized and their lives can be impaired forever by an episode of mental health or addiction treatment. They fear that increased access to information about their status will add to the stigma and discrimination already suffered by mental health consumer survivors. They fear that symptoms of legitimate physical problems that require urgent treatment can be misinterpreted in light of a psychiatric treatment history that might be available in a general hospital record, for example, and the results of that can be very serious for them.

I think the telling statement we heard from the consumer survivors we consulted is that this legislation could change the very meaning of confidentiality and cause people with mental health and addiction problems to withhold critical information in circumstances that are often life-threatening, because that's when they're seeking help.

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Even if treatment is successful, the effects of stigma can be very far-reaching. One of our former patients, when well and gainfully employed, sought a loan. When the bank's loan officer, who was very friendly and positively disposed, started to enter information into the bank's computer system, the person sitting across the desk could see a huge sign come up on the computer that said "psychiatrically challenged." So the loan officer changed their tune and said, "We're very sorry, but we can't give you a loan," and ushered the person out of the bank. That person thinks that information was obtained by Equifax, probably illegally, and distributed to credit institutions. Needless to say, that consumer survivor is not very enthusiastic about the idea of legally sanctioned broader sharing of that information.

We've provided a bit of context in terms of the rules that we now operate under. The mental health system, of course, has had rules in the Mental Health Act for some time that we have found we can work with. There are a few problems with that which are outlined here, but I'd prefer to spend the time on our response to this legislation. As I've said, we agree with the principle of a common set of rules. I'm going to tell you a little bit about the parts of the legislation that we feel are very positive and need to be kept. Dr Goldbloom is going to tell you about our issues with respect to sharing information in the care context, Dr Vaccarino is going to talk about the research context and then I will address a few specific issues.

The patient's right-of-access provisions in this legislation are very important. Of course, we have these under the Mental Health Act now. I remember that in 1978, I believe—I can't remember if it was 1978 or 1986 when these went in—there was much machination about

whether psychiatric patients should have access to their records. It was a hard-fought battle. That has existed for some time and the sky hasn't fallen in. So we feel if it can happen in the mental health system, it can happen all over the system.

Substitute decision-making is key for our clients. We need to have provisions that deal with substitute decision-making for information. We also like the quality assurance provisions. We also want to ensure—and I think it's done in this definition—that personal health information includes information about addiction clients. That's extremely important.

We do have some difficulties, and I'm going to let Dr Goldbloom address the first of those.

Dr David Goldbloom: The last time I appeared before a number of people on this committee in this room was around the subject of Bill 68, a subject which was divisive within the mental health community and within the patient community. I feel today it's a very different situation. This is far less divisive between care providers and recipients of care in terms of the perspective I want to outline to you around the protection of confidentiality and privacy in this legislation. I speak to you not only as someone who serves on the administration of the Centre for Addiction and Mental Health, but also as a physician who directly provides care to people with mental illness or addictions, and people whose expectations around the privacy and confidentiality of the information they share with me, their personal information, I feel very strongly obliged to defend.

As Gail indicated to you, we have long enjoyed within the mental health system a level of protection of privacy and confidentiality that has been several notches above that enjoyed by general health care facilities. Indeed, at a previous hospital where I worked, the psychiatric files within that general hospital were always stored separately from the general health files because of concerns of more casual approaches to issues of confidentiality. I am very pleased by the aspects of this legislation which elevate privacy and confidentiality of general health information to the level enjoyed around mental health information. I think that's a significant improvement.

I also think there should not be two standards of privacy for health information. There are many aspects around physical health information—one can only think of things like HIV status, for instance—that should enjoy every protection and privacy that mental health information or addictions information enjoy.

We strongly support the protection of this information and we are all too familiar with the stigma associated with disclosure. Our approach to stigma is not simply about protecting privacy but obviously promoting public knowledge and understanding of illness as a way of reducing stigma.

We also recognize this legislation is an attempt to balance protection of privacy with disclosure and sharing of information. We understand that balance. That is not new with this legislation, as you heard in the previous presentation, the provisions through the College of Physicians

and Surgeons around duty to warn. We have provisions through things like form 14 for the release of confidential psychiatric information, mechanisms that safeguard the privacy of information without absolutely prohibiting its disclosure. I can tell you that there are critical clinical situations which I've encountered personally as a physician where there are other means, such as the administrator-to-administrator release of confidential information, that allow us to share between distinct psychiatric facilities essential information that is necessary for the continuity of care of our patients. However, we feel that the balance has shifted too far in this legislation around access, and access for purposes other than the provision of clinical care.

Confidentiality is fundamental to our provision of clinical care. It relates to the quality of the relationship that people enter into, their expectations, and the reality that people will withhold vital information for their understanding and for their treatment if they have concerns that confidentiality is not going to be respected. Further, with third party access, an additional concern is that once it is out there, much like an e-mail in cyberspace, the controls over where that information subsequently goes are even less protected than the access and disclosure provisions that are here.

One of our strategic directions as a health centre is in the provision of client-centred care. We respect in that context the fact that this is the information of our patients. They own this information. This is ultimately about them, and that means they have every right to be involved in determining how it's going to be released, when it's going to be released; it means getting their permission; it means getting access to their own information. We welcome this addition because it's something, as Gail already indicated to you, that has been a very positive experience in general in mental health care. It is extraordinarily rare that we would ever deny somebody their right to access their own clinical record in mental health, and we have to actually go to a review board hearing if we want to deny that access. Not only that, people have the right to request amendments under the Mental Health Act to their health record. That is also an important provision so that they feel they can set the record straight around the story of their own health care.

I am going to hand back to Gail Czukar more detailed discussions around sections 33 and 36. I don't know if you want to do that now or after Franco.

Ms Czukar: Why don't I just mention it now in the context of this discussion, because we think this is where it comes up. Of course, we're concerned about the lengthy list of disclosures in sections 29 to 37 and we think they're problematic; in particular section 33, the disclosure to reduce or eliminate risk. We think that the duty to warn should be more specifically targeted and kept closer to what the current common law is with respect to warning about threats that are related to a particular patient or client of the custodian against a specific individual or group of identifiable individuals. We often have third party information that clients may

relate to us or family members may relate to us. We have no way of verifying that information, and for the practitioners to be under a duty to do something with that information would be problematic.

I know that you heard a presentation on this yesterday and we'd be prepared to answer further questions about it, but we want not just certainty but protection for those practitioners to know what they're supposed to do. Although it's a discretionary disclosure, I think that over time it will only take one incident, where something goes wrong and it comes to light that we had information that was not disclosed, for the risk management analysis to be, "Well, you should be calling the cops every time you have information like this," and then we have a problem.

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With respect to 33(b), as care of people increasingly takes place in the community, there's a need for community service providers and others to have information about risky behaviour of clients so that they can develop the right kind of risk management plan. We would like to see them be able to have that.

Finally, with respect to 36(1)(g), this section is way too broad and should be deleted. We think that clause (h) is sufficient for disclosure of information for investigation purposes. I'll leave it at that and let Franco speak to the research issue.

Dr Franco Vaccarino: Thank you for this opportunity to speak to this act. I'd like to say a few words regarding the implications of this act in the context of research. I also speak to you wearing two hats, both as a senior administrator at the Centre for Addiction and Mental Health and as an active researcher and scientist myself.

The centre supports the protection of personal health information collected for research purposes, but we believe that this information should not be subject to disclosure to authorities or others for purposes that are unrelated to research except solely in the discretion of the researcher in order to prevent harm to the persons or others.

The quality of health care research is entirely dependent on the willingness of people, including patients, to participate and be truthful in their responses. Allowing research information to be disclosed to third parties will have the effect of not inspiring trust and confidence in people who generously donate their time and information in really an altruistic sense toward the cause of curing disease or improving health care.

An important point and concern for us is also that allowing disclosure to third parties would have the perhaps unanticipated side effect, but it certainly would have this side effect, of decreasing people's willingness to participate in research studies. The concern here is that the very act of that happening would compromise the quality and validity of whatever research information is obtained as a result of that deficit.

The provisions in sections 27 and 32 regarding use and disclosure of previously recorded information for research purposes are useful safeguards, and the role of

the research ethics review bodies has been addressed in other presentations and the CAMH supports this. I won't dwell on these points, but let me just underline the key role of the research ethics boards in this regard. The research ethics boards are key to maintaining the ethical integrity of our research and research programs, and issues relating to consent and confidentiality are reviewed by our research ethics boards. No research protocol or project gets done at our centre without the careful scrutiny and review of the research ethics boards, comprising not only bioethicists and medical ethicists but also active researchers and scientists. I'd like to just stress the importance of the research ethics boards in that context. At the end of the day, really, the ethical integrity of the research is the bedrock for our research programs. Any question regarding the ethical integrity of the research would not allow that research to go forward.

A final point that I'll make is that research information—we also have to be careful here—used for purposes other than research is something we need to keep our eye on and be careful about. The reason is that there is limited and possibly even misleading utility in the use of research information for purposes other than research. Research information is information in development. It has limited, if any, utility in a broader health context prior to it being fully fleshed out. So that information outside of the context of research purposes and in the context of the centre, in my mind, would have limited, if any, utility in the broader context. I'll stop there.

Ms Czukar: That brings us to the final point with respect to—

The Chair: I'm going to have to ask you to make your final point in about 30 seconds.

Ms Czukar: I'm sorry, we haven't left time for questions. In that respect, we have differing views on the mandatory disclosure provisions, and we've suggested an alternative approach in our paper; that is, independent review. We also would like to see the oversight and enforcement provisions substantially increased. We think that is the ultimate safeguard of confidentiality, and the provisions that are there are not strong enough.

The Chair: Thank you very much for your detailed presentation before us here this morning.

CANADIAN PENSIONERS CONCERNED

The Chair: Our next presentation will be from Canadian Pensioners Concerned. Good morning and welcome to the committee.

Ms Gerda Kaegi: Thank you for giving us the opportunity to appear before you today. Canadian Pensioners Concerned, founded in 1969, is a membership-based, non-partisan advocacy organization of mature Canadians committed to preserving and enhancing a human-centred vision of life for all citizens of all ages.

What I'd like to do is draw attention to some of the key points that we have made in our submission. You will have the detailed one in front of you.

There is a need for legislation to regulate the right to privacy for individuals. A critical issue, in light of the information that has become public over the violation of that privacy over a number of years, and let me just take this year in particular: the case of the OPP officer disclosing personal health information to a citizen in Walkerton recently, information she had not received from her physician; the story about a Dr Sears who had set up business to provide personal health information pertaining to potential employees of corporations such as the TTC and Canadian Tire. He is purported to have said that he can get it one way or another. That is unacceptable, in our view. That was in a story in the *Toronto Star* of January 8 of this year.

We then have concerns about the use of the term "retirement home" in subparagraph (vi), paragraph 4 of clause 2(1)(d). As an organization, we have made many deputations, many submissions to government for the last 10 years about retirement homes. We believe that there is no clear definition in law of the meaning of a retirement home. Would it include a retirement community, a retirement village, a retirement home made up of individual apartments, or does it mean a care home? We find this term is very, very unclear. Furthermore, does it mean everybody in a retirement home is a patient? I don't think so. So we would like to have some rethinking about the use of the term "retirement home."

We are also very concerned about a practice that is common among legislative bodies across the country of leaving things to regulation. Regulations are not subject to debate in the Legislature. If something is needed, spell it out in the legislation. If a change is needed, amend the legislation so we'll have full public debate. We are really concerned in this bill how much is suggested to be covered by regulation.

We see a really important role for the Information and Privacy Commissioner. There is a role identified, but we don't think it's strong enough. We believe that resources and authority are needed. There should be a yearly report to the Legislature on the citizens' experiences. We believe that commissioners should have the power to investigate, get evidence and determine redress for abuse of privacy.

We argue that those who hold the information, and there are a number of sources set out in the proposed legislation, must get informed consent to release information. We also believe—and I was interested to hear the preceding presentation—that clearly partial consent should be available to the individual. Some things are not necessary and should not be included if the individual believes they don't want it to be included.

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We argue that an oath of confidentiality must be taken by all those who have access to personal health records, and that any violations must feel the full force of law. I again go back to that *Toronto Star* story of Dr Sears, where he said he phoned hospitals, he phoned clinics, he phoned receptionists, and he got the information. That is of deep concern to us. We understand that it is in the

public interest, and it can be in the individual's interest, to have records available when providing care. But the circumstances must be clearly controlled.

We raise the issue around fees. It appears in two places in the legislation. It seems to us it's not much use having the theoretical right to something—access to records or access to a complaint procedure—if you cannot avail yourself of these rights because you haven't got the money to do so. So we really have a significant concern around the issue of fees.

We then also are very concerned about the fact that employers should be able to ask potential employees to sign a release to give them access to their health information. This isn't a situation of equals. The applicant has everything to lose if they say no, and even then, according to Dr Sears, the employer will get it anyway. We really believe that this government and this province have the power under the Constitution to regulate that kind of action for employers working in this province. So we would argue and plead with you to prohibit that kind of application form, because in our view it's very dangerous.

In concluding, we do express concerns, and I know it's sort of incidental at the moment, with the introduction of a smart card, one that links all kinds of unrelated information. Inevitably, they will be linked electronically, and privacy will be lost. I know I'm reaching ahead a little bit with that comment, but we really do have deep concerns about that, especially with the ease of getting access through the electronic systems of information collection and information distribution.

We believe we have to have legislation that protects the privacy of our health information. We don't believe that Bill 159 does the job. So we ask you, please have legislation, but there's a lot of room for improvement, in our view. Thank you very much.

The Chair: Thank you. That affords us about three minutes per caucus for questioning.

Mr Wood: Have you had a chance to review the federal Privacy Act?

Ms Kaegi: I've looked at it, but because this was the first one, we felt that this was most crucial for our attention. It is the responsibility of the national division of our organization.

Mr Wood: Do I take it from that you're not really in a position to comment on the federal act?

Ms Kaegi: I wouldn't feel comfortable in commenting on it. I have looked at it. I realize that it has import for what happens here, but I also know, because my background is political science and I taught local government and provincial government, the areas of jurisdiction and what the province can do. So that was my focus.

Mr Wood: Second point: we've heard from some of the submitters that there are certain kinds of research that effectively can't be done because of small samples and so on, if you have to get the consent of the people whose data are going to be used. Assuming we come to the conclusion that's correct, there are indeed some areas of research that can't be done if we don't permit the re-

searchers to use the data without consent, do you think we should come down on the side of saying if you have the proper oversight, in those limited cases, you can get access to the data and to the research, or do you think we should come down on the side of saying no, in those circumstances you can't do that kind of research in Ontario? If we get to that point, which of those routes would you encourage us to take?

Ms Kaegi: I understand it's a very hypothetical question you've asked, and you're struggling with that issue. My concern is, as we read through Bill 159, the problem is if it's a very small sample, you could ultimately identify the individuals. There has to be some way to protect that.

I believe very strongly in the importance of research. I think it's critical. We need it. On the other hand, I believe the right of the individual to privacy must be protected, and I believe there are ways that could be developed to ensure the protection of that privacy, even with small samples.

Mrs Sandra Pupatello (Windsor West): I wanted to take you to point 9 that you made in your presentation regarding employment, when you suggest that the legislation should prohibit employers from asking for consent. It's of interest that it has come up several times that already today when people sign a contract in order to gain employment with a particular firm, they sign a contract, often not realizing that that contract also automatically gives consent to submit personal health information over to the insurance company that's providing benefits to the employees. People just don't realize that even today we've signed off on a whole bunch of info that's going out there.

It's a delicate balance. An insurer would have the right to know what preceding health history there is in order to provide health coverage. It's just that you're in a Catch-22: if you don't sign the contract, you likely won't get the job. You've spelled out clearly what happens when you don't sign the contract. What kind of recommendation would you have from an insurer's point of view?

Ms Kaegi: I'm not an insurance company, but if I go back in my own employment experience, I was teaching and I was required to have a medical to ensure that I did not have a communicable disease. I had a chest X-ray and so on. I accepted that as needed for the job. It seems to me that I was also, when I was employed, therefore insured by the insurance policy of my employer, which was Ryerson University. That was not a problem and I don't see that it should be a problem. I think the fact that you would open your whole medical history in a way that is totally unnecessary to the needs of the job is unacceptable.

If there are certain conditions that are required for public safety, for the protection of public health, for a medical check of some sort to be done, let that be part of the terms of hiring, but to just give blank access to one's health records, to my mind, is totally unacceptable.

You're right, most people don't know what they're signing. We're all bad at reading forms, and that's something most of us miss.

Mrs Pupatello: Had you heard about the concept of a lockbox, which has been advanced prior before this bill was tabled?

Ms Kaegi: Yes.

Mrs Pupatello: That might be something, at least in this area of concern, where you would include in your lockbox information that you felt shouldn't be passed on regardless, but information related to public safety as to your employment might be something that you wouldn't put in a lockbox. Do you follow the concept of a lockbox?

Ms Kaegi: Yes, I do, and that's why I talked about the possibility of excluding access to some records. Yes, I do believe that's a very important idea and I think it's one well worth following.

Ms Lankin: I appreciate your presentation. I appreciate your drawing the committee's attention to section 2(4)(vi), the inclusion of retirement home as a health information custodian. I found that an interesting inclusion in the act. In a sense, it is an explicit acknowledgement of the fact that there are many such retirement homes out there that are in fact collecting and using personal health information because essentially they are providing care to individuals. There are a range of retirement homes out there. Before my mom's Alzheimer's and Parkinson's proceeded to a point where she could no longer live independently, she was living in an independent seniors' building which was part of the retirement complex. There was a doctor who had an office who came in once a week, so she had access to a doctor who had a nurse in that office, but other than light housekeeping services she applied for there was nothing in the sense of a care facility there. Yet there are retirement homes we know, which Mrs McLeod and myself have been arguing, should in fact have standards of care. They should be regulated because they are proxy nursing homes for the aged. It's interesting that it almost acknowledges that in this legislation, yet in other places we're denied the opportunity to talk about regulating those homes.

1020

You've asked for clarity in definition and I would agree, but do you see that there are some private non-regulated facilities or practices—I don't even know what to call them—residences out there that fall outside of all of the regulation of nursing homes, charitable homes, long-term care facilities, but which in fact do collect and have private health information and should be regulated with respect to the protection of private health information?

Ms Kaegi: Yes I do, and if I may say, I made deputations to the Liberal government calling for regulation of those kinds of homes. I made deputations to your government—

Ms Lankin: Through all of the Lightman reports.

Ms Kaegi: —asking for the regulation of those types of homes. We're saying yes, but until they're clearly defined, until the range of services is prescribed in some regulatory way, we're very uncomfortable. This is far too loose. Yes, we want regulation of retirement homes, we desperately want it, but this we feel is far too loose a phrase. If you mean by this a care home—and I believe there is some definition around "care home"—then put that in the legislation. But yes, we would love to have clear regulation of retirement homes in the broadest context.

Ms Lankin: In fact, through the Lightman report and all of that, there was, as you know, an attempt to regulate the landlord-tenant provision, but the whole issue of standards of care remains outside of that. While I think you're right that there is a loose definition of "care home" for purposes of this legislation, do you see a way of importing that? I don't know if there's an actual legal definition that would define which group we're talking about.

Ms Kaegi: We raised it because it was clearly a concern to us and has been a concern for well over 10 years, certainly in terms of government policy.

I would like to go back and reconsider, and if I could send a note back to the committee I would be more than willing to do it and consult our group. We just hit the term and thought, "Whoa, we have a problem here." That's why we suggested the term "care home," but I would be more than happy if I could have an opportunity to go back and just submit a document to the committee giving our collective response to that question.

Ms Lankin: That would be very helpful.

The Chair: Thank you, Ms Lankin.

Ms Kaegi, you might wish to check the Tenant Protection Act.

Ms Kaegi: I have.

The Chair: There are definitions that you'll find certainly cover "care home" there.

Thank you very much for taking the time to come before us here today.

Ms Kaegi: Thank you very much.

IMS HEALTH CANADA

The Chair: Our next presentation will be from IMS Health Canada. Good morning and welcome to the committee.

Dr Roger Korman: Thank you.

Ms Anita Fineberg: Thank you.

Dr Korman: Mr Chair and members of the committee, my name is Roger Korman. I am president of IMS Health Canada. I'm joined by our chief privacy officer and corporate counsel, Anita Fineberg. I welcome the opportunity to appear before you to make submissions on Bill 159. You should have a package of materials that includes my presentation as well as a response to the Ministry of Health and Long-Term Care's consultation paper on the health sector privacy rules.

We support the goals of the Ontario government to pass personal health information legislation in the province. We recognize that some amendments may be required; however, we believe it is critical that the province introduce its own legislation dealing specifically with health information moving between the private, commercial and public sectors. Such legislation is able to address the specific issues related to the privacy of personal health information and promote an integrated, efficient and accountable health system in Ontario. It will avoid what we believe to be the unworkable and uncertain application of the federal Bill C-6 to the health sector, a bill that did not have in mind provincial health care concerns and the special problems of the provincial health care system.

I will briefly provide you with some information about IMS Health, how it's a private sector company—we manage privacy issues—and our experience with the legislative process on Bill C-6. I will then speak to two specific issues: the definition of “personal health information” in Bill 159 and the use of de-identified data.

IMS is the world's largest health research company, operating in more than 90 countries. It is recognized as a leader and essential partner in the advancement of health. It serves the government, including Health Canada, the Patented Medicine Prices Review Board, the Canadian Coordinating Office for Health Technology Assessment, the governments of Quebec and Ontario, as well as health researchers and the pharmaceutical and biotechnology industries.

IMS employs the highest standards in data collection, processing and statistical analysis in collecting data from over 65,000 sources in Canada, including hospitals, pharmacies, pharmaceutical manufacturers, wholesalers and physicians. More than 200 million records are processed each year to yield extensive information databases of diagnosis and disease treatment, including prescribing patterns and pharmaceutical utilization trends.

IMS collects no identifiable patient information. We require that patient data be de-identified prior to being sent to us. We further screen records prior to acceptance to ensure they are de-identified. In addition, we tightly control access to data and restrict its use to those employees who require it as part of their employment responsibilities. Our information practices are routinely subject to independent audit, and we enter into confidentiality agreements with our data suppliers, employees and clients.

As a leader in adopting measures to ensure appropriate and responsible use of provider information, we developed a privacy code based on the principles in the Canadian Standards Association's Model Code for the Protection of Personal Information, known as the CSA code. The Quality Management Institute, QMI, a division of CSA International, has reviewed the IMS privacy code. The practice of IMS Health with respect to the management of information respecting health professionals has been, and continues to be, audited by the QMI. In September 1999, IMS became the first company

in Canada to achieve registration based on CSA's privacy standard. In addition, we retain Coopers and Lybrand to conduct regular independent audits on our data collection procedures, specifically to ensure that we are not provided with any patient-identifiable data. In more than 40 years, we have never had a single breach of patient confidentiality.

We were among the first companies to make representation to the Quebec Privacy Commission following the passage of Bill 68 in 1994 and have been authorized to continue our business practices under this law. As you have heard, the Quebec legislation will probably be deemed to be substantially similar to Bill C-6. In addition, we have voluntarily created a health information advisory board in Quebec, made up of pharmacists and physicians, to provide guidance concerning our use of health information.

In November 1999, I appeared before the Senate standing committee on social affairs, science and technology to present evidence on the problems Bill C-6 would create for health research and generally why Bill C-6 is an unworkable model for health sector activities. I identified two significant problems with Bill C-6 and the negative effects it would have on health research. While Bill C-6 recognizes the value of research by granting an exception from the requirement to obtain consent for the use and disclosure of personal information, there is no corresponding exemption for the collection of such information. In addition, the definition of “personal information” in Bill C-6 is unclear.

These are two reasons why we believe it is necessary to address personal health information in specific provincial privacy legislation and why I am appearing before this committee today. IMS policies and audited practices speak for themselves in confirming that we support the highest levels of privacy protection for identifiable personal health information. However, we also recognize that in certain circumstances particular to the health sector, privacy must be balanced with important societal goals such as health research and system accountability.

We also believe the same rules should apply to the use of health information held by the private sector as that held by the public sector. The Bill C-6 distinction between commercial and non-commercial activities is simply not workable and fails to recognize the current realities of the health sector, where it is estimated that private sector health care spending represented 29% of total health care expenditures in the year 2000.

1030

That is why we support the efforts of the Ontario government in introducing Bill 159 to provide for consistent rules among those health information custodians who operate in the private and public sectors. As does Commissioner Cavoukian, we believe the bill may not be perfect, but we urge the Ontario government to proceed. The federal government recognized there were problems with the application of Bill C-6 to the health sector and provided a deferral of the application of the legislation to health information. Therefore, the federal legislation

dealing with personal information generally should not be used as a measuring stick for the Ontario initiative specifically addressing personal health information.

With respect to the definition of "personal health information" in Bill 159, we support Commissioner Cavoukian's proposed amendment to that part of the definition of "personal health information" to clarify that information must both relate to an identifiable individual, as set out in paragraph (a) of the definition, as well as meet the criteria set out in paragraph (b) of the definition in order to satisfy the definition of "personal health information." This clarification is particularly important to ensure that paragraph (b)(viii) is not construed to afford privacy protection to provider information that is linked to any health information, as opposed to identifiable health information.

We further support the provincial commissioner's view that information about the employment and business practices, activities and transactions of individual health services providers should not be included in the definition of "personal health information"; that such information should be considered professional in nature, rather than personal health information. We also agree with the commissioner that such information may be used to objectively assess the quality of provider services. Examples of the use of IMS data for these purposes are included in our information packages.

With respect to de-identified data, we believe it is not appropriate to place limitations on the collection, use and disclosure of information that has been de-identified or anonymized. We agree that such information should not be re-engineered to re-identify the individual, nor should it be published in a manner that could be used to identify the individual. However, we believe that the definition of "personal health information" set out in Bill 159 already addresses these issues. If there is a concern that the information "can be used or manipulated by a reasonably foreseeable method to identify the individual, or" can be "linked or matched ... to other information that identifies the individual," then it falls within the definition of "personal health information" and is subject to the provisions of Bill 159.

The ability to use de-identified data for many health sector purposes will encourage the use of privacy-enhancing technologies to encrypt personal health information and remove identifiers. Accordingly, we support the ministry's position and the current exclusion of anonymous or de-identified information as found in clause 7(c) of Bill 159.

The courts have not recognized privacy rights in de-identified information. In the case of *Source Informatics Ltd.*, the United Kingdom Supreme Court of Judicature, Court of Appeal, found that the concern of the law is to protect an individual's personal privacy. If an individual could not be identified from the information at issue, then disclosure of such information could not violate that right and the individual's privacy was not at risk. A copy of the case is in your information packages.

In summary, as a private sector company that has been referred to as a model of privacy compliance, we fully support the goals of the Ontario government to pass personal health information legislation in the province. We recognize that some amendments may be required. Nevertheless, we believe it is critical that the province introduce its own legislation dealing specifically with health information whether that information is shared as part of a commercial or non-commercial activity. Such legislation will be able to address the unique issues related to health information and promote an integrated, efficient and accountable health system in Ontario. We believe these goals cannot be achieved under the operation of Bill C-6.

Thank you very much for allowing me the opportunity to make this submission.

The Chair: Thank you very much. That affords us about two and a half minutes per caucus for questioning. This time we'll commence with Mrs McLeod.

Mrs McLeod: You've obviously been following the hearings very closely and you're responding, as well as to what's in the bill, to Ms Cavoukian's recommendations for amendments. The fact that you didn't address the amendment that she proposes to put a lockbox on identifiable information I'm assuming means that doesn't create problems for you as long as the definition of personal health information is clearly identifiable information, that having a lockbox on that would not interfere with your research?

Dr Korman: That's correct, insofar as we do not deal with any identifying personal health information.

Mrs McLeod: Right. Is there any danger in having a lockbox that it could limit access to anonymous information? You have the health information you need de-identified. Would a lockbox prevent you from getting that de-identified information and therefore skew the kinds of samples that you're getting for your research purposes?

Ms Fineberg: No, it would have no effect on our data and our research whatsoever.

Mrs McLeod: OK. That's good to know. On page 7, if I've got the right one, you talk about the fact that you have to have consistent rules for the private sector and the public sector. In what way do you see Bill 159 providing that consistency? It's clear that it addresses the public sector, but how do you see it providing consistent rules in the private sector?

Ms Fineberg: For example, in Bill 159, as I understand it, laboratories are health information custodians. There are many private laboratories in the province of Ontario, as there are many private pharmacies, for example, which are also included as health information custodians. So by that inclusion in 159, the Ontario legislation captures that part of the commercial private sector health care system as well as the public part; for example, the Ministry of Health is a custodian. So what you have in 159 is consistent rules with respect to the information that goes between the private and the public parts of the health system.

Mrs McLeod: And the health care professional working in a private setting is a health information custodian.

Ms Fineberg: Correct.

Mrs McLeod: We've had concerns expressed to us that this bill would proceed without the companion piece dealing with commercial activities in Ontario more broadly. Are there aspects of operation in the commercial private sector that aren't caught by Bill 159, by those definitions, that need to be addressed in companion legislation, if not in this bill? We've had the issue of employers, insurance companies—

Ms Fineberg: That's correct. Those aren't issues for us with respect to our information and our operations, but, having sat here for a few days, obviously the entire scope of entities out there that could possibly have health information isn't covered. But that's for others to speak to.

Mrs McLeod: Your biggest concern—am I out?

The Chair: Yes, thank you. Ms Lankin.

Ms Lankin: Your presentation is very clear, and I appreciate that in the circumstance of your company you're dealing with de-identified information so issues of consent are not really of concern or a matter to you.

But, Ms Fineberg, perhaps I can ask you this, because you've been sitting monitoring the presentations so far and you've heard the presentations from ICES and CIHI and Canadian health information research and I think you would appreciate that the committee has received some conflicting information. Some have said straight out that for the research that their organizations do and for any systems management research they could envision, de-identified information is fine. Others, for purposes of epidemiological longitudinal studies, have indicated the need to be able to match to other databases.

Similarly this morning, the presentation from the Cardiac Care Network—fantastic success story; very clear, though, that identifiable information to track the individual, in most cases with consent but not always with consent, exists in the province.

Do you, as a research entity, have any comments on that broader issue of the societal good, and can that research by and large be done with consent or are there times when identifiable information should be provided for research purposes with all of the ethics, protections, because the research is just needed?

1040

Dr Korman: If I may, I think you have your hands around the entirety of the conundrum.

Ms Lankin: Yes. I want you to give me the answer, though.

Dr Korman: Perhaps one way to parse the issue is between collection versus disclosure. I appreciate the need to create longitudinal databases and to be able to study health issues over time, because the issues that we are simply not able to deal with and those with the greatest consequences for the system are chronic care issues, for which you do need longitudinal information. It's one of the reasons why the technology needs to advance with respect to encrypting information. If in-

formation can be encrypted and then bridged or matched, it would enable information to be anonymized and then made available for research studies.

Having said that, while I can foresee instances where identified information has to be collected, there's no foreseeable case where it has to be disclosed. So that's another way perhaps to think of separating the problem.

Ms Fineberg: If I might—

The Chair: Sorry. We're cutting into Mr Wood's time. Mr Wood.

Mr Wood: Did I correctly infer from what you said earlier that you think it would be a bad idea to have two privacy regimes for health care in Ontario? I thought I drew that from what you said. We could, after all, pass an act that's not substantially similar to the federal act, which gives us two privacy regimes. I took it that you thought that would be a bad idea. Did I take that rightly or wrongly?

Ms Fineberg: That's correct, because then what would happen is, as of January 1, 2004, depending on what kind of recognition was given to the Ontario legislation, Bill C-6 would apply to the commercial activities of the health sector in Ontario.

Mr Wood: One option we have before us, among many, is to base our act on the federal act and put in health care provisions. Would you have an objection in principle to doing that?

Ms Fineberg: The difficulty, as I understand it at the moment, is that, as we spoke to, there is a deferral of Bill C-6, the application to health information, until January 1, 2002. At the moment, therefore, there are no rules in Bill C-6 that apply to health information. In addition, even though Bill C-6 speaks to substantially similar legislation, you've also heard that there are no criteria in Bill C-6 to set out what that's all about, and there's no process.

Industry Canada is currently developing a white paper that will set out both the criteria for substantial similarity and the process by which that will be determined, so that the matter gets to the Governor-in-Council, who ultimately decides on what "substantially similar" legislation is. So at the moment there are many uncertainties with respect to what is, what may be, what could be substantially similar legislation.

Mr Wood: What I'm inviting you to comment on is, if we took the federal act as a model and put in, consistent with the federal act, various provisions to deal with health care, do you think that's a valid approach or not a valid approach?

Ms Fineberg: Maybe when the federal act does have rules for health information, because at the moment it doesn't. So we need to know, in my opinion, two things before we start comparing line for line, for example, Bill 159 to the federal Bill C-6. We need to know what the federal Bill C-6 rules will be for health information—that's number one—and, number two, we need to know what the criteria for substantial similarity will be. Then I think we can look at the Ontario legislation and perhaps do a more detailed comparison, to answer your question.

The Chair: Sorry, Mr Wood. I'm afraid we're over our time.

Thank you very much for coming before us and making your presentation today.

ARCH

The Chair: Our next presentation will be from ARCH: A Legal Resource Centre for Persons with Disabilities. Good morning and welcome to the committee. Please proceed.

Ms Lana Kerzner: My name is Lana Kerzner. I'm a lawyer with ARCH, a legal resource centre for persons with disabilities. ARCH is a legal aid clinic serving the community of persons with disabilities throughout Ontario. ARCH represents individuals with disabilities in test-case litigation, provides summary legal advice and also engages in law reform and public legal education activities. ARCH is one of a number of legal aid clinics serving low-income communities in Ontario.

I'm going to begin by providing a typical example of how health privacy legislation affects persons with disabilities. The example is based on typical calls we receive at ARCH on a daily basis. It will illustrate the far-reaching effects that personal health information has on persons with disabilities.

Joan has multiple sclerosis. She is able to work, but due to muscle stiffness and fatigue she requires accommodations by her employer. She must ask her employer to accommodate her at work and, in order to receive the accommodations she needs, her employer asks that she provide personal health information. She does so, does obtain the accommodations and is able to continue working for a while until her condition progresses and deteriorates further. She is now no longer able to work.

She now has no income and no job and needs to apply for long-term disability insurance through her employer to provide income support. In order to fill out the application for long-term disability insurance, once again she's asked for her health records. She attempts to access her health records but is unable to access the health records she needs to prove eligibility. The insurance company denies her long-term disability insurance. She is still not working and has no income.

She next attempts to apply for the Ontario disability support program, provincial government disability payments. In order to fill out the application, once again she is asked to provide very detailed personal health information regarding her condition. She provides this information and successfully receives Ontario disability support program payments and now has some income support.

Unfortunately, her condition continues to deteriorate. She now uses a wheelchair and is no longer able to use the regular public transit system she's been using. She now needs to apply for accessible transit within her community and has to fill out yet another application. The application once again asks for very detailed personal health information regarding her condition. She

accesses this health information and does in fact receive the publicly accessible transportation she's applied for.

I'm not going to continue to tell Joan's story because I believe I have told enough to illustrate the following points: in order to work, obtain minimal income support, use public transportation and generally participate in all aspects of society, she has needed to obtain extensive access to her health records. Further, she has needed to divulge her medical records to a wide variety of people. At a minimum, at least all of the people to whom she has disclosed information know highly sensitive and personal information about her health status. What she doesn't know is whom else these people might have disclosed her personal health information to.

In order to participate fully in Canadian society, it is of utmost importance to Joan and to the entire community of persons with disabilities that there be a law in place which, first, ensures they have access to their health records and, second, ensures they have control over who has access to their records and that their records, with very few exceptions, are not disclosed without their consent.

In general, ARCH strongly supports the need then for a comprehensive legal framework to protect personal health information. However, ARCH does not support Bill 159 as it is currently worded. ARCH is concerned about the bill's narrow scope and multitude of exceptions. ARCH's recommendations focus on strengthening and broadening privacy protections and ensuring that the legislation is sensitive to the concerns and accessible to the community of persons with disabilities. Our submission focuses solely on those issues that are of relevance to persons with disabilities. The fact that our submission does not comment on other aspects of Bill 159 should not be taken to mean that ARCH is supportive of them. In my oral comments I will not review all of the recommendations that are covered in our written submission.

1050

Our first recommendation relates to the definition of "health information custodian." ARCH believes that the definition of "health information custodian" is too narrow and recommends that it be broadened in two ways.

Firstly, with respect to the Ontario disability support program I mentioned a minute ago, the Ontario disability support program is a form of provincial disability income support. Individuals who apply for and are in receipt of ODSP, as we frequently call it, must divulge large amounts of their personal health information for this purpose. Curiously, only a limited aspect of the ODSP program, namely employment support, is covered under the definition of "health information custodian." The concern is that the bill provides very limited coverage for health records held by the Ministry of Community and Social Services in the context of ODSP. The way Bill 159 reads, an individual who is in need of social assistance, by virtue of that need, must forfeit their right to privacy.

ARCH recommends the Ministry of Community and Social Services, in connection with the administration of

the Ontario disability support program, be added to the definition of "health information custodian."

ARCH has a second recommendation relating to the definition of "health information custodian," and this relates to residential premises in which persons with disabilities live and where care is provided. There is a broad range of residential premises in which persons with disabilities live and where they also receive care services. In general, Bill 159's definition of "health information custodian" does not cover many of these premises. These premises accumulate large amounts of health information about their residents. Some of the residences in which persons with disabilities receive care are called care homes, and this term is defined in the Tenant Protection Act. Retirement homes fall within the definition of "care home" and retirement homes for elderly persons is a category of health information custodian in the bill.

We recommend that the problem could partly be solved by replacing the category of "retirement home for elderly persons," which is found in Bill 159 and which has no meaning in law, with "care home," which is defined in section 1(1) of the Tenant Protection Act. This is only a partial solution to the problem, so we further recommend that the definition of "health information custodian" be extended to cover all living accommodations in which persons with disabilities reside and receive care.

I started off by emphasizing the significant impact that personal health information has on all aspects of the lives of persons with disabilities.

ARCH recommends that the communities most affected by the proposed legislation must be involved in its administration and enforcement. ARCH makes two recommendations on those lines.

Firstly, ARCH recommends that the assistant commissioner for personal health information envisioned by the bill be required by the legislation to be a member of, or have proven experience in and knowledge of, the communities most affected by the legislation, including the community of persons with disabilities. Additionally, ARCH recommends that a sufficient number of persons to whom this assistant commissioner may delegate his or her duties be required by the legislation to meet these same criteria.

ARCH has similar concerns regarding the research ethics review body. Bill 159 does not specify who will comprise the research ethics review body or how this determination will be made. ARCH similarly recommends that the legislation require that this body be comprised of individuals who have a direct interest in and knowledge of issues relating to health research, including persons with disabilities, and those with an interest in patients' rights.

The issue of genetic testing is not covered specifically in the bill at all. Information from genetic testing, though, regarding one individual provides information about that individual's blood relatives. None of us has complete control over health information regarding ourselves, as it may result from test results conducted on one of our

blood relatives. In addition, because genetic test results can indicate a predisposition to becoming disabled in the future, discrimination has been shown to occur on the basis of this information. ARCH therefore recommends that the legislation contain specific provisions devoted to the concerns created by genetic testing. We recognize this could be an area of great sensitivity and recommend that wide consultation be held regarding this issue and that the consultation must take into account the perspectives of those directly affected.

The final recommendations I'm going to make this morning relate to fees. ARCH is concerned that Bill 159 contains requirements that fees be paid both for individuals who want to access their records and for individuals who wish to make a complaint to the commissioner. Compared to the general population, a large portion of the community of persons with disabilities have very low incomes. We often receive calls from people who desperately require copies of their medical records but for whom the fees charged are prohibitive.

Bill 159 leaves details regarding the fees for access to records to be set out in the regulations. ARCH recommends that the legislation specify that the fees must not exceed the cost incurred by the health information custodian to provide access. Bill 159 does allow for a waiver of the fee, but the waiver does not sufficiently protect for low-income individuals. ARCH recommends that a waiver of the fee should be mandatory when an individual is in receipt of social assistance benefits or is otherwise in financial need.

Bill 159 also requires that a fee be paid in order to make a complaint to the commissioner. This means that the privacy rights enshrined in the legislation are only available to those who can afford to pay for them. When a remedy demands a fee that an individual cannot afford to pay because the remedy is not accessible, the right no longer exists. ARCH recommends that the bill be amended to eliminate any requirement to pay a fee for the right to launch a complaint to the commissioner.

In conclusion, ARCH wishes to express its appreciation for this opportunity to present the concerns of the community of persons with disabilities to the committee and we hope our submissions have been of assistance.

The Chair: Thank you very much. That leaves us about three minutes for questioning, so we'll give it to the next party in rotation.

Ms Lankin: You've raised an issue which a couple of presentations have touched on but not gone into in any depth, and that's the concern around genetic testing. I recognize you're recommending a broader consultation, but can you tell us a bit about what ARCH has in mind, what kinds of provisions you think are necessary and in what way would they differ from regular provisions if we agree the intent of this is to have stringent protections?

Ms Kerzner: We're not making recommendations at this point for specific sections or for a way that the legislation could specifically be drafted. At this point we're just raising the concern that we believe it needs to be thought about carefully and treated differently, because

it's one discrete area where people do not have control over health information regarding themselves. The concern is that a family member's genetic information will be divulged without their blood relatives knowing, and therefore their privacy rights will be infringed. We haven't gone further into suggesting how this could be fashioned, but just to emphasize the importance of consultation.

1100

Ms Lankin: You're also recommending that supportive housing and other such residences where care is provided be included under the legislation. I appreciate your recommendation around replacing "retirement home" with "care home." Is there an identifiable definition we can look to to encompass all of these other supportive housing programs?

Ms Kerzner: That's difficult because there's a whole host of different residences in which people with disabilities reside and receive care.

Ms Lankin: I'm aware of that.

Ms Kerzner: Often they're informal, and often they are not necessarily covered by any specific piece of legislation. It's not an easy solution like saying "care home," which has an obvious definition in the Tenant Protection Act.

Ms Lankin: What would you recommend we do, then?

Ms Kerzner: I don't know that I'm in a position right now to do more than provide information about the kinds of residences that exist; and for the committee to look at that on a broad scale and be sure the wording in the legislation covers them broadly.

Ms Lankin: I have one last question. I also was concerned to see provisions of Ontario Works and the Ontario disability support program exempted where there's a conflict with this legislation. In particular, I'm thinking under ODSP where it's not a doctor who determines eligibility of disability based on medical information, it's someone within the ministry structure—a public service worker—who makes that determination. They have to have access to an incredible amount of sensitive personal health information. They're governed of course under freedom of information and protection of privacy legislation. Do you see that protection being sufficient for the protection of this private health information, or do you see a superior protection in Bill 159 that should override and govern those individuals?

Ms Kerzner: We believe that because it relates to personal health information, and the proposed legislation is specifically geared to the concerns about health information rather than other information that is collected by the government, which is of a very different nature and quality, because this proposed legislation specifically deals with health information, we believe it's important that it would be this legislation that would cover the information held by the ministry. We have a concern that the bill, as it stands, only covers one portion of the ODSP, which is employment supports. We don't under-

stand why the distinction is made and believe that all of those programs should be brought in.

Ms Lankin: Terrific. Thank you very much.

Ms Kerzner: You're welcome.

The Chair: Thank you for appearing before us here this morning. We appreciate it.

POLICE ASSOCIATION OF ONTARIO

The Chair: Our next presentation will be from the Police Association of Ontario. Good morning and welcome to the committee.

Mr Bruce Miller: Good morning. I'd like to start by thanking the Chair and the members of the committee for the opportunity to be here today. My name is Bruce Miller. I'm the administrator of the Police Association of Ontario. I was a 22-year veteran of the London Police Service prior to becoming administrator. I've worked in uniform patrol, vice, break and enter and the major crime squads. Appearing with me is Constable Isobel Anderson. Isobel emigrated from Rhodesia, which is now Zimbabwe, where she was a police officer. She joined the Ottawa Police Service in 1994 and has served there ever since. Together, we will try to give you the perspective of front-line police personnel in Ontario on an issue of increasing concern.

We are appearing today on behalf of the 13,000 members of the Police Association of Ontario. Our chair, Terry Ryan, and one of our directors, Brenda Lawson, are here today, as are the president and the vice-president of the Ontario Professional Fire Fighters Association, to lend their support.

The PAO was founded in 1933. The PAO is the official voice and representative body for Ontario's front-line police personnel and provides representation, resource and support for Ontario's 70 municipal police associations. Our membership is comprised of police and civilian members of municipal police forces.

The protection of an individual's health information is extremely important to our members. We respect and endorse the need for protection of this information. However, in certain circumstances the right to privacy has to be balanced with the need to protect other members of society.

I don't think there is any need for me to explain to this committee the escalating incidence of HIV and hepatitis B and C in the population. We are here today to stress the need for emergency workers, victims of crime and good Samaritans to be able to access an individual's health records if there is a risk someone may have been infected. The police officer or the court security special constable who is bitten and then told by the offender he has AIDS should be able to access the offender's health information to be able to make an informed decision on treatment. A sexual assault victim has the same common sense right. A good Samaritan who performs mouth-to-mouth resuscitation on an individual has the right to know whether or not he or she has put his or her own

health at risk. We believe this is common sense legislation.

I don't think I need to tell you there are high-risk and high-incidence carriers of these communicable diseases in every region of the province. These high-risk individuals include, but are not limited to, intravenous drug users, prostitutes and many career criminals. For obvious reasons, these identified groups are liable to a higher incidence of interaction with the police. This sets the stage for the increasing amount of needle sticks, deliberate attacks and other exposures that place our members at risk. However, while our members are at increased risk, the rest of society is not immune.

Medical experts tell us that today's post-exposure treatments are based on best guess and trial and error. That is small comfort for emergency workers, victims of crime and good Samaritans who are exposed to free-flowing blood or other bodily fluids. This fact underscores the need for a person, in conjunction with his or her physician, to make decisions based on all possible information. The ability to access the personal health information of the person who may have infected them would allow these people to make properly informed decisions about post-exposure treatment. They need to be properly informed so they can make informed medical decisions.

The so-called drug cocktail that is administered to post-exposure victims brings its own medical risks. We can advise you that persons who have submitted to the treatment report debilitating side effects. Severe headaches, perpetual nausea, total exhaustion, hives and hair loss are just some of the known side effects. These can last for several months, depending on the individual, the combination of drugs taken and the duration over which they are administered.

The Canadian Police Association is tracking one case involving a police officer from a police service in the Maritimes who is gradually losing his eyesight since taking the treatment. The person had no problems with his vision prior to the treatment. The treatment is relatively new. Who knows what other long-term effects there may be from these treatments?

Today's best possible treatment can be best described as overkill for the offending virus. Although we are pleased to have it available, we don't want to take it unless we have to. We need legislation to be entitled to as much information as possible in order to be able to make an informed decision with our physicians as to what, if any, treatment is required.

A number of years ago, I performed CPR on an individual, who unfortunately did not survive. The coroner was concerned that that individual may have had spinal meningitis and ordered an immediate autopsy that confirmed his suspicions. I was called at home late at night and told to attend the local emergency ward to begin treatment, which I did. If the individual had survived, I might not have been privy to the same information.

I will now ask Isobel to speak of her experiences.

Ms Isobel Anderson: Good morning. My name is Isobel Anderson. As Bruce stated, I'm a police constable in Ottawa. I would like to tell you about my experience and why we need to access an individual's medical information in certain circumstances.

In October 1997, I arrested a male for armed robbery. While I was searching him, I reached into one of his pockets and felt a stab of pain in my hand. When I pulled my hand out, I found there was a hypodermic needle impaled in my palm. I immediately went to a local hospital, where my worst fears were confirmed. The doctor there informed me there was a possibility I may have been infected with HIV or hepatitis C. I was advised that if I started treatment with a chemical cocktail which includes AZT within two hours of the exposure that it may eliminate or reduce the risk of me contracting HIV.

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The suspect initially refused to be tested. He later agreed, much later, hours later. I will only say it's fortunate for me that he was hungry, because he made a deal with the officers in the cellblock that if they bought him a Big Mac meal from McDonald's, he would agree to a test. He tested positive for hepatitis C but negative for HIV.

I took the AZT and the other drugs for three days until my initial HIV test came back negative. After consulting with my physician I decided to discontinue the treatment. The side effects from the treatment were horrendous and included hives, hair loss and chronic pain. I had to wait six months for the final HIV test, as there is a lengthy incubation period.

I was fortunate in that I did not contract any diseases. However, the toll was enormous. I had to be concerned about the possibility of infecting family members as well as my co-workers. At the time, I was married with three children. The prolonged side effects and uncertainty affected my home life. I had been having marital problems prior to this incident, but this turned out to be the final straw. My husband and I separated soon after that.

My personal experience has led me to become involved in some of the issues surrounding how to protect emergency workers, good Samaritans and victims of crime. I have campaigned together with Chuck Stahl, member of Parliament, for the introduction of Bill C-244, the Blood Samples Act. This proposed legislation was put on hold by the calling of the federal election last fall. It has recently been reintroduced as Bill C-217. The proposed legislation would allow for the mandatory testing of individuals who may have accidentally or intentionally exposed another person to their bodily fluids. Certainly the introduction of this legislation would be extremely positive. However, testing can take time and false results are possible.

This is all about victims—and I was a victim—being able to make informed decisions based on all the available information. It would have been of great assistance to me that night.

Mandatory testing is one needed component, while the ability to access medical information is the other.

I will now ask Bruce to conclude our presentation.

Mr Miller: First of all, we'd like to take this opportunity to thank all members of government for the law-and-order initiatives that have been either proposed or legislated. We appreciate all of your continued commitment to community safety. However, this is another area where we are asking for your assistance. We are appearing before you today with what we feel is a request for common sense legislation. We believe section 33(a) of the proposed act can be used to access this information but needs to be clarified to include all the situations we've discussed.

We have countless examples of deliberate attacks on police personnel by people with HIV and other diseases. Rubber gloves and universal precautions only reduce the risk. We have had members spat upon, deliberately bitten and exposed to free-flowing blood and other bodily fluids by an attacker. Lax federal laws and inadequate legislation only serve to increase these incidents.

We are seeking your assistance not only to protect our members but all emergency workers, victims of crime and good Samaritans. They need your support. We don't doubt there may be unfounded concerns raised by civil libertarians. This is not an attempt to gather further evidence. This is not an attack on an individual's rights. This is common sense legislation designed to help protect victims and their families, because, at the end of the day, anyone involved in a situation like this is a victim.

In closing, I'd like to take this opportunity to thank the committee for allowing us to appear here today. We'd be prepared to answer any questions that you may have.

The Chair: Thank you very much. That affords us about two and a half minutes per caucus.

Mr Wood: If we were to prepare legislation along the lines of what you've suggested, would you have a problem if the information were available only through judicial process; in other words, through, in effect, a search warrant?

Mr Miller: My only concern with judicial process, Mr Wood, would be the time element. The treatment has to begin within approximately two hours after a person has been affected. So we have to have the ability to get a speedy search warrant. That would be the only stumbling block to that.

Mr Wood: Would you have any problem with restrictions on the use of the information solely for the treatment of the person involved in the incident?

Mr Miller: None at all. Our objective is to protect emergency workers, good Samaritans and victims of crime. We're not looking for any other avenues.

Mr Wood: Would you have any problem with restrictions on disclosure of the information to any third party? If it was disclosed to the caregiver and the person involved in the incident, would you have a problem on restrictions about disclosure to anybody else?

Mr Miller: Certainly I don't see the need for any disclosure to anybody else. We're just trying to protect these groups and the individual's rights as well.

Mr Wood: Those are my questions.

Mrs McLeod: I think Mr Wood's last question was getting around the fact that the recipient of the information about that other individual's health record is not bound by anything that's in Bill 159 currently. So the issue of how do you then protect the subsequent disclosure of that health information is a really difficult issue for us to deal with.

You mentioned clause 33(a) of Bill 159, which does allow for the disclosure of personal health information where there is a risk. In the situations that you've described, particularly an assault on a police officer, perhaps a sexual assault where the person who is alleged to have made the assault can be identified, do you think that the health care custodian would consider that evidence of risk and that that would be justification under 33(a) to provide the information or to recommend a treatment to the individual who was assaulted?

Mr Miller: I would hope the health custodian would. That's where proper training, in my opinion, needs to come in for the health custodians, to explain that this venue was possible for these affected groups. If there isn't some procedure or process explaining it written out, certainly the health custodian may well be reluctant to give that information.

Mrs McLeod: You mention as well the good Samaritan and you reference giving of CPR. That inclusion could broaden the application of 33(a), if you specified that, basically anybody who gives CPR to somebody. That would really broaden the access to personal health records significantly. Would you agree? Do you think it needs to be that broad in interpretation?

Mr Miller: Certainly it would broaden it, but we have citizens out in Ontario who actually risk their lives to save individuals. They're stopping to help out at serious accidents. They're going far beyond the call of what everybody expects from an everyday citizen and they need to be protected. They're doing these actions; we should be supporting them.

Ms Lankin: Could you tell me how you would like us to describe these circumstances in the legislation? Is it that anyone who is exposed to anybody else's bodily fluids would have access to health information?

Mr Miller: Certainly we'd have to sit down and draft language to come up with that. We're just speaking to the general intent.

Ms Lankin: But who do you envision? You just mentioned anyone who gives CPR, I guess like a lifeguard who pulls a child out of the pool, for example, someone on the side of the street, perhaps someone who is a victim of an assault by another—not a police officer who is a victim of an assault but an assault victim, whether the assaulter is a known criminal or the assaulter is someone in a position of authority. It can happen. Recently there was an alleged circumstance in one of our correctional facilities that an individual was beaten by authority figures. Would that individual then have the right, if there were scrapes and exposure to bodily fluid, to get access to the records of those individuals?

Mr Miller: Sorry, you lost me on the last one.

Ms Lankin: A prisoner in a jail cell recently alleged that he was beaten by a number of correctional officers. It's alleged. I'm a former correctional officer; I understand some of the things that happen in these institutions. What would the rights of that individual be under what you're proposing? Would that prisoner be able to get access to the personal health records of the correctional officers?

Mr Miller: I don't think we're trying to limit anybody's ability to access it if it's a valid situation. Certainly in the proposed act there are provisions for correctional facilities to have medical records.

Ms Lankin: No, I'm talking about the prisoner getting the guards' records.

Mr Miller: I realize that and I'm saying we're not trying to limit anybody's ability if it's a valid circumstance, but certainly the proposed act does recognize the danger when it allows correctional facilities to access inmates' records. It's certainly a valid concern. You worked in a correctional facility and you know some of the dangers that you and your co-workers were faced with on a daily basis.

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Ms Lankin: I'm just trying to understand. Obviously, I don't think it could be crafted in a way that was geared to just police officers, emergency workers and good Samaritans. It would have to be a provision that's very broad, that wherever there is an exchange of bodily fluids under duress, I guess, that person would then have access to medical information.

Let me ask you the next question. What range of medical information would you be seeking? Anything in the person's history? Anything that's a communicable disease? What are the restrictions in terms of what information you're accessing?

Mr Miller: Obviously I'm not a physician, but the restrictions would be only diseases that could infect one of these affected groups. That's all the medical information we're looking for. Does the person have hepatitis A? Does the person have hepatitis C? Does the person have HIV? And there are several other diseases as well.

Ms Lankin: Meningitis, you mentioned.

Mr Miller: Yes.

Ms Lankin: Once you're the recipient of the information, you said you didn't have a problem with having restrictions on what you can do with it. I'd just ask you to turn your mind to potential workers' compensation insurance claims that you may be making if it's in the course of duty, or a good Samaritan who may choose to look toward a lawsuit or something. That information would not be able to be submitted in those future proceedings, then.

Mr Miller: Our concern is the health welfare of emergency workers, including police officers, firefighters, ambulance attendants, victims of crime, good Samaritans. That's our concern. We're not looking to gather any other information, and certainly legislation could be put in place to prevent the dissemination of that information.

The Chair: Thank you for coming before us this morning. We appreciate it.

ONTARIO DENTAL HYGIENISTS' ASSOCIATION

The Chair: Our next presentation will be from the Ontario Dental Hygienists' Association. Good morning and welcome to the committee.

Ms Pat Spencer: Good morning. My name is Pat Spencer. I am a practising dental hygienist and the current president of the Ontario Dental Hygienists' Association, the ODHA. With me today is Linda Crawford, our executive director.

As you may be aware, the ODHA is the voluntary professional association representing the vast majority of over 6,000 dental hygienists who are currently registered to practise in Ontario. The ODHA is, I believe, the sixth-largest health care association in Ontario. Dental hygiene is a regulated profession. Since 1993, we've had our own self-governing college, the College of Dental Hygienists of Ontario.

Before commenting on Bill 159, I'd like to express our appreciation for the opportunity to appear before this committee and to put our views on Bill 159 before you and on the public record. Even if this bill dies on the order paper, this review and the dialogue with practitioners is useful in bringing back a better bill.

Access to and exchange of health record information is both critical to and commonplace in the practice of dental hygiene. Dental hygienists are usually the first health care practitioner a client sees in a dental clinic. Dental hygienists usually interview the client to complete the health record as the starting point for dental hygiene assessment and treatment. The health record then forms the basis for any subsequent examination and diagnosis conducted by a dentist.

Why, you might ask, would someone who is removing the plaque on your teeth need to know the health care status of a client? There are many reasons. If you have had a recent joint replacement, the possibility of infection arises due to the bacteria in the mouth that will be released into the bloodstream as the hardened plaque is broken up and removed. If you are a cardiac patient or a diabetic, you may be on a range of medications that contraindicate treatment, or you may require special precautions. We have to know these sorts of things before we begin, and so we take a comprehensive medical history and conduct a comprehensive assessment. We need to know to provide safe, appropriate care. Accurate and up-to-date health information and the protection of confidentiality is as crucial to the dental hygienist-patient relationship as it is to any other health care practitioner-patient relationship.

We believe that proposed legislation such as Bill 159 is an important building block in health reform. It's also demanded by our increasing reliance on electronically stored and transmitted data, the growing multidisciplinary approach to health care delivery, the need for more

and better data to assess health outcomes and the cost-effectiveness of alternate health care interventions, and demanded by the growth of privately funded and community-based health care.

Notwithstanding, the ODHA does have reservations about the bill and its implementation. Let's begin by addressing what we think is the fundamental need, and quite frankly, one of the major shortfalls of the bill. We are concerned that this bill emphasizes access to health records over the protection of patient privacy. Because Bill 159 would be paramount over the RHPA, and therefore our own college's regulations, we're afraid this orientation actually turns back the clock in terms of privacy protection.

For example, the definition of "health information custodian" in section 2 is very broad. The definition includes not only health care practitioners and service providers, but also the Minister of Health and Long-Term Care, members of district health councils, Cancer Care Ontario, researchers, program managers and so on. In our view, there's no a priori justification for many of these to have general access to personally identifiable information.

Furthermore, the bill unnecessarily expands the instances in which personal health information may be disclosed without that person's consent. For example, subsection 26(3) permits a health information custodian that is a health care facility or organization to "use or disclose the individual's name and address for the purpose of fundraising activities" without the patient's consent. We object fundamentally to personal health information being released for fundraising activities.

We are also concerned that personally identifiable information could be used and disclosed to the Ministry of Health and Long-Term Care for planning purposes, pursuant to section 27(e); for research purposes, pursuant to section 27(i); or for any third party user. In our view, the legislation should explicitly state that identifying health information will not be disclosed if anonymous information is equally available.

We're concerned that Bill 159 would make our patients under 16 years of age have their personal health information released without consent. I am referring specifically to subsection 46(2)(a). Let me give you an illustration. Whether a person smokes is a piece of vital information for dental hygienists. Teenagers often don't want their parents or guardians to know they smoke. I think a practitioner would be duty bound to tell a patient that the confidentiality of this kind of information cannot be guaranteed. That could affect the patient's candour and the level of trust in the patient-practitioner relationship, thereby detracting from our ability to provide quality and appropriate care.

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We are also concerned about the broad discretionary powers given to the Minister of Health and Long-Term Care to extend access to health information and thereby mute the bill's effectiveness in protecting privacy. For example, section 30 stipulates that the minister may disclose personal health information to anyone the minister

designates by regulation. The fact is that the health record is the property of the patient. In our view, the basic, immutable and overarching principle should be that no information should be shared beyond the health care practitioner team without the knowledge and expressed consent of the patient.

Informed consent should be at the heart of any privacy legislation, as it is with any treatment, and as it is with the federal legislation. We like the formulation in the federal legislation, the Personal Information Protection and Electronic Documents Act; namely, information cannot be collected, used or disclosed without consent, and information can only be collected, used or disclosed for the purpose for which consent was given. This bill allows for the collection, use and disclosure of personal health information without consent in a variety of circumstances. For example, clause 22(4)(d) allows the collection of personal health information from a third party without patient consent or even knowledge.

The ODHA recognizes that the requirement to obtain case-by-case informed consent before disclosing historical patient information could be a costly and time-consuming endeavour. The ODHA suggests the creation of a standardized consent form specifically for research use. Patients receiving treatment would be asked to provide consent in advance, thereby eliminating the time and cost involved in contacting individual patients retroactively. The patient should also be provided with the opportunity to decide which information could be divulged. The form would explicitly state that confidentiality would always be protected and a time limit—for example, for research studies over the next five years—would be imposed on disclosure.

Subsection 20(1) requires that a health information custodian be appointed, which appears to be a very good idea on the surface. Dental hygienists already follow stringent health record management policies and procedures defined and enforced by our college, the College of Dental Hygienists of Ontario. That is not an issue here. The issue is that some of our members operate independently or in small offices. Many, like me, are in rural or remote areas. Our margins are the thinnest of the thin. The statutory requirement for the designation of a custodian will add a substantial administrative burden, without any offsetting compensation.

We trust, by the way, that sole practitioners such as myself can designate ourselves as the custodian. If so, the bill should make it explicit. If not, the requirement will simply not be sustainable by our practices.

The ODHA supports the creation of a research ethics review body. We regret, however, that the review body will not be empowered to review requests for personally identifiable information made by other parties, such as the Ministry of Health and Long-Term Care, Cancer Care Ontario and public hospitals. We suggest that the ethics review body waive the need for informed patient consent only if the following criteria are met: (1) the rights and welfare of the patient will not be adversely affected; and (2) the research could not practicably be carried out

without the waiver or alteration of the consent requirement.

Part VIII of the bill gives patients the right of access to, and the right to request correction of, their personal health information. This is good. Section 44, however, lists five exemptions, several of which are troublesome. We believe the right of access and requests to correct one's own personal health information are an essential part of privacy protection and should be unrestricted. Therefore, mandatory exclusions should be avoided.

Furthermore, clauses 44(d) and (e) allow some personal health information and information under the custody or control of a class or classes of custodians to be excluded from this part of the bill by regulation. This kind of broad administrative discretion should not be countenanced in this bill. Access to health records and personal privacy should not be subject to the exercise of political discretion.

Electronic collection, storage and transmission of health information increase the risk of unauthorized use of health records. Because of the increasing role of electronic collection, storage, retrieval and transmission of health care data, it is important to be sensitive to both public perceptions and the likelihood that computerized abuses of health records will increase. We therefore suggest that the bill require the electronic storage and transmission of personal health information to be encrypted.

Mr Chairman, that concludes our formal statement. We have also made a detailed written submission to this committee. Thank you for your attention.

The Chair: Thank you very much. That affords us just under two minutes per caucus for questioning. We'll start this time with Mrs McLeod.

Mrs McLeod: Thank you very much. It was a very thorough presentation. I appreciate your drawing a number of the concerns to our attention that we're certainly hearing about the legislation that we think need to be addressed.

One of the issues you've touched on that we haven't heard a lot about is the added administrative responsibilities of being the designated health information custodian. I am assuming, although maybe we do have to clarify it in the legislation, that where you are a solo practitioner you can designate yourself as that health information custodian. Assuming that's the case, could you say a little bit more about the ways in which your practices as that health information custodian would have to change from what they are now and what the costs would therefore be to you?

Ms Spencer: I work in long-term care. At the present time when I treat a patient, I keep a copy, leave a copy with the facility and send a copy to the contact, whether it be the public trustee or the family or friends—whoever is the designated contact. I am then responsible for the disbursement of that information. The cost of ensuring the transportation, the courier to the contact person would be one. It has not been defined whether I would have to set up a whole computerized system if it's going to be

electronically stored. Would I have to make arrangements with a central agency? Would I actually have to pay for access to the long-term-care storage? There are so many unanswered questions in that respect.

Mrs McLeod: Is one of your concerns that there could be future requirements, for example, to store records electronically, without there being compensation for what would be obvious costs in setting that up?

Ms Spencer: There may be licensing costs to access any number of centres where the data might be stored. We don't know if it's going to be centrally stored. There was some discussion on trying to decide even who would be holding the electronic information.

Mr Wood: I'd like to take you back to the part of the submission where you spoke about data being made available for research purposes without consent. You've said, in effect, where it can't be done; otherwise, you think that might be permitted under basically firm guidelines. That's what I took from your submission. Did I correctly pick up on what you were saying?

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Ms Spencer: We would prefer that where it can be done anonymously it would be done that way, or if it could be disclosed so that you can get consent ahead of time. Am I understanding your question correctly?

Mr Wood: What I thought you were saying is you feel there are some cases where it may be necessary for the purposes of research to make data available without the consent of the person. That's what I thought you were saying.

Ms Spencer: We prefer that it be done with consent but that there would be time limits. The individuals might be more amenable to giving their consent if they knew there was going to be a time stipulation and that they would have input into what information would be released.

Mr Wood: What about the oversight of that? You're familiar of course with the ethics committees that are proposed?

Ms Spencer: Somewhat. I'm not sure; I'm not an authority.

Mr Wood: OK, let me try and make this very simple. There's a proposal for some oversight committees. My question is this: should the oversight committees have the final say or should the final sign-off be someone like, for example, a privacy commissioner? Should there be an identified public official who has final sign-off or do you think it should be the committees themselves that have final sign-off?

Ms Spencer: From my understanding at the present time, as long as there was a review process to protect the information of the patient, whatever form that might take.

Mr Wood: That's really my question. Do you think that the committees themselves should have the final sign-off, or should there be some public official who has the final sign-off on a research project?

Ms Spencer: That's not something that we have actually explored. I would have to do some research and come back to you on that.

Mr Wood: Feel free to send a memo to the committee and a memo to the minister once you've had a chance to think over your thoughts on that. Thanks.

The Chair: Thank you very much for coming before us here today.

Ms Spencer: Thank you.

ASSOCIATION FOR HEALTHCARE PHILANTHROPY CANADA

The Chair: Committee members we have another group which is not in your schedule. Apparently there was some difference of opinion between the clerk's office and the presenters, but it seems we do have some time before noon. It's the Association for Healthcare Philanthropy. Perhaps they can come forward to the witness table, please. Welcome to the committee.

Mr Michael Farrell: Mr Chairman, honourable members, thank you for accommodating us. We very much appreciate that. My name is Michael Farrell, I'm the executive director of the Hamilton Health Sciences Foundation, but I'm the chair of the Association for Healthcare Philanthropy Canada. To introduce the delegation that is with me: I have Leslie Sher from the Greater Niagara General Hospital Foundation, Sally Dobbie from the Trillium Health Centre Foundation, Gina Rosen from Markham-Stouffville Hospital Foundation. To my right, Anne Randall, who is the president of the St Joseph's Health Care Centre Foundation in Toronto, and Carol Chabot from the University Health Network Foundation in Toronto.

We are here, first of all, on behalf of the Association for Healthcare Philanthropy and we bring this delegation, more than anything, so that you'll understand that we're represented province-wide. We have 400 members in Canada—200 in Ontario—and we have members representing the fundraising offices in virtually every major health care facility in the province.

We are here to endorse both the letter and spirit of Bill 159. It recognizes the importance of grateful patients to the health care system, and we are in support of that.

By way of background, you should be aware that in Ontario virtually every health care provider in the province is currently following up with grateful patients and offering them a chance to participate. We do this with utmost sensitivity and with respect of confidentiality. I have attached some documents at the back of this which are the standard of professional behaviour that our organization adheres to, a donor bill of rights, and general guidelines for the type of grateful patient programs that may run across the province, and in fact across North America in this case.

Grateful patient programs offer an opportunity for individuals whose lives and good health have been preserved or enhanced through the use of the health care system to contribute in support of the continued delivery of these services. We have taken great care to respect their privacy.

I want to talk a little bit about health care and philanthropy in Ontario. As you know, we are in the midst of probably the most significant reinvention, if you like, or restructuring of health care in recent history. You also know that 30% to 50% of the capital project costs are costs that rest with communities and with hospitals. Much of the work being done to generate that sort of revenue is being done by the hospital foundations and the fundraising offices across the province. In a study done in the greater Toronto area in the year 2000, they identified in the next five years some campaign totals in excess of \$1.6 billion. We would expect that sort of number would be double across the province. I can't nail that down exactly, but certainly it would be that order of magnitude.

Philanthropy's influence on the health care system goes way beyond the bricks and mortar. I think the importance piece to understand is that philanthropy now has found its way. Whether its partnerships with the faculties of health sciences at the various universities where we have fellowships or shares in some of the smaller community hospitals and in community hospitals across the province, we're seeing much of the innovation in the health care system. This is the result of philanthropy and people in the community who want to participate in their health care system and have done that and have shown that sort of leadership.

There's an old saying in fundraising that goes something to the effect of, "Even if you don't need the money, you ought to do this for the dialogue," and the communications that come out of development offices, whether they be part of the hospital or part of the foundation, put the best foot forward for our health care system, explain the health care system and explain opportunities to these individuals. Quite frankly, this may be the time they listen most to us: to explain the health care system, how they can participate, their importance.

I think that when we come to the very core of the matter—our two surveys that have been done, one in Hamilton was done at the hospital that I was in prior to merger and was repeated again at the North York General—the point here is that 80% to 82% of the individuals who are donors identify themselves as either grateful patients or immediate family of grateful patients. I think that statistic, in and of itself, is significant and that our ability to communicate with former patients of the health care system is absolutely critical. It's one of the linchpins of the work that we do in the community.

Now we get to the whole issue of notification. We're addressing section 26(3), "Exception re fundraising," and it's (2) where the act tries to define what notification is. First and foremost, we agree completely with the concept of notification; in fact, it may come as a shock to you that we don't want to contact people who don't want to hear from us either. It's expensive. We would rather not send letters or contact in any way the folks who don't want to hear from us. Being aware of this, we have wrestled with this for several years: how will we do it?

The ethical dilemma that comes forward is that some of our hospitals even considered trying to have people sign off on their own at the hospital just because it would avoid that mailing to someone who may not want to hear from us. It creates a very serious ethical problem. For anyone entering our health care system who is ill or sick or somehow has their decision-making weakened, it is an inappropriate time to ask them to make a decision about participating in any way with the hospital. It's just not appropriate.

The concept of trying to do so at discharge is difficult, because in hospitals you discharge from all over the place. You discharge at different points all through the hospital. It's not that easy a piece to deal with. Then there's the issue of outpatients, as well, that is challenging.

All these things considered, we have first considered some of the things that certainly by practice we think ought to be considered as part of notification. That could include signage in the emergency and admitting areas of the hospitals. Again, because of the way people enter the hospital, no one of these will ever be enough, but the availability of an opt-out card and postage-paid return envelope in emergency and admitting areas—the importance of the attachment of a postage-paid envelope is that, even in this situation, we would rather these folks are not confronted with having to hand that or make known that decision to someone that they are opting out. It's something that they can do in the privacy of their own home or send home with a loved one.

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Further, and more significantly, the inclusion of an opt-out card and postage-paid self-addressed envelope with the first correspondence to potential grateful patient donors: herein lies the meat of what we would consider the recommendation around notification. AHP Canada recommends, for the purposes of this legislation, that a hospital or its affiliated foundation should mail its solicitation correspondence to patients no sooner than one month after either the discharge of an in-patient or visit of an outpatient.

Let me talk for a second about that concept of one month. You will see in some of our guidelines and in the general guidelines that it can be as much as three months. These are international guidelines and, quite frankly, in the United States model they are usually suggesting you don't do this until all the billing has cleared. That has driven the three-month period in our general piece. We feel that the ideal time is approximately six weeks, because that allows the patient to have probably regained their strength and made them in a better position to make any choice. They're outside of the health care sphere and would be in better shape. We believe they ought not to be at all contacted before one month. We didn't just pick one month; there was some rationale there. After one month, there is some stability. It ought not to be before that.

Further, we recommend that this first correspondence must include a card and self-addressed, postage-paid

return envelope that allows the individual to have their name removed from hospital/foundation solicitation programs and that this card be considered written notice, as described in subsection 26(3), "Exception re fundraising," paragraph 2. The act currently reads that there ought to be written notification. What we're saying is it can be cost-prohibitive for us to send a letter asking not to send a letter. What we're suggesting is that in that first correspondence there be a postage-paid opt-out card that the individual could respond to us to have their name removed.

I would further say that if you go into some of the practice, we in daily practice encourage people to opt out if they don't want to correspond with us. I would go back to this point: fundraising is, by its very nature, a voluntary endeavour, and we have no intention to foist ourselves upon people. It's an interesting discussion when we talk about philanthropy in its purest sense that quite often you get people talking about the idea of arm-twisting or things of that nature, and it's just so far from what we do in our daily jobs. What we do is we encounter people who are of goodwill, who have come forward to make a difference. Those are the folks that we want to talk to; those are the folks that we continue to talk to. We believe that with only slight changes to the piece regarding notification, we can achieve that end.

We are here to answer questions. I would again thank the committee for their indulgence.

The Chair: Excellent. Mr Wood, we'll start with you. We have about two and a half minutes per caucus.

Mr Wood: I thought it was a very clear and helpful presentation. It was so clear and helpful, I don't have any questions. But thank you very much for coming.

Mrs McLeod: Very quickly one, and then my colleague has a question. I appreciate the issue around notification. I've had that raised by our own hospital foundation with the same sensitivity that you've expressed today. Do you think it's appropriate, though, to leave the provision to the regulation, which is allowed for in the legislation, rather than be that specific in the legislation itself, or should it be in the bill?

Mr Farrell: I'm sorry. I didn't quite hear you.

Mrs McLeod: The notification issue: should it be in the legislation, or is it sufficient to leave it up to the regulation process?

Mr Farrell: It would be fine with regulations. We would take the direction from the committee. I just think that it needs to be defined.

Mrs Pupatello: Thanks for your presentation. I appreciate the stress you're under these days to fundraise in your sector too. In essence, you're suggesting that there would be a similar to a negative-option billing issue in that where you need to have consent in order to send people a letter for fundraising, you need to have the net cast, and if the people don't want to, then they need to report back to you. That's the condition you'd like to be able to fundraise in?

Mr Farrell: Effectively, yes. We can't find a way to do it otherwise.

Mrs Pupatello: Because it's so inappropriate in emergency situations etc.

Mr Farrell: Any time. When someone is in the hospital, even when they're near discharge, as people are leaving the hospital, I don't think it's a fair time to ask them to make a decision. They're still weakened and ill. We have wrestled with that. I would just go back to the point again that we really don't want to mail to people who don't want to hear from us, but without being able to cast the net, we don't know of any other way to intervene, and we hoped that by this—

Mrs Pupatello: But you would likely acknowledge that once you are sending out a general mailing to everyone who has come through those doors, that envelope can land in a home where others in the home aren't aware that this individual accessed health services though the hospital?

Mr Farrell: For the most part, yes, we can't say that couldn't happen, but you'll see that there are extensive exclusions almost all of the time. We ask the hospital before we get the records to exclude—and you'll see a general list of the type of exclusions that might be there.

Mrs Pupatello: Yes, I saw that. Name some for me.

Mr Farrell: Police admissions, abortion, psychiatric admission, and the list goes on. Anything that we would consider—

Ms Anne Randall: Usually under a certain age.

Mrs Pupatello: So those are at your discretion, who have made that list, for what you feel is appropriate?

Mr Farrell: What we have done is, and it comes back to the same point, we have tried as generally as possible—in each organization right now, none of us wants to mail to those individuals. We also allow individual caregivers to exclude people. We don't see what's happened, so that there's the opportunity for a caregiver at any point to stop that process. Quite frankly, that happens right now in a different manner at each one of our organizations, but we get a very limited amount of information.

Mrs Pupatello: It was interesting how this whole thing sort of grew. It may not be a matter that people mind that this information is immediately passed over to the foundation, but that there really is no law governing the fact that you can or cannot. If it's generally well known that you can, it's interesting that you are a separate incorporated body. It is not within the confines of the same corporation. So you are handing information over outside of the corporation and into the corporation of the foundation, because in every case your foundation is a wholly different corporation. Correct?

Mr Farrell: That's correct. It's not always done that way. In many cases the hospital is generating the letter and the only things that will come to the foundation are the positive responses, so it operates differently. In some cases the foundation is in fact generating those letters; in some cases they're being generated by the hospital.

Ms Randall: I would suggest they come from the hospital more times. There's a larger percentage that do it that way. That's the way we do it in ours. We don't ever

see those names. The only thing we get is the donations on the foundation side.

Ms Lankin: I'm sorry; I was outside when you made your presentation, but I just read through it. My experience, in fact, has been the opposite. In two or three circumstances with different hospitals with myself and family members, the letters have come from the foundation. I wasn't unwilling to receive the information, but I found myself surprised that information had been handed out of the hospital corporation and over.

Perhaps we should be looking at some restrictions around this that don't simply exempt the passing of that information, but that require the hospital to take the first step and get consent and then pass it over. How that consent is done—I understand Mrs Pupatello's concern that any kind of correspondence to the person's home could inform others, but that's true of billings. If there are outstanding billings from your semi-private room that your insurance hasn't covered yet, that correspondence is going to come to your home address, so I'm less worried about a letter coming from the hospital that includes the kind of consent card to pass the name over.

If that were the case and that were required so that foundations were not able to receive individual patients' names unless they had agreed to have their names passed over, would you have a concern with that?

Mr Farrell: Part of the discussion we had was trying to find a place and a way to get the consent. What happens is, if anyone is asked to do that in a hospital environment, it creates a real dilemma. We would have done that, but what I was explaining before was that we don't want to mail to people who don't want to hear from us.

Ms Lankin: I know, but given your suggestion that the letter go out within a month, for example, what if the rule was it has to be the hospital that sends it, not the foundation?

Mr Farrell: That would not be a problem. It's interesting you've mentioned the absence of legislation. I know that in my situation we have a signed confidentiality agreement with the hospital and have declared what we get and how. Each individual who would even work with that signs it. We have done that in the absence of legislation. As I say, we support this in that it clears that up and will define some of that. I don't believe there would be any serious resistance from us.

Ms Sally Dobbie: I'd also mention that at Trillium Health Centre that's exactly how it's handled. The foundation actually never sees the name until that person is a donor. The hospital information department and the health records department are actually very interested in all the exclusions before those lists go to our direct mail house. Should a person choose to make a donation, then that name comes in to the foundation—

Ms Lankin: I'm sorry. Did you say the hospital sends those names to a direct mail house?

Ms Dobbie: That's right. It never passes through the foundation. We don't actually get the patient records.

Ms Lankin: Is there not a problem with that information going to a direct mail house? There's a third party who is receiving a list of names of people who were patients at this hospital.

Ms Dobbie: But there's a contract between the hospital and the direct mail house. They work closely together so they know those lists are confidential, and it keeps it removed from the foundation's records. In other words, we don't have the patient database in our files. That's the way we handle the confidentiality issue.

Interjection.

The Chair: We're over time already.

Mrs Pupatello: I've got a really important question.

The Chair: Perhaps you could ask it after, in deference to the other—

Mrs Pupatello: It's important that it be on the record.

The Chair: Very quickly.

Mrs Pupatello: I just want to know if there's a restriction anywhere to selling lists. Can you include that in an answer somewhere?

Mr Farrell: We absolutely do not trade and sell lists. It's a practice that doesn't exist in the health care sector.

Mrs Pupatello: But the mail house does.

Mr Farrell: No, those lists are seeded with bogus names all through them, and there are security issues that go through that. Any mail house that had ever done that—the government, I'm sure, must use mail houses on occasion to do this sort of thing.

Mrs Pupatello: More and more.

Mr Farrell: Anyone who would ever breach that would put themselves out of business. It would be illegal. They would be subject to all sorts of other penalties outside of what we've done.

The Chair: Thank you very much for bringing a different perspective to the hearing this morning.

With that, we stand recessed until 1 o'clock.

The committee recessed from 1203 to 1306.

ONTARIO PSYCHOLOGICAL ASSOCIATION

The Chair: Good afternoon. I call the committee back to order. Our first presentation this afternoon will be from the Ontario Psychological Association. Good afternoon and welcome to the committee.

Dr Christian Keresztes: I'm Christian Keresztes. I'm a psychologist and chair of the ethics and policy committee of the Ontario Psychological Association. The Ontario Psychological Association is a voluntary organization that represents psychological practitioners in Ontario. Its mission is to be an advocate for issues of importance to both the public and its membership.

The association has followed the development of this legislation with great interest, participating in previous requests for feedback both through a written brief and by attending meetings to discuss the legislation. The association's current response has been developed primarily by its ethics and policy committee. This committee is responsible for providing ethical guidance and

assistance to members and for preparing ethical and other policy statements pertinent to psychological practice.

Psychological practitioners are health professionals, regulated by provincial statute and governed by the College of Psychologists of Ontario. In the course of their work, psychologists both produce and make use of extensive personal health information. For instance, we conduct and record the results of psychological assessments of personality and of the social-emotional, behavioural, intellectual and neuropsychological functioning of children, adults and families in a variety of settings, including health facilities, social services, schools, industry and corrections. We provide mental health counselling and treatment to citizens of all ages. These services often involve, as an integral part of the therapeutic process, the sharing and recording of an individual's most private and sensitive feelings, thoughts and life events. We access physical and mental health information collected and recorded by others to aid in our assessment and service activities. We access physical and mental health information to research the causes and patterns of health problems in the interests of knowing how to prevent and continuously improve the treatment of those problems.

OPA welcomes Bill 159. OPA welcomes the legislation, recognizes the need for it, and endorses its intent and comprehensiveness. In an era of growing concern about privacy, occasioned partly by the ease of electronic data interchange, the protections intended by the act can contribute to maintaining public trust in government and in our health care system.

OPA welcomes, in particular, the following aspects of Bill 159: the codification of limitations on the collection and disclosure of personal health information; the codification of individuals' right of access to their own health information; the codification of the responsibilities of health information custodians and information managers, regardless of whether the setting is a sole practitioner's office or a large organization; and the responsiveness to previous consultations.

One example of this, and of great importance to psychology, is the incorporation of a suggestion made by OPA at one of the consultations; namely, the right to refuse access to raw data from psychological tests. This will ensure the continued utility of these tools for assessment and protection of individuals from harm due to misinterpretation of raw data by persons not trained to interpret such data.

In spite of OPA's opinion that the act is needed and incorporates much that will be helpful to the protection of personal privacy, the association has some very serious concerns about Bill 159.

The first of these is the removal of the lockbox provision. Given that different types of health information have different levels of sensitivity, the implementation of a lockbox provision would be helpful. For instance, patients would have more direct control over their privacy if they had the right to limit the transmission of selected psychological and psychiatric

information to other health care providers. Such a provision was included in previous versions of the act. It is our strong recommendation that it be put back into the act.

Second, there is a lack of explicitness about the need-to-know criterion. An explicit statement clarifying the principle of need to know and its application would strengthen the legislation. Application of this criterion would ensure that personal health information custodians and managers include this concept in policies and procedures related to the sharing of information in an office or health facility. For example, there should be graded access to the contents of electronic health records, so that potentially sensitive physical or mental health information should not show up on a receptionist's screen. In addition, policies and procedures should ensure that employees, contractors and consultants understand their responsibility not to seek or search for information they do not have a legitimate need to know. Also, the implementation of health information systems and networks must guarantee the control of access to personal health information in accordance with defined need-to-know criteria.

Subsection 21(3) stipulates the nature and extent of the information to be collected, used or disclosed that may be identified when seeking consent. OPA believes that such information should be conveyed in all situations of obtaining consent for disclosure.

Third, there is the implied definition of the record as a single entity. The current definition of a record, although comprehensive, can be construed as being a unitary entity, suggesting that a disclosure means disclosure of all the information in a record. As such, instead of looking for relevant information, the entire record may be sought or mandated, much of which may not be relevant to the purpose. This is particularly problematic when information is sought for investigative purposes, such as warrants, or for proceedings. Often, a warrant does not provide any option to limit disclosure to relevant information. We believe the provision of warrants without true judicial oversight about the nature, level and relevance of the health information being sought promotes fishing expeditions, unwarranted invasions of privacy and potential harm to the individual.

Recent changes to the Child and Family Services Act regarding tele-warrants have already raised similar issues for us. Access to an adolescent's most private thoughts and feelings, when unwarranted, can be devastating to the adolescent's treatment process and to his or her future willingness to engage in mental health treatment.

One recommendation that might help offset this problem is to make it clear in the act's definition of a "record," that a record includes the concept of a part of a record. This latter phrase is used in subsections 34(9) and 48(5), but is not used consistently elsewhere. Using it in the definition would offset the need to use the phrase throughout the act.

A second recommendation is that the act establish special protections, such as when obtaining a warrant, for

certain types of health information; for example, information in a lockbox or highly sensitive information like psychotherapy notes. In this latter case, OPA notes that the recent US regulations to the Health Insurance Portability and Accountability Act established special protections for psychotherapy session notes. Such protection does not include factual information about diagnoses, medication and attendance at sessions, but it does include protection of notes about the individual's feelings and thoughts.

Fourth, there are profuse and unclear exceptions to the need for consent. There are a large number of permitted uses which allow for disclosure without consent and which we believe are a matter of concern to psychologists as health service providers and as citizens: the whole issue of directed disclosures which gives the Minister of Health considerable power to compel disclosure; apparent exemptions for insurance companies and WSIB; unclear exemptions for employment and labour relations purposes. The possibility of employer access to health records is particularly worrisome.

The presence of such a large number of exceptions in part VI undermines the intent and credibility of the act. In many of the exceptions, we believe there needs to be someone with independent judicial authority who can establish and review whether a disclosure for a warrant, proceeding or court production is relevant and who can remove what is not relevant.

When personal health information is released into a proceeding without consent, the act, in subsection 34(4), provides for a process of judicial review, unless "(d) the proceeding is one in which the competency, conduct, actions, licensing or registration of a person are in issue." We believe this exception is unnecessarily and dangerously broad. All proceedings appear to be included. What proceeding is not a proceeding about one's conduct or actions? It is not hyperbole to consider the absurd example that a parking ticket could be argued as a proceeding to warrant disclosure of a health record without consent.

It is not clear how the provisions of Bill 159 apply to insurance companies, employers and workers' compensation boards. Why should these organizations be treated differently from others? Clarification is needed regarding the protection of personal health information by and from these organizations.

Fifth, there is an onerous burden on health care research. It is our strong opinion that section 32 has the potential to create a structure that would make even very simple research projects extremely difficult to carry out, placing unnecessary obstacles in the path of research undertaken to improve direct health care and the health care system. Under the act research ethics boards, which presently exist in universities, will have a legal obligation to enforce what have until now been consensually established guidelines, namely the federal Tri-Council guidelines for ethics in research. This is a significant and novel shift in function for university research ethics boards, and they might not be equipped to accommodate

the volume of requests that the legislation would be expected to generate. The act apparently does not allow for institutions that are health information custodians to create their own research ethics boards for this purpose.

The act also goes beyond the Tri-Council guidelines in requiring written consent for research. Under the Tri-Council guidelines, oral consent is acceptable under some circumstances, such as in respecting cultural differences, as perhaps among First Nations people.

It is our belief that the current research provisions of the Mental Health Act would provide a much more realistic and reasonable structure for the use of personal health information for research purposes.

We are aware that the possibility of linking health information databases for research purposes was not addressed in the Mental Health Act. This is a new concern in light of recent technologies and may have led to many of the unwieldy provisions of Bill 159. We appreciate the opportunities, complexities and challenges that these new technologies bring. However, we believe the entire section on research needs rethinking. To this end, it might be helpful to incorporate concepts that differentiate between forms of health information, such as personally identifiable information, non-identifiable information and hidden identity information. Such a differentiation might enable access to information on linked databases without undue risk of violations of privacy. The researcher who accesses hidden identity information would never be aware of the personal identity of the persons whose health care information is being accessed. There would be strict control over the linkage codes, and there could be severe penalties for those who try to break or access the codes without legitimate authority to do so.

Too many details are left to the later writing of regulations. In its present form, the act leaves virtually all operation and oversight to be resolved through regulations, which generally do not go through the same type of consultation process as legislation. The drafting of regulations will determine whether the intent of the act is achieved or subverted. Accordingly, OPA requests that the regulations, given their importance, should undergo the same kind of extensive public consultation process as is given to the draft act.

Also, there is use of language that is inconsistent with other legislation and court decisions. Section 33 deals with the disclosure of personal health information related to risks. The criterion for disclosure is "if the custodian believes on reasonable grounds that the risk is significant." This is a more liberal test than set out by the Supreme Court of Canada in *Smith v Jones*, 1999, which upheld in large measure the well-established *Tarasoff* precedent on requiring disclosure only if risk of harm is "imminent and serious." It may be better to stay with the stricter *Tarasoff* criterion.

In its present form, clause 36(1)(g) gives permission to health care providers to report past criminal acts of persons receiving services. In most circumstances, ethical codes of regulated health professions would regard such reporting as a breach of confidentiality.

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The use of the phrase "on his or her own" in section 46(2)(b) is confusing. Does this mean all individual therapy regardless of age or is it referring to the provisions of section 28 of the Child and Family Services Act? We suspect the latter and suggest that reference to the specific section in the Child and Family Services Act and similar language to that section of that act be used.

The Chair: Thank you very much, and that does give us about three minutes for questions. This time it will be the turn of the government.

Mr Wood: On the question of research, some have suggested there should be a sign-off by some public official such as, say, the Information and Privacy Commissioner. So the ethics committees presumably would do their work and that would then go to some public official who then, in effect, would set the policy and make sure the policy has been implemented. Do you see that as a good idea, a bad idea?

Dr Keresztes: In principle it's a good idea. One of our concerns is that university research ethics boards may not be equipped to handle the volume of requests that might be generated by the act. An alternative might be to allow other institutions to have research ethics boards, non-university-affiliated institutions, which would then do their work, although the problem they would face is they may not have the requisite skills and knowledge to make a proper determination of whether a proposal meets the requirements of the act.

Mr Wood: Is this a situation where these other bodies cannot have these boards or they simply don't have them?

Dr Keresztes: Other bodies do have such boards. It is not clear under the terms of the act as it stands right now whether these boards would be allowed or how they would be recognized under the act.

Mr Wood: Let me return to the question of lockbox for a moment. An alternative model to having a lockbox is simply to say, "We're going to have the record stand as it is and you either authorize disclosure or you don't"; in other words, an all-or-nothing approach. The concern that we've heard expressed is where you can take some things out of the record and destroy its clinical integrity.

Dr Keresztes: That's a very difficult balancing act, but for mental health information and psychiatry and psychology it would be very problematic if there was complete access to all of that information, psychotherapy notes being a very good example. But there may be other kinds of information as well. It's understandable that there's no universal agreement about what sensitivity is, and that's a problem.

Mr Wood: It would seem to me that if you had incomplete notes from therapy that's been offered, those notes are really not very helpful, are they?

Dr Keresztes: Usually psychotherapy notes are not released or made public. The psychotherapist keeps those notes for himself or herself and they are not usually what's requested, although sometimes on fishing expeditions people do go looking for them.

Mr Wood: If you were reviewing what a psycho-therapist had done for someone and had only part of the notes, you couldn't give an opinion as to whether that therapy was well-founded or poorly founded, could you?

Dr Keresztes: I would have to consider further the range of information the therapist may keep in notes, and that may be highly variable. The notes are sort of a running record for the therapist to understand what's going on and will not have complete details. So those are best not interpreted out of context; that is, outside of the presence of the therapist.

The Chair: Thank you very much for taking the time to come before us here today.

CANADIAN ASSOCIATION OF CHAIN DRUG STORES

The Chair: Our next presentation will be from the Canadian Association of Chain Drug Stores. Good afternoon and welcome to the committee.

Ms Deb Saltmarche: Good afternoon, Mr Chairman and committee members. Thank you for allowing me the opportunity to present to you this afternoon.

The Canadian Association of Chain Drug Stores was established in 1995. We're a voluntary, not-for-profit national association representing 18 retail chain drug-stores across Canada; 13 of our members have stores in Ontario. Our members are major stakeholders in the Canadian retail and health care fields and fill over 53% of all prescriptions in Canada.

Our work includes the promotion of the pharmacist as a primary health care provider and ensuring the viability of chain drugstores. Representing pharmacists as primary health care providers, we have a significant interest in the proposed Bill 159. We have previously submitted a brief on this subject and we're pleased with the response to issues that we have previously presented; for example, the removal of the lockbox provision, which we feel could be detrimental to the provision of pharmaceutical care.

CACDS firmly supports the principle for ensuring the security and confidentiality of health information and the need for legislation to achieve this. However, we would like clarification on the following sections of Bill 159.

With respect to section 12(9), CACDS interprets the legislation to indicate that Bill 159 would not preclude other health care practitioners from disclosing all information necessary to pharmacists to allow them to fulfill their roles as primary health care providers. This role includes but is not restricted to provision of patient care, reimbursement of drug claims, ensuring that patient claims meet criteria for coverage under specific plans and compensation of pharmacists' services.

We would like to ensure that the ability to collect personal health information expressly permitted by a specific law or necessary for a lawful purpose related to a function or activity of the custodian not be adversely affected by the interpretation of what is considered the necessary amount of information. We'd like to receive

direction on whether our interpretation is correct, and if not, we'd like to see the legislation clarified to this effect.

With respect to section 22, which addresses the collection, use and disclosure of personal health information, we'd like to receive clarification as to how this informed consent may be obtained.

We refer to the recent experience in Manitoba where legislation was introduced a couple of years ago. It was stated in the regulations that informed consent in a pharmacy could be achieved by the posting of a sign in the pharmacy which states that the pharmacy staff will collect, use and disclose information from consumers for the purpose of providing health care services. We would like clarification as to whether a similar method for obtaining consent would be sufficient to satisfy the requirements of the legislation in this respect.

The next area I'd like to address is the operational roles of the various players in the chain drug industry under the legislation. Under section 2, a health information custodian is defined as "a person ... who has custody or control of personal health information." By this definition, we interpret that a chain head office is not a health information custodian, as the head office has an operational role in ensuring that its stores comply with the legislation but it is not the custodian of the data, as the data resides at store level. Further, we interpret that all pharmacists are health information custodians and that the pharmacy manager-owner of independent stores has an additional responsibility in ensuring the legislation is complied with. We further interpret the role of an operator to include a pharmacy manager, an owner or a franchisee, and not the head office.

With this understanding, we further conclude that in a mass merchandiser such as Wal-Mart or a supermarket with a pharmacy such as Loblaws, only those employees under the direct supervision of the pharmacist would be "performing duties for or on behalf of the custodian."

Further, we interpret the role of the head office IT department or help desk as that of an information manager. These IT departments may or may not have access to store-level data, dependent on individual chain setup.

Following implementation of the legislation in Manitoba, it was agreed that an agreement between the pharmacy operator and the IT department would allow access to view and provide related services to pharmacists relating to use of health information data.

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With respect to agreements with information managers, we see an administrative burden being caused on the pharmacists by the implication that we see in the legislation that each health care custodian would have to sign an agreement with each IT manager. There may be many pharmacists and many health care custodians in one location. The health care custodians may vary, for example, with relief pharmacists, and the signing of individual agreements between all pharmacists for all locations within which they work and the IT manager is an unrealistic administrative burden.

Under the current legislation, we would like to receive clarification as to whether it would be sufficient for the pharmacist-operator to sign one agreement with the IT manager to cover all its health information custodians at one location.

Again, on an operational level, we would like clarification on the role of pharmacy district managers. District managers are employed by head offices, not by health care custodians; however, they do have access to the dispensary to perform operational functions. Is the district manager considered to be in the service of the pharmacist-operator and therefore covered by the legislation as it stands? If not, this issue was addressed in Manitoba by requiring the district manager to sign a confidentiality agreement with the pharmacist-operator. We would like to clarify whether this approach would be adequate in Ontario and in the spirit of Bill 159.

With respect to subsection 18(1), which states, “a health information custodian ... shall take reasonable steps to establish and maintain administrative, technical and physical safeguards and practices,” again relating back to implementation of the bill in Manitoba, a procedure is in place in many large stores whereby the patient drops off a prescription and then asks to be called over the loud speaker when the prescription is ready. We would like clarification in this respect, because in Manitoba it was deemed that was an inappropriate use of health information and that practice was prohibited.

With respect to subsection 24(2), which states that the health information custodian should take “steps that are reasonable in the circumstances to ensure that the information is accurate, complete and not misleading”: pharmacists regularly collect information from a variety of sources, including, but not limited to, consumers, caregivers, long-term-care facility staff, and other health care providers. CACDS interprets that “steps that are reasonable” would cover collection of data from all necessary individuals while relying on those individuals to meet the requirements when they disclose the data. We would like to receive clarification on this interpretation.

With respect to subsection 12(5), which states, “to the extent reasonably possible, a health information custodian who collects, uses or discloses personal health information relating to an individual shall do so in a manner that conceals the identity of the individual,” we would like clarification in two respects operationally to that section of the legislation.

First, requiring segregation of patient name from a patient file at the store level would not be feasible in the process of providing care to consumers. Second, claims adjudication protocols currently require that patient name is sent along with patient ID for payment of a claim.

Third party adjudicators have access to store pharmacies in order to conduct audits. Third party adjudicators are not employed by the pharmacy custodian; however, they do provide services for the pharmacy custodian. Again, we would like clarification as to whether third party adjudicators, under the legislation as it stands, would have access to the pharmacy to conduct audits.

I would like to thank you for the opportunity to comment on the legislation. I would be pleased to answer any questions you may have.

The Chair: Thank you very much. That affords us just under three minutes per caucus. This time we'll begin with the Liberals.

Mrs McLeod: I'll lead off. I was intrigued with the concerns you had about the nature of getting consent. I'm not sure that a sign posted would be considered adequate under Bill 159.

What kinds of concerns would the pharmacists have about their ability—obviously they are going to have information disclosed to them in the prescribing, which we assume has prior consent to file that prescription, but are there other issues in terms of being able to call back the doctor to get more information or being able to communicate with other pharmacists and therefore to disclose that would be onerous in terms of getting consent from the patient?

Ms Saltmarche: I think I heard two parts to your question and one was the consent of the patient. Logistically, to get written consent for every patient is an administrative burden. It also puts the pharmacist, who is the front-line health care practitioner in many cases, in a difficult situation in that they're explaining the regulations and the bill.

We found the model that was followed in Manitoba very useful in that a posting of a sign informing the patients of what their information could be used for got over that administrative burden, plus the issues at the pharmacy level in terms of understanding the legislation and explaining it to patients.

I think the second part of the question was related to obtaining information from other health care practitioners. Is that correct?

Mrs McLeod: Yes.

Ms Saltmarche: We do have a concern, and it's under subsection 12(9), that as pharmacists we would be able to collect all necessary information to provide adequate health care to all consumers. We're concerned that the legislation may leave up to the interpretation of an individual health care provider what the extent of the information needed by another health care provider is. We would like clarification that if a pharmacist is requesting health care information that the other health care provider assumes that is for the use of the health care of the patient, so that whatever information the pharmacist needs, whether it be with respect to providing pharmaceutical care or obtaining reimbursement for a prescription, can be provided under the legislation.

The Chair: Ms Lankin?

Ms Lankin: I actually have no questions. I appreciate the clarity of your brief. You've put a number of questions to the ministry for clarification. I think as we see this bill evolve, we have some expectation that there will be changes. We'll keep your questions in mind and ensure we try and get clarification for them.

The Chair: Mr Wood?

Mr Wood: I thought your presentation was quite clear as well. We appreciate your coming. I have no questions.

Mr Raminder Gill (Bramalea-Gore-Malton-Springdale): I have one brief question, if I may. You mentioned the pharmacist announcing the name of a person picking up a prescription. In your mind, do you think it's a breach of some kind of privacy information?

Ms Saltmarche: No, I don't. I believe that if the patient asks to be called when a prescription is ready, they've already given an implied consent that we can do that.

The Chair: We appreciate your coming before us here today.

CHURCH OF CHRIST, SCIENTIST

The Chair: Our next presentation will be from the Church of Christ, Scientist, the Christian Science Church. Good afternoon and welcome to the committee.

Mr Lyle Young: It's a pleasure to be with you today. Thank you very much for taking the time to hear me.

I represent the Church of Christ, Scientist. You might know the church as the Christian Science Church. Some of you probably know the Christian Science Monitor. The Monitor's six Pulitzer prizes I think bespeaks our church's deep interest in matters of public interest, matters of societal interest. There would be some 20 or 25 churches of our particular denomination in Ontario.

A little bit on my background: I have been a Christian Science practitioner since 1987. A Christian Science practitioner is someone who gives his or her full time to helping others through prayer. My practice is in downtown Ottawa. A Christian Science practitioner would help people with a wide variety of problems, everything from a very physical illness to mental illness to marital problems to family problems or work-related problems—problems of any sort. The prayer that is given is consistent with the Biblical teaching about praying for others. Every Christian Scientist sees practising Christian healing as an integral part of practising Christianity. But Christian Science practitioners are those who give their full time to helping others through prayer.

In addition to being a Christian Science practitioner, for the last five years I've served as the Ontario Committee on Publication. The use of the word "committee" here dates back to the 19th century when one of the definitions of the word was "a single person charged with a responsibility." As the Ontario Christian Science Committee on Publication, part of my duties would involve public affairs, representing our church in public forums such as this one.

In that capacity, I serve on the Ontario Multi-Faith Council on Spiritual and Religious Care. Some of you might know the OMC. It's the province's most prominent multi-faith organization, made up of some 33 faith group members. Basically, it's a transfer payment agency of the provincial government. The current level of funding is \$1.5 million. The OMC has the duty and the responsibility to help ensure that those in provincial institu-

tions—these would be hospitals, prisons, homes for the elderly—receive adequate and appropriate spiritual and religious care.

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The last three years, I've served as secretary-treasurer of the OMC. In that capacity as well, I sit on the joint committee that's made up of representatives of the Ministry of Health, the Ministry of Community and Social Services and the Ministry of Corrections and, up until just recently, was the chair of that joint committee. So I bring a fairly broad range of experience in thinking about matters related to spirituality and to health, not just from the perspective of our own particular faith group but from that of 32 other faith groups as well.

My comments on this particular piece of legislation aren't very lengthy, but it did seem to me to be important to come in and put those comments on the record. If you look on page 11 under "Other exceptions," you'll see that there are several exceptions to the health information custodian. The first is an aboriginal healer, the second is an aboriginal midwife and the third is a person who treats another person by prayer or spiritual means in accordance with the tenets of the religion of the person giving the treatment.

Certainly Christian Scientists would see that as something that's very welcome, because then individuals who are practising spiritual healing don't need to keep records of particular ailments or particular physical problems that their clients would have told them about. Christian Science practitioners really have no medical records; they're there trying to help people from a religious basis. Although there are strong health benefits to religious practice, they are not there primarily to help the person in terms of health. The care provided really is entirely spiritual. Practitioner billing records really contain no description of the patient's physical condition. Those records only consist of information needed for billing purposes such as name, address, dates of service. Any other information would be wholly religious in nature.

The care provided by a Christian Science practitioner is a religious ministry, and in that sense it's similar to the clergy of other faiths who are asked to have prayer for healing. In other words, it might be like an Anglican priest who perhaps was asked by a parishioner, who maybe has received a diagnosis that's serious, to pray for the individual. Or you might have a Pentecostal minister who is asked to pray for an individual who would be sick. So in that sense, the Christian Science practitioners' religious ministry is very similar to that.

What I wanted to say simply was that we're very happy to see this provision in Bill 159. It's a good protection for Christian Scientists. It's also a good protection for anyone who, in time of illness, is turning to another for prayer as a resource to meet that illness, to cope with or to heal that illness. It may seem like a fairly obvious provision, but sometimes fairly obvious provisions get left out of legislation. So we're very happy to see it there.

I think the language was just lifted from the RHPA, so again we really just wanted to come and put on record that we're pleased to see it there. In any future drafts of the legislation, we'd be very pleased to see it there. We are grateful that it was there. Thank you very much for your time.

The Chair: Thank you. That certainly leaves us time for some questions, just over three minutes per caucus. This time we start with Ms Lankin.

Ms Lankin: I have no questions.

Mr Wood: I have none either. I thought it was very clear, and we appreciate your comments. It was very helpful.

Mrs McLeod: I'm not sure that it's a relevant question to ask you. I appreciate the clarity and your appreciation of the fact that that inclusion is there for people who are providing healing through spiritual means. The issue that I have some questions about, but we haven't had a chance to get at in the hearing yet, is unregulated practitioners providing different kinds of therapy in the name of a spiritual kind of healing but who are not in fact practitioners of a faith community. I'm just not sure it's a relevant question for you. I don't know how we catch these kinds of individuals. There are some very questionable therapies being practised by some unregulated so-called health professionals that I wish there was a way that we could capture without seeming to exclude others. If you have any comment on that, please, but I'm not sure it's going to be a relevant question for you.

Mr Young: I'm not sure. I think that one of the nice things about the wording here is that by saying "the tenets of the religion of the person giving the treatment," that might imply a certain established religion, and if so, that may be helpful. But I recognize the problem for the writers of the legislation. It's hard to do that.

Mrs McLeod: It is. Thank you.

The Chair: Thank you again for coming before us here this afternoon. We appreciate your bringing your perspective.

JOHN MANUEL

The Chair: Our next presentation is from Mr John Manuel. Good afternoon, Mr Manuel. Welcome to the committee.

Mr John Manuel: It's interesting that the last question from Lyn McLeod addressed a problem with which I am, regrettably, all too familiar. Not that I'm casting aspersions on any particular individuals or groups, but it is regrettable that there is quack therapy. It unfortunately is that which brings me here today.

I've chosen, because of the 10-minute limitation, not to read my presentation—you can do that easily yourselves—but rather to summarize it, to add perhaps a few personal comments, and to then focus on the particular suggestion that I'm making, which is really, in my mind, fairly simple.

First of all, I should introduce myself. My name is John Manuel. I have chosen not to include that name in my presentation because of certain pending litigation, which I will address in a few moments. The bottom line is—

Ms Lankin: Sorry to interrupt. You said you'd chosen not to include your name in the presentation. However, you have just put your name on record in the Hansard. You're aware of that?

Mr Manuel: I am aware of that, and I'm also aware of the rules regarding parliamentary privilege, that they don't apply in this room and so forth and so on. It is for this reason that I am being most careful. I certainly don't mind using my own name. If you have any questions, you have my telephone number, and it's on record. The fact that I did appear here today is quite conveniently a matter of public record. What I said, what I talked about, whose name I mentioned, is another matter. So I'm going to be very cautious there.

However, the bottom line is, my daughter unfortunately followed in her dear mother's footsteps and developed mental illness, during the course of which she has regrettably decided that all kinds of horrible things happened in her childhood which never did. I am named in those activities, along with a very good friend of mine, her own brother and her brother's friends, and it's a difficult situation to deal with.

I have a professional accounting practice, or had for much of my adult life, so for me confidentiality is as automatic as knowing where the brake pedal is on the car. You're not thinking about it all the time, but you know it's there, you know how to use it and you're ever-conscious of the need to have it very close by. Confidentiality to me is a matter of deep importance.

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However, there were times in my professional practice when I was visited by the RCMP and by officers of the investigative unit of various levels of government, Revenue Canada among them, in which they demanded rights to see certain things which I considered to be confidential between myself and my client. How did this happen? Simply because there is legislative authority for them to do so. That legislative authority in those cases overrode any considerations, or almost all considerations, of the need to preserve confidentiality. There was a conflict in my mind as a professional practitioner as to whether or not the presumed authority was in fact properly executed and whether or not I ought to, notwithstanding the apparently important-looking papers in their possession, release information in my possession to these important-looking people. That is common to any professional person, I'm sure.

However, it is that particular element which I am looking for in this bill. Being a defendant in a civil trial has meant that I have had to use all of my resources not to prove that I am, beyond reasonable doubt, not guilty of the things that were presented, but overwhelmingly unlikely to have committed them and that my daughter is overwhelmingly not to be believed. That's the challenge

presented in a civil case, different altogether from a criminal case. I am only one of numerous fathers—typically fathers—who are defending themselves against the accusations of mostly daughters—occasionally sons, but mostly daughters—in this kind of situation where the daughter has unbelievable confidence and sympathy, naturally, from the community from which juries are being drawn and from the community from which lawyers are drawn and judges are drawn.

Our problem is access to medical records where they are relevant to demonstrating that innocence is present. The basis of all of this is very simple: you tell me you're sick. Show me how sick you are; show me what kind of sickness you have. You tell me I am responsible for this; show me that I am responsible. Show me that beyond any doubt I am responsible. Let me demonstrate from those same records that there are all kinds of things in there that, unfortunately confidential though they may be, are useful to me in demonstrating that I could not have done these things, that in fact there are other mitigating things within those records. That's an extremely difficult call to make, and I don't think any father is qualified to make that call, although he is likely to be very concerned about getting access to those records.

It is in that framework that I have come today. Generally speaking, I think what I see is fair. I direct your attention only to section 34. Again, I'm not a lawyer. I am presenting what I think to be the place where we might put something that would provide a need for people like myself.

We have section 34, "Disclosures in proceedings":

"(1) Subject to this section, a health information custodian may—that permissive word "may"—"disclose personal health information relating to an individual," and then we jump down to paragraph (e), "for the purpose of complying with,

"(i) a summons, order or similar requirement issued in a proceeding by a person having jurisdiction to compel the production of information, or

"(ii) a procedural rule that relates to the production of information in a proceeding."

There's nothing wrong with leaving those words there. I think they're useful. There are procedural rules that are developed, some based upon common law principles, some based upon statutory provisions. Summonses and orders are generally issued with reference to statutory provisions.

My question is, what statutory provision exists which permits these things to happen? How difficult is it for us ordinary citizens trying to get on with our lives to do the things that are uncomfortable but demonstrably necessary in order to overcome some of the obstacles that are put in our way? I think if we have statutory authority to fall back to, procedural rules and summonses and orders will have some basis for their origin. That's all I'm addressing here today.

I'm suggesting that section 34 be amended to include a further paragraph, and I put that on the last page in bold of my very brief presentation. I'm still not comfortable

with the words and I'm certainly not a lawyer, so I don't know why I would even presume to go this far except to give some guidance as to the kind of character that I'm trying to put into it: "a person defending a criminal or civil proceeding, upon the order of a court, and upon such conditions as the court may stipulate, where the action against the person is based upon a medical or mental condition of the individual, and the person requests, in prescribed form, such relevant health records as may reasonably be considered necessary to presenting a fair defence."

I think failure to do something like this will regrettably play this whole act into the hands of those for whom fairness is not a consideration. Confidentiality, while useful, can unfortunately become a mask of secrecy behind which culpable behaviour by practitioners such as Lyn McLeod referred to, and others, and malicious or ill-advised intent by accusers can proceed unrestrained. So we're not only building a system by which there are rules by which to play a very important game, but at the same time, if a violation of those rules occurs, if something goes wrong in the middle of the game, how do we solve that problem? What rules do we build to say, "OK. Time out. What do we do now?" That's what we're looking for. I say "we." I'm representing myself here, but there are people like myself who share this very deep concern.

So I share that with you folks. Thank you for inviting me into this process. Democracy comes from all corners. I guess I come from one of those corners. Thank you for your time.

The Chair: Thank you, Mr Manuel. I'm advised our next group isn't here yet, we don't think. Is there anyone here from Zero-Knowledge Systems?

In the absence of that, I would certainly entertain a brief question from each caucus, if you're inclined to take questions.

Mr Manuel: Yes, of course.

The Chair: This time the rotation would start with the government members.

Mr Wood: I don't know that I really have any questions, but if you'd like to leave your card, maybe we can get a little information for you on this. I'm not sure to what extent the existing laws—you have to read this law in relation to all the laws, so we may be able to give you a little more information as to what extent what you're trying to do here is already available.

Mr Manuel: The problem with looking to other laws is that this law is specific in addressing what happens with medical records. It is in this place that we can not only provide confidentiality over those records, but at the same time provide for exceptions to that and access to them where necessary. I don't think we should be looking all over the place and passing it on somewhere else. I'm hopeful that this committee will accept the challenge to say this is one place where we might codify that clear intent of this government to be fair to all concerned. If you embody it, embody it in this piece of legislation.

Mr Wood: If we had half a day, we could get into all the complexities of legislative drafting, which I'm sure you don't want to hear, but I'll see if I can get some information for you and give you a relatively simple answer as to whether or not what you're looking for is going to end up being a part of this. If you'll give me the card, I'll try and find something out for you.

Mr Manuel: Thank you.

Mrs Pupatello: I guess that's surrounding my same question, that currently a warrant could be issued in order to access that information now. Your lawyer would be able to arrange a subpoena to get that.

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Mr Manuel: The rules under which those are being issued are being eroded. The federal government is amending the Criminal Code, which makes criminal cases more difficult. Judges are bound by those rules. Legislation should guide people in formulating those rules and in issuing those summonses. I'm suggesting that this piece of legislation is one place where such a rule might be provided for their guidance.

Mrs Pupatello: So are you telling me that at this point you're not able to access a warrant or subpoena currently in order to defend your case?

Mr Manuel: I'm saying it is unnecessarily difficult, and becoming more so. The thrust of this is confidentiality and limited access, and I accept that. All I'm saying is, let's not make it more difficult for ordinary innocent folks in the land to be able to defend themselves against things which arise from those very medical records that we're trying to get at. This is a place where we can solve that problem. Doing so, embodying it in a piece of legislation that says, "This is the way the game can be played," will guide people in issuing orders, will guide people in making applications to courts requesting that information. It's becoming increasingly difficult. The door is being closed on us. It should be difficult, but it shouldn't be impossible. There should be some specific direction that we can point to. I'm suggesting that this bill could provide that place.

Ms Lankin: I appreciate your comments. We've received letters from a number of individuals who have raised the same concern. I think you are showing an understanding of both the complexity and the balance that has to be looked at. I also acknowledge that you've suggested your wording is just a suggestion, an idea, and that we should work with it.

I would hope, Mr Wood, if you're able to provide some information to Mr Manuel, that you can share that with us. I'd be interested in what the existing provisions are.

I'll tell you my concern with an approach that embeds it in the freedom-of-information and protection-of-health-information privacy legislation. A number of years ago, in Criminal Code and court proceedings, we had changes to the laws that prevented defence attorneys from going after personal medical record information of women, for example, who were victims of rape: the rape shield clause. Again, I'm not holding you to this wording; I

understand that it's a best effort that you've put forward. But something where the action is based upon medical or mental condition of the individual opens up a new access for lawyers to determine what that means and who it applies to in a way that could have implications far beyond what you're intending.

My sense is that the right of access to appropriate information for defence purposes needs to be understood and clarified if there is a problem, but not embedded in an exception to the privacy rules. Otherwise you open up a new way to get access to medical records for a whole range of things that you wouldn't want and I wouldn't want people to have access to medical records for.

I just place that forward as a concern, but I think Mr Wood's undertaking is very helpful. It will be helpful to all of us.

Mr Manuel: "Under such circumstances as might be prescribed by regulations." I mean, there are ways around these things, to embody in the legislation that there is a clear intent to be fair and to provide an avenue for access from which you can then develop regulations that limit that. I understand the process by which these things happen to some degree, but not to walk away from it. I don't think that's reasonable, for a government to walk away from it.

I'm extremely sensitive to your concern for violation of privacy, but when you're telling me that it's my fault and I did it, I'm sorry, ma'am, I want you to show me. I want to have the same right of access to the information upon which you decided that, in order to prove that it couldn't possibly have happened. Regrettably, that rests in the medical records and only there. Because it rests only there, it becomes critical to a defendant to have access to it, notwithstanding the fact that I'd rather not see my daughter's medical records. Honestly, I don't want any part of this, but I'm sucked into the vacuum, the void, of this thing. I have to fight with everything I've got. Some of the things that I've got are the things that you've got. Some of the things that my daughter has are the things that I want to have. That may seem unfair, but fair's fair, folks. Give me an equal opportunity.

How do we draft those regulations? We don't draft the regulations by saying somebody else is doing this. We don't draft the regulations by walking away from it. We codify it, we embody it in a piece of legislation, we write supportive legislation, we design forms, we establish regulations and procedures, and we embody that into the legislation and support it through these other mechanisms. I really encourage you that this is important to a small number of people in Ontario, but to that small number, it is exceedingly important—the most important, horrific thing that has ever happened in my life. I have sustained a near bankruptcy, I have gone through a fire, I have lost money in the stock market, but nothing compares to the anguish that I have felt through this. To have my government close the door a little bit tighter on me is not acceptable. Sorry.

The Chair: Thank you very much, Mr Manuel. We appreciate your taking the time to come before us and bring your perspective here today.

Mr Manuel: I'm prepared to leave several cards for general use if anyone else wants to—

The Chair: Thank you very much.

Ms Lankin, at lunch you mentioned there was an issue, and I don't think our next presenter has arrived yet, so perhaps this is as good a time as any.

Ms Lankin: Thank you very much, Mr Chair. I've been trying to turn my mind to the process for committee to deal with this bill, given that our public deputations are scheduled at this point in time to end midday or so tomorrow. I must indicate that in the back of my mind is also the rampant rumour that the House is going to prorogue. If it does so without a resumption of the House to pass a motion to carry on bills, this bill will be lost on the order table.

I think the government has acknowledged the benefit of hearing from people, that there are a number of issues and ideas that the ministry is listening to and taking account of and that will be part of their advice back to the minister of what has taken place in these proceedings. I also think, however, there has been a genuine expression on the part of all three political parties to see a non-partisan process of working together to come up with some recommendations which may inform the ministry's work and/or the advice to the minister. The minister can do with that advice what he will at that point.

In speaking with Mr Wood, what I would like to propose, and see if committee members think this would be useful, is that we ask legislative research to produce the summary of the proceedings with some of the key recommendations—I'm sort of assuming that ongoing work has been taking place as the hearings have been proceeding—and that that summary be circulated to committee members. Perhaps we also have an opportunity for that summary to be given to the ministry, and the ministry could provide us with any key comments they have.

There may be some things—for example, Mr Jackson presented to us that it was not their intent in any way for this legislation to interfere with the scheme of the RHPA. It's not very necessary for the committee to turn its mind to significant amendments or suggestions to that area of the legislation if the ministry itself is embracing the recommendations that have come forth.

So we might be able to get a little bit of feedback from the ministry. Then the committee could meet, with those two documents in hand, to discuss what we think of the key recommendations that we've heard from presenters and the ministry's response to them, and see if there's a consensus on any number of issues to recommend to the government with respect to the future of this type of legislation, whether it be this bill, a new bill, or whatever.

In making this suggestion, I do recognize that if the House prorogues, there is not a legal mechanism for this committee to meet, but that MPPs who happen to also be

members of this committee can meet together as a group at any time we wish.

I'd like to ask if legislative research could tell us what a reasonable time frame would be to receive a copy of a summary of these proceedings and what the ministry would suggest it would need to respond in any way to some of the key issues that have been heard. Perhaps we could select a date that is mutually convenient to us as a group and, depending on the status of the sitting of the Legislature, at that point in time we could meet officially as a committee or unofficially as a group of MPPs to discuss recommendations to the ministry.

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The Chair: First, I wonder if the research officer can give us an idea of the timeline.

Mr Andrew McNaught: I think we could have the summary early next week.

Ms Lankin: Monday?

Mr McNaught: Yes.

The Chair: Mr Jackson, might we put you on the spot for a second day in a row and ask you not just from what you've been able to glean sitting in the hearings themselves, but once you've had a chance to look over the summary prepared by the research officer, what sort of time frame would you be able to turn around and give your thoughts in response to the recommendations that have been made by deputants?

Mr Phil Jackson: Probably about two weeks, to be fair, given the volume, unless the committee decided to prioritize areas. That might be a more workable approach. If you started to prioritize, for example, the research issue, we could come back much more quickly. To do it section by section is going to be that horrible Pandora's box. And we're going to need some time to go over the material, probably about 10 working days.

Mr Wood: Mr Chair, it might be helpful to get some general comments early. That doesn't preclude a second meeting where he's going to be able to help us out on some technical matters, which are important, of course, but it seems to me if we had a memo summarizing what we've heard and sat down and took a look at that, we might have some questions about that, and then invite the members to offer their comments on the record. All of that can then go into the ministry and they can take that under advisement as they consider what to do with the bill. I think it might be helpful.

The Chair: What precisely are you proposing, that Mr Jackson be requested to respond to with general comments within the week and then that we meet, or do you propose we have a meeting and we frame the categories that we would like general comments on?

Mr Wood: I think we can wait until he's ready, if that's what the committee feels is appropriate. There are certain dangers to that, so to speak, that we'd have to take into consideration. Or we can meet somewhat earlier. I think the key at this point is to give an indication of what policy directions are deemed to be advisable and not advisable. There may be consensus on some and there may not be consensus on others. I think that's really what's

helpful at the moment. My bias would be toward proceeding without full benefit of some of the technical advice from legal counsel, but I'm not strong on that. If people want to wait, that's fine with me.

Mrs McLeod: I think there's a potential consensus between Ms Lankin's and Mr Wood's suggestions. Obviously it's important to have the research officer's summation. I'm impressed at the fact that he can have it done by Monday. I'd just like to recognize that that probably means a great deal of overtime hours in order to produce it, because I don't think he's had a lot more time than we've had to digest this in the heavy hearings we've had. But if that's a reasonable undertaking for him, that would be fine.

As Mr Wood has suggested, I think there would be merit in at least a subcommittee getting together to look at the larger picture, at some of the areas where there is likely to be consensus around amendments to the bill. I say that being mindful of the fact that the ministry indicated in the technical briefing that there were some issues which really would require some political direction and policy direction for them to make the changes. We would obviously need their technical advice, as well as their experience in commenting on those, but I think at one point it was suggested there be a subcommittee meeting with MPPs and with the ministry staff present so there can actually be a dialogue about this, as opposed to a position and another position and another position. I think that could be very helpful.

Ms Lankin: On that basis, let me refine my recommendation and suggest that upon receipt of the research officer's summation of the proceedings, we set aside a time for a subcommittee meeting with ministry staff present and we begin to explore some of the areas and see where there may be a consensus. I think we can decide at that point in time whether or not we see a value in the full committee coming back together and receiving the technical response in any of these areas from the ministry, or whether we see ourselves undertaking a process of discussion about specific amendments and/or whether by that point in time there's a ministerial direction as to the future of this bill.

I think as Mr Wood has indicated in some of his questions, one of the options is a bill that's rewritten to look like the federal legislation, with health imposed on top of it, or do we work with this framework and try and build the federal similarities into it? That's going to take a decision inside the ministry, but that minister's decision might well be informed by the kind of discussion we could have in a subcommittee.

Mr Wood: Another alternative would be to have the subcommittee meet after our meeting today with a view to some prioritization to help the legal people.

Ms Lankin: I'm afraid I'm not available after the meeting today.

The Chair: Might I suggest a compromise, Mr Wood? Since we don't have a full day tomorrow, perhaps we could remain after the last deputation tomorrow to have a brief discussion about setting priorities. Might I

also suggest, recognizing two of the three caucuses have caucus meetings in the first part of next week, in deference to Ms McLeod's suggestion that it might be putting a strain on the research officer, perhaps Wednesday morning would be just as good, given that at least two thirds of the caucuses will not be in the building. If that meets with everyone's approval, perhaps we can give you a little more time to refine your work. Might I suggest that next Thursday might also be a day that, depending on what we discuss tomorrow, we could tentatively block off for a—

Mr Wood: I have another committee meeting that day, unless it changes.

The Chair: Then let's just leave it that tomorrow afternoon we'll all come armed with our schedules and hopefully find a mutually convenient date relatively quickly. If I may add, we'll invite the ministry to stick around tomorrow afternoon as well to be part of the dialogue that has to take place.

Mrs McLeod: Are the caucus meetings on Wednesday or earlier in the week?

The Chair: Ours are Monday to Wednesday. I thought yours were—

Mrs McLeod: We had ours. I was here. I ask that only because Wednesday, if we're free, might be an alternate day to meet next week, but if your caucus meeting continues on Wednesday, that's not possible.

PHILIP WYATT

The Chair: We have a deputant here, so we'll take it a little out of sequence, but in deference to the early bird, Mr Philip Wyatt will be our next presenter.

Good afternoon, Mr Wyatt, and welcome to the committee. Just as a matter of course, I don't think you've had a chance to speak to the clerk, so in cases where individuals come before us who may not be familiar with the rules, unlike the groups that tend to be frequent visitors here, for your protection we like to put into the record that while the MPPs themselves may enjoy parliamentary privileges and certain protections pursuant to the Legislative Assembly Act, it's unclear whether or not these privileges and protections extend to witnesses who appear before committees. For example, it may very well be that the testimony you have given or are about to give could be used against you in a legal proceeding. So we caution you to take this into consideration when making any comments. With that, the floor is yours.

Dr Philip Wyatt: Thank you, Mr Chairman. I'm here representing myself as an individual, although I am a physician in Ontario. I'm the chair of one of the departments of genetics in this city. I've served on many ministerial committees regarding consent and confidentiality and I'm a practising geneticist.

Regretfully, I believe the act as proposed should not be supported and needs to be substantially rewritten and revised. I've read many of the comments by other groups and I'm certainly not here to go through it item by item. I don't think there's any point at this time.

There are three points I'd like to address. They're in my letter, but I'll speak to them briefly. Number one, in reading the act I believe the intent of the act actually is to open up files, not to close them down. I'm very concerned that it appears that the intent of the act is to improve management by allowing more access to confidential information than we should permit. It's a philosophical point and I wanted to make sure I had the capacity to address it.

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Second, I note in the compendium they break the type of information down into two types: personal health information and registration information. The difficulty with the registration information in the province of Ontario is, because of the system we have, where you go for care is actually determined by the government to a great deal. That is, we have centres where you go for cancer care, we have centres where you go for addiction care, we have centres where you go for abortion care. Even the compiling of lists regarding registration provides some information regarding health care status. I think that point needs to be reconsidered as the information is looked at.

The third, which was most concerning to me when I read it, is that geneticists—and genetics is becoming more important in modern medical health care and in the entire running of the health care system—deal with information transmitted from generation to generation. Traditionally, health care information has been restricted to the individual or patient who is coming in for access for care. When we're talking about genetic information, we are now at the point where we can take your own genetic material, identify what diseases you may have, may develop and have the risk of developing. By having that knowledge, we have knowledge about your entire family back several generations, and even future generations.

I cannot see in the existing act how the linkage between generations is prevented. I can see that an individual may make a request to, for example, identify all the individuals in 1950 who had the gene test for breast cancer. By having that information, that means I know whose children will develop the disease because I know how many children they may or may not have, and by the way, I may know how their grandchildren will develop the disease. I'm not sure—as a matter of fact, I'm convinced that is not protected in the current legislation proposed. That is, I think the access to genetic information needs to be looked at as this information is re-looked at.

I'll stop there. I really felt so strongly, however, that I felt I should come here as an individual and express the fact that I believe this is a very badly written act and I would hope that you do something to stop it at this point in time for a period.

The Chair: That certainly leaves us time—about a minute and a half—for questioning, unless we are still shy of the next presenter, in which case, I'll be a little indulgent.

Mrs McLeod: Thank you for coming. The whole issue of genetic information, in particular, if I could focus on that. We've only had it raised one other time, by ARCH this morning. The field of research and knowledge is so new that I'm not sure that ideas about how to manage that in terms of health privacy have even been considered yet. Are you aware of any legislation dealing with health privacy and medical records that addresses the issue of genetic information?

Dr Wyatt: The information is actually not new. We've had fairly good genetic information and how to track it through families for quite a long period of time.

Mrs McLeod: So it's more the genome research that's new.

Dr Wyatt: Every time, however, people have looked at linking and protecting confidentiality, we have been assured a system will protect us and we should allow the linkage. This is what was determined in the European countries in the 1930s and 1940s. That didn't work out well. We've had several efforts where governments have assured us that we will not be using this confidential information to start a population screening.

We've failed. Each time this is looked at, people believe that the most important relationship to protect and not violate is the confidential relationship between the individual or the patient and their health care provider. I think that's where it will sit for a while. This is sensitive information that needs to be dealt with on a one-to-one basis and we need to be very careful when we establish systems that break that confidence. This proposed act leads to the potential of breaking that confidence. I've used the example here of a condition called sickle cell disease, but you could substitute any condition you may want. If, in the future, we develop genes that can identify intellectual potential, risk for addiction or risk for alcoholism, do we really want to have the capacity to reach into an individual's file—hopefully blinded—extract that and hold that in some sort of database which may be accessible when the right protections are not in place?

Mrs McLeod: Could I take it a step further? Do you feel that there are some areas of health information which an individual should not be required to provide as a condition of employment or even as a condition of receiving insurance? Respecting the fact that employers need to know about fitness for work, respecting the fact that insurance companies need to know about risk factors, are there some—and I think of it particularly in the area of intergenerational genetic information. Is some of that really not relevant to what the employer or the insurance company has a right to know?

Dr Wyatt: In some cases, the information needs to be very careful before the individual or patient even requests the testing to be carried out. We try to set up a system that involves an informed consent process, where the individual requesting information understands the strengths and weaknesses. I think the concern is if someone identifies that you carry a gene that has potential damaging effects on yourself, your family, your children or your

relatives, humans handle that in a very individual way and they may not wish their sister or their brother to find out that they are also at risk. Currently, we transfer the responsibility of the passing of that very unique personal information on a individual-by-individual basis. It's slow. It's sluggish. But it tries to deal with the sensitive nature when you have such enormously impacted information, such unique information.

I can very easily see the proposed act being misused very quickly because of the capacity to mine data, create lists and then be forced with the fact that you've identified a group of individuals who are at 50% risk of passing a disease on to their children and we feel obligated that we must notify the at-risk individuals. I don't want us to get into that position.

Ms Lankin: A really interesting and thought-provoking presentation; a lot of ethical issues down the road that we are going to have to grapple with in many ways. I guess you're just suggesting let's not make them any tougher than they're going to be.

Putting aside the research and mining-of-data aspect of this for a moment, you made a reference to the strength of the system lying in the confidentiality and the relationship between the patient and the health care provider. Some of the representatives of health care providers—and I'm thinking here of the Ontario Medical Association—said very clearly that confidentiality has to be there, the trust has to be built into the relationship and confidentiality is a large part of that.

However, the OMA did also say, though, that if information is to be transferred between health providers for the sake of providing health services, it's the health care provider who should determine what's relevant and what can be transferred, and not the patient. This is sort of the backwards way of getting at the issue of the lockbox. Who should have control over that information? You've raised the prospect of genetically inherited diseases. Using that as an example, should someone be compelled to have that information travel along their health record in between providers, or should they be able to withhold that?

Dr Wyatt: You're dealing with the core fundamental philosophical issue: whose information is it? I think in terms of management, it's clear that certain factors should be transferred relatively easily. In other factors, I think that it may be very important that if a woman, for example, had an abortion when she was 17 years old, she may not want to have that information automatically transferred through the system every time she appears in an emergency room or is treated for a flu, the fact that that has appeared.

I think there are mechanisms that you can put in place that say anyone who uses the health care system in Ontario should know up front that we are moving into a system that, if you contact the system, you will have your information transferred unless you opt out. It may be important at every site to have a sign that says, "Part of Ontario's system is the movement of managed information. Do you consent or not consent?" and allow an

opt-out right at the beginning. That may control the overall point of view.

I think there may be types of information that you should have, implicit explicit consent by the individual. Examples would be history of addictions, abortions and genetic-based disease testing. I think, personally, that should be left with the individual, not with the system to say, "It's not relevant. I'll just transfer it through; no one will care." We will in the end, and we will regret the fact that up front we are not advising our patients contacting the system that they have the right not to participate in information transfer. One of the most concerning things about the legislation as proposed is that we were apparently putting in steps where we were saying, "Really, we can look after this; they don't have to know that the information is being transferred." I think we should know, as we walk through the door, that this is what we're moving into.

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Mr Wood: Have you had an opportunity to look at the federal privacy act that was recently passed?

Dr Wyatt: I've looked at some of it, not in as much detail as I have the Ontario.

Mr Wood: Have you looked at enough of it to offer any opinions as to whether or not you think it might be a better model than the bill we have before us?

Dr Wyatt: I recognize that at the federal level there were ongoing discussions, that one of the issues they did not properly deal with is genetic information. There are a series of meetings actually going on this month, which I'm attending, about that legislation having some problems with it also. I think overall it has strengths that are slightly better, but it has weaknesses. As I, however, see Canada, we remain a federation, with each province responsible for its own unique needs, and I think we should deal with our own legislation, keeping in mind what the federal individuals are proposing. But really we have a unique system.

Mr Wood: What are the strengths you would see in the federal act?

Dr Wyatt: I'm sorry, I don't have the legislation in front of me, so I can't answer that.

Mr Wood: The use of this information for research: if we're going to have disclosure without consent, it's generally thought there would be an ethics review body to take a look at that. Would you favour, in addition to that, the overlay of a sign-off by, say, the Information and Privacy Commissioner?

Dr Wyatt: The difficulty with utilizing institutional review boards or research ethics boards—and I can say, because I'm the chair of one—is that most of them are unfunded, voluntary and have no idea what they're supposed to do. In addition, a great deal of the research that's going on dealing with confidential patient records is carried out by individuals who are in no way regulated or controlled; that is, one government in this province established what's called the Regulated Health Professions Act, which ensures that people who access records

have some degree of professional and I think even monetary responsibility if there's a mistake.

When you're carrying out data mining by the lowest-level researcher in the university, they tend not to understand how confidential and how personal this information is. One of the great difficulties I see—and I've presented a handout from this month's *Nature Medicine*, where they've already identified I believe over 100 cases where people have violated confidentiality because, since they're only undergraduate students, they really don't understand how sensitive some of this information is. I think that data mining by research is a big area that's very important, but we have a very weak infrastructure to protect ourselves from individuals who are data mining who are not, for the most part, trained health care professionals monitored by colleges with professional responsibilities. If you make an error and you're an undergraduate student in your second year, it's just an error, it's not that big a deal to you. But it could potentially, in the genetic area, ruin families for 10 to 20 generations in the future, and they'll have no recourse. That's what concerns me about the data mining, at least in the genetic areas.

The Chair: Thank you very much for coming before us here today, Doctor.

Again I'll ask if anyone from Zero-Knowledge Systems is in attendance.

MENTAL HEALTH LEGAL COMMITTEE

The Chair: We'll move on to the Mental Health Legal Committee as our next presenter. Good afternoon and welcome to the committee.

Ms Anita Szigeti: My name is Anita Szigeti. I have to say that I'm becoming a bit of a regular visitor here these days. I want to thank you for your time. I'll let you know too that how often I'm coming by these days is alarming to me, because if I'm here, then there is at least some concern that the rights of my clientele, who are psychiatric in-patients by and large, are possibly being eroded by something that's being proposed.

The legal committee I chair works on behalf of consumers of mental health services to protect their legal rights. We have provided to you a very lengthy and very detailed set of comments on Bill 159. It's our position that patients in Ontario's psychiatric facilities have had a legislated right of access to their clinical records and the right to request corrections for almost 13 years, so we come at our comments from that level of experience.

There are certain basic protections in terms of access and disclosure of records that we believe in, which are listed for you in the executive summary, most of which I think are thought to be addressed in Bill 159. However, upon a very careful and exhaustive and exhausting review of the bill, we conclude that our clients are better served by the existing relevant provisions of the Mental Health Act than proposed provisions of PHIPA. I'm sure you've heard this from other organizations. If you've heard from the Psychiatric Patient Advocate Office

already—and I'm sorry, I'm not on top of the order of things—then you've probably heard some of these concerns.

I'm not going to trouble you in my oral submissions with any of our concerns relating to disclosure. I'm going to focus on the business of access and certain very specific amendments that would impact my practice and that of my colleagues in terms of representation of these folks at proceedings of the Consent and Capacity Board, things that very much worry me.

Having said that, I think I'll tell you a little anecdote to illustrate for you how I think things should go. Some time ago I was asked to come and represent a client at one of our provincial psychiatric facilities, I think maybe the one that's left, or one of the very few. In due course, I phoned ahead and made the appointment to say I was a lawyer coming by to see my client's records. I showed up there, and when I went in I was asked, "What unit?" I gave my client's unit number. They said, "What is your name?" I told them and I spelled it. They checked in the computer. The woman said, "Humph," and she went off. The next woman came and we went through the same thing: I gave a unit number and a name; she looked in the computer. I thought, "They're very well organized here. When you call to say you're coming by, they put your name in the computer and if there's some problem"—eventually the third woman came. She said, "Here to see your records?" I thought, "All right." All of them believed me to be a psychiatric in-patient because it was records access day at the facility; in other words, every Wednesday, all day, for the in-patients of the provincial psych facility who want to come and view their records.

To me, this illustrates how things should go for this clientele. When they feel like it, if it happens to be a Wednesday or on another day, they should be able to come by and access their clinical record. Why? On one occasion, I have a client who's been in for more than 53 years. There's not a lot going on. These folks want to know what's being said about them and they're entitled to know what is said about them. These are very sensitive records. They have every right to see and to ask that corrections be made to these records. It is not always this easy, and I have real concern that provisions in Bill 159 would make this type of easy access to one's own record really difficult for psychiatric in-patients.

Particularly, the ways in which I think our clients are better protected are under the provisions of sections 35 and 36 of the Mental Health Act. My main concern is that whereas now if a physician wants to withhold access to the clinical record of a patient, it is the physician's onus and obligation to apply to the Consent and Capacity Board, as you know, within seven days and make the argument with respect to harm. That is section 36(6) of the act, and those harm criteria are a very high threshold. It's about serious bodily harm to another person or serious mental harm to another person. It also contemplates serious interference with ongoing, real treatment of the individual. That's the way I think things need to stay.

With the changes contemplated in Bill 159, what you get is the prospect of a patient asking to access their own record and 30 days for the initial contemplation of a refusal. Maybe you get that refusal, maybe you don't. If you don't ever get the refusal, then you don't even have a deemed refusal section so that the individual can apply to the commissioner on that. That's very frightening in terms of our clients' right of access.

Plus they need to pay a fee. When you're a psychiatric in-patient and you've got a \$112 comfort allowance or personal needs assistance and the public guardian and trustee is managing your money, even a \$5 fee is going to be something that's going to be difficult for you to come up with and organize. To go then to the commissioner as opposed to the Consent and Capacity Board, which has the expertise that in my submission is required to look at questions of harm to another individual or interference with treatment to withhold a record, I think is inappropriate. The seven-day deadline that's already in the Mental Health Act is there for a reason: because proceedings of the Consent and Capacity Board must get underway within seven days of the time of an application.

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If we were to lose these protections in the Mental Health Act in terms of access and the decision to withhold those records or not, I think you're going to see a complete bogging down of the process of the Consent and Capacity Board and essentially an abuse of process by patients, who will apply where they otherwise maybe would not have for various proceedings before the Consent and Capacity Board, because if they do that, if the physician wants to withhold their records and makes a statement as to expectation of harm, then at least that issue must be dealt with by the Consent and Capacity Board in a very expedited fashion in order for the rest of the hearing to proceed.

I have a concern about that because that's what I, as counsel, will be left with in terms of advising my client: "Well, you'd better apply. Figure out a reason"—and there will be a reason if someone's in a psychiatric hospital—"to apply to the Consent and Capacity Board to review your involuntary admission or your treatment decision, and then they are the ones who will have to deal with whether access can be withheld from you as opposed to your waiting for the rest of your life for the commissioner to deal with it or for a refusal to come."

Otherwise, the process of the board when there's a hearing that's been scheduled on someone's involuntary admission will be interfered with if we need to wait for another tribunal and another process to determine whether the client can have access to their records for purposes of that hearing on their involuntary admission.

You have to keep in mind that when we talk about psychiatric in-patients and their right to a hearing before the Consent and Capacity Board, you're talking about liberty and trusts that have been infringed, and it's absolutely appalling to contemplate that the individual who goes before the board to litigate these serious issues,

to try and get their freedom back or their autonomy to make decisions back, would need to wait longer than the seven days to deal with the issue of access. I'm focusing on that because that, to me, is the single most important issue.

I'm only going to speak for a couple of more minutes and talk to you about the Health Care Consent Act amendment that is proposed, that in my view stems out of what I've just said. I'll tell you from a practice perspective, and this is on page 3 of the executive summary under consequential amendments amending the Health Care Consent Act, right now section 76 of the Health Care Consent Act has a part I and a part II. Part I entitles you to look at evidence that the physician may want to put in at a hearing, and that's sort of due process and common. Part II, though, affords the psychiatric in-patient and her counsel basically an automatic right of access and the right to make photocopies of the entire clinical record at, it currently states, her own expense in preparation for a hearing of the board when capacity is an issue.

This single provision, subsection 76(2), has been the key to effective, competent and timely representation by legal counsel of all psychiatric patients who have an issue that they want to proceed to get reviewed by the Consent and Capacity Board. The amendment that's proposed in Bill 159 would erode what can be read as an absolute right to that access and to the copies because it adds the phrase "subject to subsections 34(5) to (9)" of Bill 159, where a physician may register a statement with respect to harm.

That's hugely problematic for me, because when I now go out to an institution to represent my client I face a lot of barriers already in terms of accessing their record. I'm often told that the client needs to execute a form 14, which is incorrect and a barrier to me because our clients are often paranoid; they don't want to put their name on a piece of paper, on a form 14. That doesn't mean they don't want me to look at their records and represent them competently; they just don't want to sign anything. I often get a lot of trouble about making copies of their records and I'm very often told that it will cost me \$300, \$400, \$500 to get the first 10 or 50 pages of that record. All of these things are barriers that need to be removed and not made more complicated. So I really urge you, if you're going to do this, to preserve the absolute right that I have as counsel to review my client's records in anticipation of a Consent and Capacity Board proceeding and, if at all possible, either remove the phrase "at my own expense or that of my client" or ensure that any capping on fees for photocopying that are contained in the rest of Bill 159 is consistently applied to this section of the amended Health Care Consent Act.

Basically, having said that, our conclusion is that our clients, for a good reason, have enjoyed essentially a Cadillac model of rights protection in terms of disclosure and access to their records, and that's because these are psychiatric records. They are the most sensitive records that an individual can have in terms of health records,

and that's because whatever information is contained within records that are compiled in a psychiatric facility will go on with the individual for the rest of their life and potentially cause there to be an involuntary admission, a removal of the right to make your own treatment decisions. Also there's a huge amount of stigma that attaches to the fact of a diagnosis and treatment of a mental disorder.

I appreciate that the thrust behind the bill is to consolidate and unify the way health records are handled in various institutions, but I think there's always been the acknowledgement that mental health records are different, and I see no reason not to continue protecting them that way.

This is the last point. On the same general thrust of things, there is already precedent in the way the Health Care Consent Act and the Mental Health Act are structured, where if you're found not capable with respect to treatment—that's medical treatment—you don't get independent rights advice about your right to apply for a hearing on that. However, if it's psychiatric treatment for a mental disorder and you're a patient within a psychiatric facility, you get the extra protection of rights advice attaching to that.

With respect to the sections that are in Bill 159 about capacity and the review of findings of capacity, I really think it would be a mistake, one that's potentially very tragic, to replace the existing provisions of the Mental Health Act with ones in 159 which don't require rights advice to be provided upon a finding of incapacity with respect to your records.

My suggestion is that you either leave the Mental Health Act alone and let it be paramount over everything else, the way it always has been and continues to be, or you make a stronger effort to import the higher level of protection in the Mental Health Act consistently into Bill 159 into different contexts.

I'm going to stop there, and if that leaves time for questions, I'm delighted.

The Acting Chair (Mr Toby Barrett): Thank you, Ms Szigeti, for your presentation. That would leave just short of two minutes' time for each caucus. Ms Lankin, do you have a comment?

Ms Lankin: Anita, thanks again. Your presentation is informative and helpful and I'll take time to read the more detailed submission that's here.

Yesterday we had a presentation from a law firm which raised an issue—which later was disputed by a number of lawyers, but there you have it, the issue is before us now. They raised an issue we hadn't heard before. It was with respect to the concept of informed consent and presumed capacity. They essentially said that we're not talking about treatment here but the concept of informed consent from the Health Care Consent Act, the real legal meaning about understanding the treatment and the consequences of having the treatment or not having the treatment. It is not reasonable to ask a health care custodian, which may be a hospital, to know what the inevitable consequences or reasonable consequences of

consent to disclosing the information may be when it's being disclosed to a third party, or even a doctor if disclosing with a patient's consent to an insurance company to know what the insurance company is actually going to do with it.

They said that there's a difference between informed consent and consent with knowledge, "Give the person all the information," but somehow they made a legal distinction between consent with knowledge and the standard of informed consent.

The other thing they said is that with respect to assessment of capacity, the capacity to understand the consequences of giving consent to a treatment, as assessed by a health care practitioner, is totally different than the capacity to give consent for disclosure of information, and that again it's unreasonable for a health care custodian, who may well not be a health care practitioner—it could be a community care access centre, a district health council—to have placed on them the burden of determining whether that person actually is capable and what is the capacity test. I got sort of blown out of the water on that because those words are so used in the health care system, and in mental health, with respect to disclosure of records and everything, they're used. But in general, outside of mental health, in the rest of the health care system, we have not tested these standards. Do you have any comments about that?

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Ms Szigeti: I have two comments. One, the Mental Health Act historically has placed the obligation on the health care practitioner to make these determinations in terms of capacity to consent to or refuse disclosure of your record, and also in terms of the capacity assessment.

Ms Lankin: Practitioner versus health care information custodian?

Ms Szigeti: That's right, because in the Mental Health Act you're talking about a physician who is also more than likely the individual providing the treatment, not on the facility, and that's fair.

In our paper we suggest that the optimally perfect thing to do, if you're talking about capacity assessment with respect to something esoteric like the notion of disclosure of your health records, is set up a category of individuals who are capacity assessors for this purpose, or somehow provide training to capacity assessors already established through the Substitute Decisions Act to come in and make a specific determination about the specific capacity issue.

Having said that, it can be such a big deal. If you know what's in the records and you're able to say, in our context, to someone, "Look, we've given you a diagnosis of schizophrenia and when we disclose this record to another provider somewhere, they will approach you based on that basis. If we don't provide this record, they may not have that diagnosis." Those are some of the types of consequences.

Whether I would draw a distinction between informed consent versus consent with knowledge, I'm not sure. If the concern that was raised yesterday is that the person

giving the information may not themselves fully understand the ramifications, then how are they getting full information such that consent with knowledge can then be obtained? I don't actually see a meaningful distinction there. I don't know if that's of any assistance at all.

Mr Wood: I wondered if I might ask your opinion with respect to fees. One suggestion we've heard is that the fees should reflect no more than the actual cost of providing the information. What is your reaction to that possibility?

Ms Szigeti: My reaction is that in the context that I'm concerned about, which is getting copies of records when I'm trying to assist a client in a seven-day time frame to turn things around for a hearing, I don't believe I should be charged anything. But having said that, the types of costs hospitals charge in using the photocopy room as a profit centre that may be appropriate for lawyers to come and get access to records in a personal injury lawsuit are not appropriate in some other context. Fees that commence with \$150, \$200, \$300 for the first 10 pages are wrong. I don't know what the actual cost is and I don't know how that would be determined, but if you look at a 10-cent-per-page cost, that's a nominal cost that most people would be willing to pay, and I don't really want to put a figure on that.

I think the most important thing would be to have flexibility, which there is in Bill 159 in terms of waiving the fee where it seems appropriate. But what I would like to see is a mechanism to appeal that decision—for instance, not to waive the fee to a psychiatric in-patient such as my client—to the commissioner if a decision is made that no discretion will be exercised to waive a fee. If it's a substantial fee, then I would like to be able to appeal that decision so that my client, who has very limited resources, doesn't end up paying out of pocket. But actual cost for photocopying is better than what is currently the practice. So if I had to, I would support that.

Mr Wood: To allow an appeal, the cost of the appeal would be greater than the cost of the photocopying, wouldn't it?

Ms Szigeti: I don't know. I'm accustomed to a \$5 freedom of information search fee, so that's the kind of things I would think about. Would the out-of-pocket costs of the appeal be more? I guess it all depends on whether or not our provincial legal aid system were kind enough to fund services for that type of appeal.

Mr Wood: That's what I'm saying. In actual fact, the cost of the appeal would be far in excess of the cost of the copying, wouldn't it?

Ms Szigeti: I suppose the cost of defending that appeal might outweigh the cost that you're forgoing in place of recovering the photocopies. So it would work both ways, would it not?

Mr Wood: I guess what I'm trying to say is, would we not be over-judicializing if we allowed an appeal for the cost of copying?

Ms Szigeti: I think it would only take one good appeal to set the standard. You'd then wave the case around for people, and my hope would be that at that point there

would be a working relationship between the health information custodian and the subject of the information. So it wouldn't happen.

If it can be stipulated in regulations that there are certain situations where no fee is appropriately charged, that would really be my preference. My clients' legal issues, in terms of the relationship of those issues to their involuntary hospitalization, would be the types of issues I'd like to see not burdened by negotiations around costs of photocopying.

Mrs McLeod: I know you were focusing on access but you extensively discussed disclosure as well in your brief and, for the record, I want you to comment on it. Your perspective, as you've set it out in your brief, and a perspective that was provided to us this morning by the Centre for Addiction and Mental Health commenting on section 33, suggesting that it be expanded somewhat to deal with risks to the individual by being able to provide health information to community care providers; the concern being the individual who is discharged from a psychiatric institution or perhaps from a jail. I've used the example of cases we've dealt with of someone literally put on a bus in order to find his way to a hospital and not being able to do that. That is a much broader aspect of disclosure, because you've said here that the disclosure should only be where there is risk to an individual other than that individual.

Ms Szigeti: Right. So the question is, should there be disclosure without consent based on the potential for harm to the individual if the individual fails to give their consent, as opposed to based on harm to others? Is that the question?

Mrs McLeod: Exactly. I think you've addressed it in your brief. But I wanted you to comment on the recommendation we had this morning that we need to be able to provide community support to somebody who is being discharged.

Ms Szigeti: Throughout our brief we're consistent in this. I think it all depends on capacity. The simple fact is, capable people have the right to risk and incapable people have the right to have informed decisions made on their behalf. So I would not support the notion of disclosure without consent in respect of records of an individual who is otherwise considered capable of giving that consent. I think that violates some very basic tenets.

Mrs McLeod: Presumably you'd like to think that if they're not considered capable of giving consent, they're also not being put on a bus on their own.

Ms Szigeti: I don't know if I can comment on that, but I would certainly say if they are considered not capable with respect to that consent about their records there is a substitute decision-making regime both in Bill 159 and in the Mental Health Act, if you leave it alone, and that ought to work fine, at least in theory.

The Acting Chair: Thank you, Ms Szigeti.

Is there a representative here from Zero-Knowledge systems?

COLLEGE OF DIETITIANS OF ONTARIO

The Acting Chair: We are running a little ahead of schedule. I wonder if we could move down to the College of Dietitians of Ontario, if you could approach the witness table. Good afternoon. We would ask if you could identify yourselves for members of the committee.

Ms Shirley Lee: Good afternoon. We're here to present on behalf of the College of Dietitians of Ontario. I'm Shirley Lee, registrar of the College of Dietitians of Ontario. With me is Mr David Buell, who is a public appointee on the council of the college.

Due to time constraints, we will not be speaking on all the issues that are in the written submission before you.

First of all, I would like to tell you a little bit about the college. The College of Dietitians of Ontario is one of 21 regulatory health colleges. It was established on December 31, 1993. The college presently regulates approximately 2,200 dietitians whose practices focus on health promotion as well the treatment and prevention of diseases using nutritional means. Dietitians practise in many different settings, including home care, hospitals, long-term-care facilities and public health units, just to name a few.

The primary duty of the college is to protect the safety and interests of the public. The college fulfills this duty under a group of statutes that includes the Regulated Health Professions Act, 1991, usually referred to as the RHPA; the Health Professions Procedural Code, which is schedule 2 to the RHPA; and the Dietetics Act, 1991. The RHPA and the code apply to all 21 regulated health colleges.

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The statutory functions of the college include: establishing and enforcing standards for issuing certificates of registration to dietitians; establishing standards for professional practice and conduct for its members; investigating and holding hearings on allegations of professional misconduct, incompetence or incapacity in order to make appropriate findings and assess appropriate penalties; and last, not the least, developing and implementing programs to promote continuing competence among its members.

The college commends the Ministry of Health and Long-Term Care for its efforts in developing privacy rules for the health sector. The college recognizes that this is a complex piece of legislation and that the ministry has had two previous consultations with its stakeholders on this topic. The college has participated in those consultations. The college agrees with the principles of this piece of legislation, which appear to be consistent with the intent of the privacy provisions in the RHPA. These principles are also consistent with the college's expectations of its members regarding the handling of patient health records.

After reviewing the PHIPA, the college is concerned that many provisions of the PHIPA may not apply well to the colleges. First of all, health regulatory colleges are fundamentally different from individuals and other or-

ganizations that have been classified as health information custodians in the PHIPA. Colleges do not provide health care services nor do they directly collect health information to create personal health records. Colleges collect health information from health practitioners and health care facilities in order to perform their regulatory functions, including investigating complaints and, when appropriate, holding disciplinary or fitness-to-practise hearings on allegations of professional misconduct, incompetence or incapacity.

We believe that the college has an obligation to protect the confidentiality of personal health information that is in the college's possession. Colleges are already subject to strict privacy provisions in the RHPA. With the exception of a few very specific circumstances, section 36(1) of the RHPA requires every council member, committee member, staff, consultant, legal counsel and volunteer to preserve secrecy with all information that comes to his or her knowledge during the course of the duty, with the exception that the information can only be used in the administration of the RHPA. This provision applies to personal health information as well. A breach of this privacy provision is punishable by a fine of up to \$25,000.

The college is concerned that the PHIPA may impair its ability to protect the public. The college recognizes the effort that has been made to address some of these concerns that we have expressed in previous consultations. However, conflicts between provisions of the PHIPA and provisions of the RHPA still exist. These inconsistencies will make it difficult for colleges to enforce its standards and hold its members accountable for their actions. For this reason, the college recommends that the health regulatory colleges be exempt in part by regulation from being classified as personal health information custodians. We have made some suggestions on specific wording, but I'm not going to go over it verbally.

As indicated earlier, there appear to be inconsistencies between PHIPA and the RHPA, and I would like to provide some examples. The first example is the conflict between the disclosure provision of the PHIPA, section 36(1) and the power of the investigator under the RHPA, sections 76 and 78. According to section 36(1) of PHIPA, the disclosure of personal health information by a health information custodian to a college appears to be discretionary. This would seem to be in conflict with sections 76 and 78 of the RHPA, which authorize investigators appointed by the college to enter business premises of a member and review, remove and/or copy documents, including personal health information documents, without consent.

If the PHIPA overrides the RHPA, a health information custodian may refuse to disclose health information records to an investigator appointed by the college, which would make it difficult for the college to conduct investigations or hearings. This may pose significant risks to the public, particularly when the investigation

involves sexual abuse of patients or gross incompetence of a regulated health professional.

In addition, section 11 of the PHIPA stipulates that the PHIPA prevails over other acts where there is conflict in provisions respecting confidentiality. This contradicts section 76(4) of the Regulated Health Professions Act, which also stipulates that the section relating to the power of the investigator applies, despite any provision in any act relating to the confidentiality of health records. So which one prevails over which one?

Another example of conflict relates to the reporting provision in the PHIPA and the mandatory reporting provisions in the RHPA. There are two mandatory reporting provisions in the Health Professions Procedural Code, schedule 2 to the RHPA. Under section 85.1, regulated health professionals must report the sexual abuse of patients by any regulated health professional to the appropriate college. Section 85.5 makes it mandatory for employers to report the termination of a regulated health professional for reasons of professional misconduct, incompetence or incapacity. These mandatory provisions aim at reducing risks to the safety of the public. However, under section 33 of PHIPA, the disclosure of health information by a health information custodian for the purpose of eliminating risk to an individual's safety appears to be discretionary. Since the proposed PHIPA is supposed to override the RHPA, an individual may choose not to report sexual abuse of patients by health professionals and they may choose not to report terminations related to professional misconduct or incompetence.

There also appears to be a conflict between section 24(2) of PHIPA and the investigative and disciplinary roles of the college under the RHPA. Section 24(2) of the PHIPA requires health information custodians to make reasonable effort to ensure that the health information is accurate, complete and not misleading before using or disclosing it. This provision appears to be in conflict with the role of the college. Under the RHPA, every college is required to investigate allegations of professional misconduct, incompetence or incapacity. Incomplete, inaccurate or misleading patient health records are often collected as evidence. To fulfill its role, the college is obliged to collect the health information as it exists, even if it is incomplete, inaccurate or misleading. Such information may be crucial for proving the guilt of the member and for taking disciplinary actions against the member. As these inconsistencies may make it difficult for the college to carry out its mandated function, the college recommends that section 11 of PHIPA be amended so that where there is conflict between PHIPA and the Regulated Health Professions Act, the Regulated Health Professions Act should prevail.

Having pointed out some discrepancies between the PHIPA and the RHPA, I would like to make some comments on an excellent provision relating to the promotion of quality-of-care information in the PHIPA. One very important and proactive function of the college is the development and implementation of quality as-

surance programs that require participation of all members. The purpose of such programs is to ensure that regulated health professionals continue to maintain and improve their competence to practise. These quality assurance programs usually require members to assess their own competence and to take actions to address any identified need. Members are also required to provide information relating to their QA activities to the college.

If we want members to participate in these QA programs in a meaningful and candid way, members must be assured that QA information, whether it is in the possession of the college or the member, will be kept confidential and will not be admissible at proceedings. Some short-term measures were introduced to provide protection until the PHIPA could be enacted. However, the protection in the PHIPA is broader than the interim measures provided in the Health Professions Procedural Code. First, all information gathered for QA purposes is covered, not just the information about the member. The information is protected from disclosure in pre-trial discoveries, not just, as might be the case now, at the hearing itself. There is protection for civil liability given to those who provide the information, not just to those who gather and use it.

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In sections 40 to 43 of PHIPA, the protection of QA information appears to be limited to quality of care committees of hospitals. This college believes that the college's QA activities would be more effective if they were covered by the protection provision under section 40 of PHIPA. For these reasons, the college recommends that section 40 of PHIPA be amended so that the definition of "committee" includes the quality assurance committees of colleges.

Our last recommendation relates to the Business Corporations Act. Bill 152, the recent proposed amendment to the Business Corporations Act, if passed, will allow regulated health professionals to incorporate their practices. These health professional corporations would most likely collect and use personal health information. To ensure that the privacy of such information is protected, health professional corporations must be subject to PHIPA.

We recommend that if Bill 152 is passed, section 2 of PHIPA should be amended to include in the definition of "health information custodian" professional corporations owned by regulated health professionals under Bill 152.

I would like to thank the standing committee for the opportunity to provide comments from the college, and we request that our recommendations be considered and adopted. We would be pleased to answer any questions that you may have.

The Acting Chair: That leaves two minutes for each caucus, and we will begin with the government members.

Mr Wood: Do you have the power to subpoena records?

Ms Lee: At a hearing.

Mr Wood: Do you have the power to do that during the course of your investigation?

Ms Lee: During the course of investigation, an investigator appointed by the college right now would have the right to enter the premises, usually with a warrant, and to take any evidence, copy any information or remove any objects that are relevant. Right now, in RHPA, the wording is such that people are required to comply.

Mr Wood: The warrant comes from whom?

Ms Lee: We would have to apply for it, but it is not a must. As the Health Professions Procedural Code stands, the investigator has that authority with or without a warrant. What we are saying is that the provision in PHIPA may dilute that power.

Mr Wood: Suppose we were to say, for the sake of argument—I'm not saying we're going to do this—"We'll accept your submissions to take you out of PHIPA and leave you in the Regulated Health Professions Act, but if you want to get a record of somebody, you've got to get a search warrant to do that," would you have a problem with that?

Ms Lee: We are working under that right now. I just want to clarify that when we say we'd like to be exempt in part from being health care custodians, we're not saying one way. There are many different ways of doing it. We may not have to be taken out totally, but what we are pointing out is that as it stands now, many areas do not work, many provisions do not work. We've suggested one way of doing it but there are many different ways, and we are not suggesting that the only way is to take us out totally.

Mr Wood: We understand the concern. I'm saying if, for example, we were to meet that concern and say to you, "All right, if you want to have access to a health record, you have to get a search warrant from a court before you can do that," could you continue your work under a regime of that nature?

Ms Lee: I can't answer that question without consulting our legal counsel, because I don't want a situation where we cure one problem and create another problem. So I have to say I cannot answer that question at this point.

Mr Wood: If you have a chance to consult with your legal counsel and give us the answer to that, that would be helpful, to myself at least and perhaps to the committee and the ministry.

Ms Lee: Sure.

Mrs McLeod: I'm one of the ones who has been persuaded by the effective representation of the regulated colleges that we have to make some changes. One of the directions that we've been at least discussing around the table is the exclusion that's been recommended, but as well to specifically recognize the Regulated Health Professions Act in terms of the protection of your ability to carry out your regulatory duties. One of the questions we've been posing back to people is what would be missing if we went as simple a route as that. You pointed out a couple of things in your brief that would probably need to be added to the Regulated Health Professions Act if in fact you were not to be included in Bill 159.

I also appreciate that you are the first ones, I think, who have recognized this issue of the incorporation and the Business Corporations Act. I guess that could be covered under Bill 159, it could be made to apply to Bill 159 without having to be under companion legislation that deals with the commercial sector. Would that be your sense of it?

Ms Lee: I will leave it up to the legal experts to deal with that.

Ms Lankin: Thank you for your presentation. I have one quick question. With respect to incorporated health care practices, could you tell me why it is you think the bill, as it stands, wouldn't cover them? You are talking about practices that are owned by members of regulated health professions and they fall under the definition of health practitioner, which falls under the inclusion of being a health information custodian.

Ms Lee: From my limited understanding—and I would have to check with legal counsel—once there's an incorporation, the corporation itself is a separate legal entity from the practitioner. That's why we felt it is important to make sure that's there, so there's no misunderstanding, no vagueness in it.

Ms Lankin: It would be interesting to have your legal counsel's views on that.

Ms Lee: This is actually recommended by our legal counsel, that it should be—

Ms Lankin: I'd appreciate getting a bit more background. Here's the nature of my query: if the regulated health professional is de facto a health information custodian, because they are collecting and using and disclosing for the purposes of giving health treatment, of providing health care, why would the corporation as a separate entity also need to be covered, and do we run into problems then in terms of transfer of information? I can't understand why the entity would have access to that information.

Ms Lee: From my understanding, the proposed amendments allow the corporation to have multiple practitioners, more than one practitioner. So it would be clear, rather than—

Ms Lankin: So each one of them would be a health information custodian under the act as it is.

Ms Lee: Right.

The Chair: Thank you very much for appearing before us today.

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CANADIAN LIFE AND HEALTH INSURANCE ASSOCIATION

The Chair: Our next presentation will be from the Canadian Life and Health Insurance Association. Good afternoon and welcome to the committee.

Mr Charlie Black: Thank you, Mr Chairman. My name is Charlie Black. I am the senior assistant of insurance operations for the Canadian Life and Health Insurance Association. I'm very pleased to spend a few moments with you this afternoon to make some comments

on Bill 159 and to express several concerns that our association has, based on our review of the proposed legislation and on our experience over quite a number of years with regard to similar legislation such as the federal Bill C-6 and with other issues in the protection of personal information.

The Canadian Life and Health Insurance Association is the industry association or trade association representing most of the life and health insurers that are active in Canada. We have approximately 75 members who account for about 90% of the life and health insurance business in effect in Canada.

Life and health insurers, and the provision of those services, are not typically regarded as being part of the health care sector, although in some ways we are very close to being part of that sector in the course of paying or reimbursing the costs of some health care services that are not covered under the Ontario health insurance plan or similar provincial programs, and also in providing disability benefits to meet some of the financial implications of serious illness or injury.

As we understand the legislation, it is essentially a sectoral code or piece of legislation focused on certain designated entities within the health care sector, and life and health insurance companies would not be directly affected by the legislation as proposed currently. In 1997, with the consultation paper that was released by the ministry at that point—of course that was in the days before Bill C-6—insurers and some other third parties were included as health information custodians. We believe the current approach is appropriate in current circumstances and is also consistent with the other provinces—Manitoba, Saskatchewan and Alberta—that have legislated in this area.

In spite of the fact that insurers would not be directly affected by the legislation, our activities in providing life and health insurance to Canadians are very closely inter-related with the health care sector and information flows with great frequency between the two sectors. And I would emphasize that that is a two-way flow, although personal health information and other personal information is essential for the conduct and provision of voluntary insurance services.

There are three main activities of our industry that relate to this area. One—and by far the highest volume of activity—is in the payment or reimbursement of the costs of certain health care services, coordinating and supplementing the provision that is made under OHIP and other provincial programs. Primarily these involve the costs of prescription drugs for individuals who do not qualify under the Ontario drug program, the costs of dental services, some hospital charges for semi-private accommodation etc, some ambulance services, health care costs incurred outside Canada and so on—a fairly long list. As I say, these are fairly high-volume, and probably in the few minutes we spend together this afternoon in the order of 8,000 to 10,000 claims will be processed in Canada, approximately 40% of that in

Ontario, for the costs of health care services. So it is a high-volume area.

The second area where personal health information is essential, as I referred to earlier, is in the assessment of claims for disability benefits when someone is unable to work because of an illness or an accident—again provision of benefits in a complex system. In other situations, benefits may be available under WSIB, from Canada pension, from employment insurance, from auto insurance no-fault benefits and so on, but the provision of disability income replacement benefits is a very important service and a very important benefit to individuals who suffer a serious health problem.

The third area that is very significant is in the evaluation of risk when someone applies for insurance. Under a strongly voluntary life and health insurance system that involves a wide range of choice to individuals, it is essential to review information on the risk that individual represents when he or she applies for insurance, and personal health information is a key part of that assessment. Recognizing the importance, indeed the essential nature, of personal information for the provision of life and health insurance, our member companies have recognized for many years the importance of protecting the confidentiality of that information. The written submission that I have provided to you, and I apologize that I was not able to get that to you earlier, outlines a number of the activities that our industry has been engaged in over an extensive period of time.

For example, in 1980, 21 years ago, our industry, as far as we know, was the first industry to adopt a privacy code, what we refer to as our “right to privacy” guidelines. Those guidelines were presented to Mr Justice Horace Krever when he was conducting his extensive survey of the confidentiality of health information in Ontario, and he included those principles or those guidelines in his report and commented favourably on them. They have been revised periodically, most recently in 1993. We should have revised them more recently, but frankly there is so much happening with the development of the CSA code, which is very similar to the industry guidelines, and with the development of Bill C-6 that we are focusing our attention on those issues rather than on what we consider might be spinning wheels at this point in time in terms of making slight amendments to our industry guidelines.

We have also been involved—and I’m just highlighting a couple of the items in the written submission—over the years in extensive discussions with the Ministry of Health, as they have dealt for many years with the development of legislation such as you have before you to protect the personal health information of residents of Ontario.

Given this history, I don’t think it would be any surprise that we very strongly endorse the objectives of this legislation. We strongly endorse the principles that underlie the legislation, although, as you’ll note in the written material, we do urge that these principles be set out somewhat more explicitly and in a more consistent

manner with the way in which such principles are presented in other legislation.

We have reviewed some aspects of the legislation. It is a complex piece of legislation. Our assessment is that it reflects many years of effort, many years of expertise, and that it is essentially a sound and thorough document. However, as we review the material and look at it in the light of current aspects in the protection of personal information, we do have some concerns that it does not adequately reflect the most recent developments, particularly the implementation of the federal legislation, Bill C-6, which will apply to virtually all activities in our industry and in many organizations in the province, and the proposals for an Ontario privacy act that would similarly have very broad application to those activities. We do have some concern about the lack or apparent lack of harmonization in a few respects—not extensively but in a few respects. It appears that there is not adequate harmonization between this legislation and the federal legislation.

Incidentally, I have noted many of the comments your committee has heard regarding the importance of a substantially similar designation under C-6. Our assessment of that provision under C-6 is that even if legislation such as Bill 159 or the Ontario privacy act were deemed substantially similar, many organizations such as life and health insurers would continue to be subject to C-6 as well as the other legislation. There would be potential overlap, potential duplication, and thus the need for harmonization is critical. That is the key issue or concern that we have in terms of looking at this legislation.

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We are also concerned, or maybe the word is “confused,” about the status of health professionals who are employed or engaged on a part-time basis by insurance companies and by other organizations to provide their expertise in the area of health care but not to provide health care to individuals. For example, most life and health insurers do have medical staff, do have trained nurses or physiotherapists engaged in assisting and developing programs to help an individual return to work. In that capacity, those individuals are not providing health care to the individual. They are not in custody of the information; the insurer is. Thus, we feel that there should be an exception for those individuals, that they should not be considered to be health information custodians while engaged in those activities and that there should be another provision added to Bill 159 comparable to, I believe, subsection 2(3), that currently deals with a similar situation where someone is acting in a similar capacity with an organization that is subject to the Freedom of Information and Protection of Privacy Act.

Also, just moving very quickly, we do have some concern about the comprehensiveness of this legislation. In our view, it would not protect certain information in the health care sector if that information is not viewed as being personal health information. This is of particular

concern to us because, in some instances, that information could be information that is collected from life and health insurers. In the submission I mention that details on an individual's insurance coverage might provide information that that individual is eligible for reimbursement of a drug claim or a dental claim because he or she is a dependant of another individual. That, by itself, would disclose information on the relationship between those two individuals. In our view, that information, in many cases, would be sensitive, perhaps extremely sensitive. We believe it should be protected in some way through privacy legislation, particularly given the uncertainties regarding the application of Bill C-6 to the health care sector. It appears that if any activities are deemed to be non-commercial, then C-6 would not protect that information either. So we wanted to draw that to the committee's attention and to urge that consideration be given to broadening the comprehensiveness of legislation such as this. Or I guess our overall preference would be to combine it with the proposed Ontario privacy act and have a single piece of legislation that would set forth general rules and would also set out specific provisions that would be necessary for protection of personal health information.

Mr Chair and members, that is a very quick summary of our comments on the legislation. I appreciate this opportunity to meet with you, and I will try to respond to any questions you have, either now or subsequently.

The Chair: Thank you very much. That leaves us that awkward amount of time. Dare I try and divide it amongst three colleagues? We've got about four and a half minutes, so I can ask for a minute and a half from each.

Mrs Pupatello: Thank you for coming today. I understand that some of your member companies have been involved in list collection and/or purchase of lists or selling of lists. Much of it may have to do with research that these companies would engage in to determine outcomes to actuary-type work etc. When that happens, give me a typical follow-through of data that's collected and then used for those purposes, or when lists might be sold to interested parties, that they would be cleansed in what manner, if at all.

Mr Black: I apologize, but I'm not aware of any instances where lists of individuals are sold by our industry. We have a condition in our consumer code of ethics and commitment to comply with that consumer code is a condition of membership in CLHIA. That provision is quoted in the submission but I think the words are “to protect personal information and to use it only for the purposes for which it has been submitted.” Insurance services are offered in some cases to members of an association or members of a defined group. In that case, generally speaking, our companies would not buy the list; they would work with the association and make available a mailing or an offering that could then be sent by that association, for example, to the alumni of the University of Western Ontario, as I sometimes receive.

But I'm not aware of the sale in any instance of lists of individuals.

Ms Lankin: A quick comment and then a question. We did hear earlier this week from an individual who saw a doctor who fraudulently billed OHIP for services that were not provided to that patient. A number of people in that community were in the same situation. One of the individuals told a press conference about subsequently being denied continuation of his insurance policy. It could be coincidental, but nothing else happened in his life, other than some knowledge of psychotherapy, alcoholism and other things being reported on his OHIP record which were untrue.

Is there anything in your industry that goes on where the industry attempts to get access to that kind of information from doctors' records or OHIP records? That leads to the concern a number of people have raised that we should be looking at legislation that regulates health information irrespective of where it is, instead of regulating the control and access and disclosure of the information by the health sector. Some people are urging us to include your sector under this legislation and to actually regulate the protection of health information wherever it falls in society. Could you respond?

Mr Black: I will try, although that is a rather complex area. It's difficult to comment on the first instance without knowing the full details of that. There are situations when someone applies for insurance or someone applies for benefits whereby confirmation of information obtained from that individual may be sought from an attending physician or a hospital where the individual has received certain services etc. But other than that, information would not typically be sought from the health care providers.

I'm sorry. What was the second area?

Ms Lankin: The legislation as it's now drafted applies to the sector. Some people are saying, "No. Write legislation that protects information wherever it is in society."

Mr Black: It's a very complicated issue, and this is the sort of question that led to our comment that we feel the legislation should be updated and should be carefully reviewed to ensure that it affects recent developments.

Bill C-6 will apply to all activities within our industry, we're convinced, whether it's personal health information or other personal information. There is provision for sectoral rules. There are uncertainties under C-6 as to whether it does apply to the health care sector, and to what extent, and thus we feel Bill 159 is essential to fill that gap.

I hope the information indicates that we are committed to the protection of personal information, all personal information in all sectors, public and private. Our preference would be for a single legislative approach that would address all information in all sectors. That is not possible in the current environment in Canada. We believe the sectoral focus of this legislation is appropriate and that any issues regarding any type of health information should be covered within the health care sector, and also that for any type of information where controls

are necessary, those should be provided under either the federal legislation, as they are, or under Quebec's legislation, which has been in effect for six years now, or under the Ontario privacy act that we fully expect to probably be back here speaking with you on in a few months' time.

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Mr Wood: Have you had an opportunity to address your mind to the question of informed consent, which is required in the draft act, rather than the test of just consent?

Mr Black: The area of consent is a very perplexing one. I had the opportunity—and I stress the word "opportunity"—to work with representatives from various sectors, including an employee of the Ontario government, as the CSA code was being developed, and in particular to chair a subcommittee that looked at the broad issue of consent. Our feeling there was that the nature of consent varies considerably, and in our view appropriately so, in different areas.

For example, in the area of health insurance, I'm not quite sure what word to use, but it's not implied consent; it's more than implied consent—

Mr Wood: No, I'm talking about informed consent.

The Chair: Mr Wood, we've run out of time.

Mr Wood: I'm not over my minute and a half?

The Chair: Actually, we are.

Mr Wood: Not by my watch.

Mr Black: We strongly support informed consent, and certainly the openness provision in Bill C-6 I regard as being extremely important, that information would be available to individuals on what is done with information.

I just wanted to mention that in the health care sector a very common situation is that someone walks into a drugstore, presents either a paper card or a plastic card to the druggist, and walks out with a prescription. The druggist enters that information into the computer, the information is transmitted to the insurer, and the pharmacist's bill is paid. There is no signature; there is no explicit consent in that sense. So there are various forms of consent. I fully agree there should be adequate and indeed superfluous information available to an individual to know what is done with his or her information before he or she provides consent.

The Chair: Thank you very much. We appreciate you taking the time to come before us here today.

COLLEGE OF OCCUPATIONAL THERAPISTS OF ONTARIO

The Chair: Our next presentation will be from the College of Occupational Therapists of Ontario. Good afternoon and welcome to the committee.

Ms Jan Robinson: Thank you. Members of the committee, good afternoon. My name is Jan Robinson. I'm registrar for the College of Occupational Therapists of Ontario, and I'm representing both the college and the council of the college. We're really pleased to be here

and to have an opportunity to bring our perspectives to you.

You have a copy of our written response. Just by way of background, our college regulates around 3,500 occupational therapists in the province. Occupational therapists practise in a wide variety of health-related settings, both publicly and privately funded. Those settings include hospitals, CCACs, community area clinics, schools, employment settings, industry, health planning and health promotion, a very broad spectrum, and also include assisting individuals of all ages, from neonatal to elderly individuals, in all stages of life related to health service care under occupational therapy.

I really wanted to just focus on two particular areas today in my time with you and emphasize some of our points in that regard. I know that you've heard from many of my colleagues over the course of the last few days, and as well in particular from the Federation of Health Regulatory Colleges of Ontario. I just wanted to emphasize that we were participants in the development of that particular position and certainly have signed on to the position of the federation.

Our remarks are also based on the fact that we support the intent of protection of the privacy of health information and we believe this discussion to be really critical to the public interest.

Our first area of concern is what appears to be the blanket inclusion of health colleges as health care custodians. Our concern is that there appears to be a lack of appreciation of how colleges use health information and use the information they receive. As a result, the proposed act inadvertently throws a wrench into components of our mandate. The college certainly does receive and review health information internally. The purpose, however, of that information is not the management, manipulation or disclosure of the information. The purpose is rather as evidence in a variety of ways to assist in examining an occupational therapist's practice. We don't generate health information.

The rules in the RHPA speak very clearly to the sensitivity of the information that we receive. Certainly there are confidentiality provisions within that which we need to work with, and to the highest regard.

Our fear is that the broad inclusion of colleges as health care custodians serves to clash one public interest mandate with another. I just wanted to provide you with examples of where we're coming from around that particular issue. In particular, they're related to mandatory reporting provisions of the RHPA.

I'm sure by now you're familiar that there are two particular ways to mandatorily report under the RHPA. One is through employer reports. That is the situation where an individual may be discharged from their particular practice related to their competency or issues related to their performance. The second is sexual abuse mandatory reports, which of course are quite egregious. I know that you're probably also aware that there was an awful lot of time and energy in the late 1980s and early 1990s around whether or not a mandatory provision was

necessary for sexual abuse reporting. In fact, the evidence was overwhelming that that needed to occur.

I'd like to point out that our mandatory reports, although they are fewer in number than the complaints to the college by far, are some of our most critical investigations. They're some of the most critical that we do. They are our most complex by far. They are certainly our most challenging by far. They are also the ones that reveal for us some of the greatest substandard care that we have to investigate and look after and deal with. The majority of our referrals to discipline, actually, come from our executive committee related to mandatory reports.

It would appear, however, that section 34(1)(b) under the proposed act, where the clauses are permissive about the release of information, in fact shields an individual from reporting where otherwise they'd be required to do so under the RHPA. Again, our position is that the RHPA is about the public interest and about protection of the public interest. So the influence of the PHIPA on our inability to then maintain that mandate is of concern to us, and the issue of paramouncy, we believe, needs to be addressed.

Our role, very specifically, is about safe, ethical and effective occupational therapy practice in this province. Where elements of the health care custodian role impair this mandate, we believe changes are necessary. Not dissimilar to some of my colleagues, we would see this accomplished either by exemption from the health care custodian role via regulation or, at the very least, a look at partial exemption around some of these key roles that we have concerns about, and further, assuring that the paramouncy of the RHPA to the PHIPA, where necessary, is taken into account.

Secondly, the piece that I wanted to raise has to do with our registrants and the ability of the college to guide and regulate registrants. Currently, as a regulatory college, we put out an awful lot of material related to guidance around health information already. We have specific guidance related to informed choice and consent, release of documents, confidentiality, security of records etc. So there's a fair amount of information already there. Further, when we look at our trends related to complaints, mandatory reports and, in particular, the practice advice calls that the college receives, although the majority of our practice advice calls are from registrants, we receive them from the public as well. I must tell you that those calls, particularly from the public, tend to come from individuals dealing with health care providers in the private sector, and their concern very often is about release, access and use of their data within that particular sector.

We're very concerned that this proposed act has deliberately excluded the insurance sector as a custodian. When I'm talking about the insurance sector what I mean is auto insurance and the health and life side of insurance, and I also refer to the Workplace Safety and Insurance Board. Our belief is that the result of this exclusion really skews the management of health information and could

skew the management in many ways. We do acknowledge and certainly understand that this sector will be covered under commercial privacy legislation, but our understanding is that this government chose to introduce separate health information privacy legislation because it was not satisfactorily managed by other bills, such as Bill C-6. We also acknowledge that bills similar to Bill C-6, whether they be federal or whether they be provincial, are not set out with health interests in mind. Their interests are business and commercial. So we would suggest that if the government believes that information needs to be protected, it needs to be protected across all health sectors, public or private.

In our profession, what this legislation would effectively do in this particular issue of health information is divide our therapists and our regulation of this issue in half, with half of them dealing in the public sector and half dealing with different rules related to private sector activity.

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One of the other ways that our council has considered it and debated it is that if you're in a publicly funded environment, so if you're part of a CCAC or you're part of a hospital, that particular system is looked at as a health care custodian and individuals are employees within that sector. Within the insurance industry, for example, that is not looked at as a health system or a system that deals with health information sufficient enough to be covered. So what you've got are the individuals being covered off, but not the system itself. It's sort of the flip side of the visual.

The other thing that we'd really like to suggest is that health care is changing. You know this. The government of course just recognized this by introducing the new telecare program over the last week or so. But with telepractice starting to occur, not only within the province but across boundaries and borders, and with the increase in multinational health corporations and the potential of those settling in Canada and how we're utilizing those, we're really in a position where we believe that this legislation needs to look not just at what we had yesterday or what we have today, but where we're going to be going in the next five to 10 years, with technology and the mobility of professionals and how that will affect the Ontario public.

Again, I mentioned earlier that we provide guidance to our registrants to ensure public interest. If we were to be writing guidance around the protection and use of health information, and we presume and we carry this through to its fruition, two or three years down the road what we're looking at is a document that includes guidance under the RHPA, guidance under this particular act, guidance under the Freedom of Information and Protection of Privacy Act, something under consumer and commercial relations here in Ontario, and Bill C-6. That's a very fragmented way to look at a very important issue from a health care provider perspective and from a consumer perspective. Our experience and logic would say that if we're going to divide it up in that way, it's probably

ungovernable at best and creates confusion at best. Many providers practise in different sectors, not just in one.

An example of consolidating that would include the consent piece, how we've looked at consent in this province. Although not perfect, it looks at consolidation. Another example of how we've looked at consolidation would be the Regulated Health Professions Act, where there were 50-some-odd ways in which we legislated health providers for a number of years, and over 10 to 15 years studied about how we looked at consolidating that under one act.

We suggest that if health information is seriously important enough to safeguard, then it's important that the rules should apply across those sectors that manage it.

That concludes my remarks. I commend my report to you for your further consideration. Thank you for the opportunity.

The Chair: Thank you very much. That leaves us about two and half minutes per caucus. This time I guess we'll begin with you, Mr Wood.

Mr Wood: Do you have the power to subpoena documents now?

Ms Robinson: We have the power to summons materials, yes, under the act.

Mr Wood: Who does the summons come from?

Ms Robinson: We would seek a summons through the court system, through the typical legal process.

Mr Wood: For the sake of discussion, suppose that we were to agree with some of your suggestions revolving around the relationship between the regulated health act and the draft act we have before us, and suppose we said you have to get a subpoena from a court if you want to access anybody's health information without consent, would you be able to perform your functions under such a regime?

Ms Robinson: I guess part of the issue would be dependent upon the kinds of circumstance available. I'm trying to think of the kinds of scenarios, but partly it might depend on timing. Part of the issue might be related to that. There may also be issues related to the particular kind of investigation that we're looking at doing.

Mr Wood: If I could jump in, we are moving toward 24-7 availability of search warrants. Assuming you had 24-7 availability of the warrants, would you be able to function under such a regime?

Ms Robinson: Given that we're a small college, my preference would be to provide a written response back to you on that because I would like to have the opportunity to ask our legal counsel around situations that we might not yet have experienced in order for me to make a better-informed comment. I'm happy to do that, but I would prefer to do it in a more informed way.

Mr Wood: That would be fine. Simply send a memo to the committee and it will be distributed among the members. Those are my questions.

Mrs Pupatello: I was interested in your comments around the insurance companies and other firms that wouldn't be included in this. I was looking through the various sections of disclosure, for example, and one of

them has a particular clause of disclosure and when you can disclose. One of them says "fee for the purposes of obtaining payment for health care provided to the individual." I guess, looking back, it's not included in terms of custodians, but they also aren't the deliverers of health service, and any that would be I'm guessing have been listed. Tell me what your concerns are around that group not being listed as custodians.

Ms Robinson: What happens currently is that insurers utilize occupational therapists really broadly, so they are hired as independents. The problem is that the insurance system often expects its reports to be directly sent back to an insurer. What you have then is a client who wants direct access to their information, and deserves to have access to their information, but gets caught in the system of an insurer that isn't necessarily releasing or takes a long time to release, or is in fact very paternal about their release. Their release is more indirect: they won't release directly to a person but they might release to their physician or they might release to another individual.

Mrs Papatello: There's no authority, in other words, for them to have to release if they don't choose to release.

Ms Robinson: No. So what happens, for example, for occupational therapists is that we have overriding provisions for expectation for release. But then what you've got is a system that's out of sync. So everyone's working on slightly different rules and what happens for consumers is that they feel that they are caught, and they're not clear on what they're dealing with, even around their own claims. That's been our experience, and distress—for example, an occupational therapist must submit a treatment plan. We're right in the middle of doing auto insurance education across the province, and some of the things I heard around this is that treatment plans are submitted but not necessarily shared with the client, so then you have a provider that's going out to provide the treatment that they're being asked to by the insurer with a client who hasn't yet heard what the treatment plan was about in the first place.

So it's those sorts of pieces that we believe that if in fact systematically we looked at health information as just clearly health information, period, then what you'd have is transparency and the ability of people to access what is rightly theirs in the first place.

Ms Lankin: Following up on Mr Wood's question, you've given an undertaking to have legal counsel provide a response to the committee about what concerns you would have if you were compelled to use a warrant to access information. This question has come up a few times. I actually am not sure where based in the concerns colleges have raised that query comes from, so I want to ask if you would ask legal counsel to inform us if there have been any problems or complaints lodged against the college for the way in which you have accessed information. Under the RHPA it was envisioned that a very specialized group involved in self-regulation must have the right to enter premises and seize records in order to undertake the investigation. And the triggers for that are

set out in the legislation. So I'd like to know if there have been any problems with that system, if there have been any complaints about how it's been exercised and what additional protections or benefits we would have from involving the judiciary or court proceedings in issuing a warrant.

Ms Robinson: Fair enough. I know we haven't run into anything, but I'll ask, sure.

The Chair: Thank you very much. We appreciate you coming before us here this afternoon.

1600

ONTARIO FEDERATION OF COMMUNITY MENTAL HEALTH AND ADDICTION PROGRAMS

The Chair: Our next presentation will be from the Ontario Federation of Community Mental Health and Addiction Programs. Good afternoon. Welcome to the committee.

Mr Chris Higgins: Thank you very much. I certainly appreciate the chance to address the committee on the matter of the bill before us. My organization represents 230 agencies across Ontario that provide mental health services and addiction services to people here in our province. At any given time we would see about 50,000 people a day.

We understand that health information is a critical component of the delivery of health care, that is, the timely and accurate provision of necessary information is necessary to do a good job. There are lots of simple examples of this and I'm sure you're very aware of them. PHIPA or something like it is necessary to get at that problem because right now information flow is anything but effective.

As well, in the mental health and addiction world, the therapeutic relationship between staff and a person, an individual, is a very critical component of service. In fact, if you don't have that therapeutic relationship, you cannot provide service. It may or may not be necessary to have a good working relationship if you're doing some procedures in health care, but in mental health and addictions, if the person does not trust and feel safe with their counsellor, their therapist, there is simply not going to be any service delivered.

The issues that people talk about with a therapist are intensely personal, intimate and often deeply disturbing. People are experiencing stuff they've never experienced before, or perhaps they have, but it strikes them at a very profound level. People don't like to talk about that with anybody. Sometimes they don't even like to acknowledge that it's happening. That's always the case, or at least often the case, with mental health, and often the case with addictions as well. There is a denial or a tendency to try and hope the problem away. When someone finally comes forward to talk to somebody about that problem, they need to feel they can do that in safety. If they don't feel safe, they simply won't do it.

That's the other trade-off, the other element in the quandary we face. We need to have good information to provide good health care, but if we facilitate the transmission of information in such a way that we convey to someone a sense of insecurity, then we won't be able to provide health care, at least not in mental health and addictions, and I suspect in other places.

From the consumers' perspective, they have to develop a relationship in which they trust the person, share that information and know that it's not going to rebound in the form of stigma, discrimination and so on.

Right now the mental health world, that is, the community mental health sector, functions in a sort of common-law understanding under the Mental Health Act. We're not listed in the act as scheduled, that is, we're not scheduled in the act as having their forms and procedures apply to us, but we voluntarily comply with that process. Typically, to give any information to anyone, a community mental health service provider must have a form 14 that is signed to release that information for an express purpose to a particular person. That's the basic understanding we work under now. So we're going from that understanding, where a client is able to say, "I'm not comfortable with you communicating," and when they become comfortable, when they develop a level of trust and they are prepared to sign a form 14, then the information can move between the two parties named in the form. That's what we have.

What we're proposing here is something that is very different. We're proposing that once the health information custodian knows it, whether they even commit it to writing or not, they can convey it to any other health information custodian for the purposes of care, broadly defined. In the mental health world and for that matter the addiction world, that can be very broadly defined.

We'd like to suggest an interim between the form 14, which is often arduous and makes moving information very difficult, and a situation that would result in people being very reluctant to give you the information in the first place, rendering the services almost impossible. What we would suggest is that the basic provisos you envisaged in Bill 159 be applied only to name and identification of the client, that is, a registration nucleus of information. Any health care custodian could acknowledge that they have as a client any given person whom they are serving but that information is all they would be able to acknowledge without consent. That would allow a couple of key things to happen. It would allow agencies to know who is working with a client and it would allow GPs to know if another GP is working with the client. So it would allow for many of the needs-to-know to be satisfied for the purposes of management but it would stop shy of a wide-open scenario.

We would suggest that we add something similar to form 14 but somewhat broader. For the sake of having a name, I've called it a consent to disclosure of personal health information certificate. If someone signed such a consent, we would propose that that would allow the custodian to share information with the other named

party in the consent. The other named party in the consent could be a single entity or a network of entities.

We would propose that consent would not be restrictable, that is, once you were able to speak about that person's experience, the person could not rule out of order parts of the file and only leave other parts consentable, if you will. So it would be a broad consent.

It would exist for the length of the client's working relationship with any of the named health information custodians.

What we are proposing, in effect, is something between form 14 and a very broad consent; something that requires that the person feel enough trust and develop enough trust in their relationship that they're prepared to allow that information to move.

On the same basis of need to trust and feel safe to disclose information in a therapeutic relationship, we would like to draw your attention to section 36. Section 36 is a section in which agencies have the discretion of establishing policy that would allow a worker to decide if there are reasonable grounds to suspect that an offence has been committed by the client and then report that to any of a number of named officers under various acts.

We have some serious reservations about that, starting with the basic reservation that it is not anything to do with health care. It is about reporting various breaches of the law, no matter how serious or not serious, to other officers who are charged with dealing with those laws. It is not about delivering better health care. It relies on agency policy to establish a standard for disclosure where there is discretion, and agency policy is no substitute for the law. Agency policies can be changed at every board meeting, if you want, and they are not as strong as the law.

Second, it relies on therapists and agencies to understand what reasonable grounds are in a scenario where the information provided with respect to a person's behaviour experience is somewhat equivocal. People with serious mental illness or people who have problems with substance abuse or addiction experience things that we can't always verify are real. Who is to know what's real or not and how we could establish "reasonable"? Secondly, reasonableness, as an agency policy, gets a lot more difficult to defend if something goes awry after the fact. It may seem reasonable before the fact, but after the fact it may not be judged so.

What offences should be reported? This law would allow any offence to be reported, anything from loitering, to failing to put in their tax return, to more serious offences. We don't think we should have the discretion to report such things unless there is a risk of harm to self or others, and that is actually covered elsewhere in the legislation.

If the client feels that we could talk to any officer of various acts under this discretionary provision, they will leave out information that we will need to know. That is, on the fear that we're going to report them to whomever, they simply won't tell us and we will not be able to do our work.

Finally, that discretionary ability to report somebody under various acts allows a very interesting power relationship to develop, where a person comes in, discloses various trials and tribulations and experiences, and then the worker may or may not report them at their discretion. I don't think that's an appropriate level of relationship in that the worker acquires a certain amount of discretionary power over the client which, again, will not serve a therapeutic relationship. So we ask that section 36(g) be struck.

With respect to my written remarks, there are a couple more points about putting the onus on health care providers, government and bureaucracies to deliver accurate health care records, not on the client. I think the person should be relieved of that responsibility and the bureaucratic apparatus should have it. Fees and procedures for remedying mistakes to records ought not to be charged to the person, since any mistakes that may have been made were not made by them and they may or may not be able to afford the fees. The onus should be on bureaucracies and management structures to correct the records.

That's all I'd like to say in written remarks.

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The Chair: That leaves us about two minutes per caucus. This time we'll start with Ms Papatello.

Mrs Papatello: I wanted to go back to section 36(g) as it's worded. Can you think of an instance where it would be necessary and reasonable that medical records would be accessed without a warrant?

Mr Higgins: Yes, I do, if there is a risk of harm to self or others, but if there is not a risk of harm to self or others, then records should not be available.

Mrs Papatello: Fraud?

Mr Higgins: There are other means to conduct investigations to determine whether a warrant is needed. Once a warrant is provided for, section 36(g) doesn't apply anyway.

Mrs Papatello: Wouldn't you have to have some idea before you could get the warrant issued to know there's something to get a warrant for?

Mr Higgins: Yes, you would, but fishing around in files without having a reason to do so would not be appropriate.

Mrs McLeod: One quick question about your recommendations on the signed consent form. You would specify the health information custodian or custodians who may receive the personal health information. I tried to think about how that would apply to somebody on a community treatment order, for example. Would it not be important for all the members of, say, an ACT team to have access to that individual's health information, yet it would be very difficult to know who the members of that crisis response team might be in order to specify that they're the individuals who can have access to the information?

Mr Higgins: An ACT team is employed by one corporate entity under the current provisions, so all the members are entitled to share information among themselves.

Mrs McLeod: So the consent form would specify the care provider as an entity, not individual care providers.

Mr Higgins: Yes. If I'm running a housing program, which I used to run, and there's a client and an ACT team and we have this certificate of consent, then we would be able to communicate freely between us for the purpose of delivering good health care.

Ms Lankin: I appreciate the suggestion you're making around the certificate of consent. It's one of the things we're grappling with, what the right balance is. I don't think we really fully understand yet the relationship between this legislation and the Mental Health Act. We've had some presentations trying to draw our attention to what protections will be lost that people currently enjoy under the Mental Health Act with respect to the privacy of their health information.

You did say that you're looking for something in between this legislation and what I think you referred to as the rigorous approach of form 14. I understand some of the concerns of sharing information from facilities and psychiatrists to community mental health, and there have been barriers there. Within the facilities' and psychiatrists' side of things, could you tell us what the problems are with the form 14, or is it primarily between those entities and community mental health that the problems have been seen?

Mr Higgins: Between psychiatrists and other psychiatrists?

Ms Lankin: Well, you said form 14 is too rigid. Why is it too rigid?

Mr Higgins: If it was strictly applied, you would need a form 14 for every single time you talked to the third party, who specified specifically the objective and purpose of that conversation and had it written. If you have a form 14 and I call you today with it, two weeks from now if I wanted to talk about the same thing, technically I probably should get another form 14. If enforced to the full degree of rigour, you would have stacks of form 14s.

The usual way to provide service in health care, including mental health, is a network of agencies. You have labs, pharmacies, physicians, rehab folks, mental health workers. That network needs to be able to move information effectively without each and every one of them needing a specific form every time they want to talk to another one. That's the current strict interpretation we would have to apply. We struggle to do good mental health care when we're not actually able to convey information very easily. I've certainly had experiences as a direct service provider where I have literally had no idea who the other agencies were until I eventually developed a trust relationship with the client so they would tell me. Then I didn't know what they were doing until I developed enough of a relationship that they would release the information.

Ms Lankin: How does that differ from—

The Chair: Sorry, Ms Lankin. You're out of time.

Mr Toby Barrett (Haldimand-Norfolk-Brant): With respect to community mental health clinics, I understand there are no legislative rules at all with respect to

privacy. I'm assuming, say, with adult mental health clinics across the province, a lawyer who is working on a custody case can pick up the files on a client and take them to court on behalf of the husband or the wife. Assuming that's been going on for about 20 years, what kind of impact has this been having on people showing up for counselling? How many people drop out once they find out their records can be picked up by a lawyer?

Mr Higgins: First, it's not quite that easy. Although we're not named on a schedule, we generally comply with the form 14 rigour and we will usually seek legal counsel and ensure that there is a process that means the file is necessary or at least the elements required are necessary for the conduct of the court. Sometimes that means a hearing that's in camera so it can be determined whether the information is needed. We do try to prevent unnecessary file transfers with a fair degree of success, since the courts acknowledge that unnecessary information doesn't serve the interests of justice.

Mr Barrett: Would that be your association or the individual clinics that do this?

Mr Higgins: The individuals do it, although our association has provided them with some training stuff. When it comes to addictions issues, if you have an addiction to an illegal substance, the day you walk in the door and acknowledge the addiction you are automatically breaching the law, which is why 36(g) would allow us to turn in every single client we have in any program who comes in voluntarily to seek addiction care. That's just not going to work. No heroin user, no cocaine user, no user of any illicit drug will go to a clinic if the clinic can just voluntarily supply the file to the police. You will not get any people seeking help or moving forward unless they do it through court-mandated things after they go to jail, and surely we can't want to do that. We need to find a middle ground.

If the person comes into care, then the network would know they're in care, so we could know that that person was seeking care. If we wanted to know more about that, we would need a form, and that would provide the necessary rigour so the person will hopefully trust us enough and develop that relationship enough that they would sign the consent.

The Chair: Thank you very much for coming before us this afternoon. We appreciate your taking the time.

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ONTARIO ASSOCIATION OF MEDICAL LABORATORIES

The Chair: Our next presentation will be from the Ontario Association of Medical Laboratories. Good afternoon and welcome to the committee.

Ms Virginia Turner: Good afternoon. I am Virginia Turner, chief executive officer of the Ontario Association of Medical Laboratories. In addition, I would like to introduce Perry Brodtkin and Graham Brown from the OAML who are accompanying me today. I am pleased to

have the opportunity to address this committee today regarding Bill 159.

The Ontario Association of Medical Laboratories, or OAML, as we are known, is the common voice of Ontario's community-based laboratory corporations. Our members served more than 13.5 million patients last year by providing more than 94.5 million medical laboratory tests, representing about 70% of the objective information that physicians, nurse practitioners and midwives used in the diagnosis and treatment of patients. To that end, community laboratories are an integral part of the health care system. In fact, community laboratories are often referred to as the glue that holds the system together. As an organization, the OAML represents community-based laboratory members and holds the opinion that privacy is part of our everyday mission and value.

The OAML is intrinsically linked to the health care system and strongly supports the introduction of health privacy legislation. In our view, properly written legislation should provide patients with a guarantee regarding the confidentiality of their personal health information. It should clearly define in legislation the individuals or bodies who may collect, use or disclose that information. Additionally, effective legislation must provide an avenue to an individual should their right to privacy be breached. While there is great need for legislation to govern the increased use of electronic exchange of health information, such guarantees must be legislated and maintained. It is the position of the OAML that Bill 159 does not clearly guarantee those areas. Before I continue my direct comments about Bill 159, I will make a few comments on Bill C-6, the federal bill.

Last year, the OAML was the only provincial body from Ontario to appear before the Senate standing committee on social affairs, science and technology in regard to the federal bill, Bill C-6, known as the Personal Information Protection and Electronic Documents Act. Two principal concerns were brought to the attention of the committee as they related to health privacy: the issue of patient consent and the distinction between commercial and non-commercial activity. I will be filing a copy of the brief of that presentation with my remarks today. But suffice to say, a clear issue for us at that table was the unique partnership that our members have in relation to the private and public sector arrangements in hospitals where there was ambiguity in the act at the federal level, and for us, that directly impacts the working relationship in Ontario.

Due to the testimony of the OAML and other health care sector witnesses, the Senate committee made the unusual recommendation to have two amendments added to Bill C-6: a definition of "personal health information" and the suspension of the application of that bill to the health care sector for a period of two years. These important amendments acknowledged the concerns brought forward by the health care community regarding privacy and provided the federal government with the opportunity to consult with affected parties.

Now I will return to the bill that I am here to discuss, Bill 159. Again, the OAML supports the need for a health privacy bill but we believe there are a number of serious weaknesses with Bill 159 as it is currently written and we have some recommendations as to how that might be addressed.

Therefore, I urge you to make the necessary amendments to improve upon the foundations of this bill before sending the bill back to the House for final consideration. Indeed, it is our view that it would be a lost opportunity for this committee not to suggest the necessary amendments.

Specifically, subsection 3(1) of part I of Bill 159 provides that any health information custodian who operates more than one facility, "shall be deemed to be a separate custodian with respect to personal health information of which it has custody or control." The OAML is concerned that this will be a burdensome requirement on community medical laboratories given that they are centrally operated corporations. Subjecting their more than 400 specimen collection centres scattered across this province to appoint a designated custodian for the purposes of the act would be a duplication of human resources. We are also concerned that such an approach could result in inconsistent application of policy related to confidential patient records.

While we realize that a regulation can be made specifying that subsection 3(1) does not apply to community laboratories and specimen collection centres, we are concerned that such a regulation may not be made at the time that Bill 159 comes into effect. Accordingly, we are seeking a specific amendment to section 3 that would specify that subsection 3(1) does not apply to laboratories and specimen collection centres.

Under the heading of broad disclosure, the OAML strongly holds the belief that personal health information should primarily be used as a tool to ensure the health and well-being of the individual and given the highest degree of privacy and protection. The inclusion of all organizations involved in the health care sector under the same legislation is one we support wholeheartedly and which we think recognizes the continuity of medical care that an individual experiences in the health care sector.

While recognizing the need of health care practitioners to share vital information in their efforts to treat health issues, we are concerned about the broad disclosure allowed under the legislation as it is currently written. We believe that the proposed legislation must be an enabler of health care. It is our considered opinion that broad disclosure of personal health information, as allowed in part VI, will be permitted without the consent of the individual, particularly in relation to the management of the health care system. As it is currently written, a direction could be issued for a community laboratory to disclose confidential information it has gathered in performing its diagnostic role to somebody other than the ordering physician.

The OAML is very concerned with the broad authority created under this bill for the introduction of regulations

which could fundamentally alter the intent of the bill. Our review suggests that in many important areas, the bill includes the authority to make a regulation to either clarify or revise a process set out in the legislation. This bill, in our view, should have restricted use of the amending tool known as regulations. As the regulation-making process is not visible to the public, the OAML believes the current scope and number of areas in which regulations can be made should be dramatically reduced. It is directly related to a concern for the protection of health privacy that we propose that a transparent process, open to public comment and scrutiny, be established for any regulatory changes to be introduced. In essence, for the purpose of this bill, the use of regulation changes must have a built-in mechanism to afford public consultation, especially with affected parties.

In the area of consent, the OAML believes this bill must set out clear rules on consent when information is used for purposes other than direct medical care and public health. Further, we believe the legislation must allow for a balance between personal privacy and process. We urge the members of the standing committee to carefully review each potential area of disclosure to determine if such a disclosure is warranted or necessary, given the potential loss of privacy.

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In conclusion, we appreciate and accept that a bill such as Bill 159 must of necessity be a law of general application, applicable to all health care providers. We would ask that certain provisions in the bill be specifically tailored to recognize the unique role of certain health care providers in the health sector, including the unique role of community-based laboratories. To that end, we would recommend that, at a minimum, the amendments we have outlined here today be incorporated into the bill, and we would commit to work with you on those. A Personal Health Information Privacy Act that is so specifically tailored would, in our opinion, be a better bill and would further the purposes that you have so clearly articulated and set out in section 1.

The board of directors of the OAML has recently recommended to its members the creation of positions directly responsible for personal health information privacy. The association is well aware that at least one of its members has already embarked upon this ambitious program to address privacy issues by establishing a director of privacy position. We expect that other members of the association will follow suit in the near future.

Thank you for the opportunity to present on this important matter and we wish you the best of luck in your deliberations.

The Acting Chair: I wish to thank the OAML for your presentation. I think we have a little over two minutes for response.

Ms Lankin: Thank you very much, Virginia. I appreciate the presentation. It's nice to see you again. Not having your written submission to follow along with and it being late in the day, I got the last couple of points you made but I've already forgotten the reasons why you

were recommending exemption from subsection 3(1). Could you please explain that to me again, and I might then have a quick question with respect to that.

Ms Turner: We were afraid, as it is written, and the interpretation of our legal counsel and others is that it would require each specimen collection centre—and in fact we have 412 across the province—to have a specific person there delegated with authority to keep records and ensure all the privacy records would be held. What we said in terms of understanding this issue is that you have to think about a specimen collection centre as usually having one or two staff there, and we wanted to make sure that the people who really owned those specimen collection centres and ran them had the authority to do that and kept consistent records there.

Ms Lankin: If the central lab owner is the health information custodian, the laboratory medical technologists who are taking the specimens in the specimen labs out there, the satellite labs essentially, are employees of and subject to all the rules of employees of a health information custodian?

Ms Turner: That's right.

Ms Lankin: Thank you. I understand.

Mr Wood: I was wondering if you had a chance to consider the test on the act of informed consent as opposed to simply consent. Have you addressed your mind to that issue at all?

Ms Turner: Could you repeat the question?

Mr Wood: I was wondering whether or not you had addressed your mind to the test in the act of informed consent, as opposed to simple consent. Have you addressed your mind as to whether or not that would create any difficulties with respect to the work that you do?

Ms Turner: This is one of the issues that we were so concerned about with Bill C-6 in Ottawa, so we have given a lot of consideration to it. Perhaps the best way to explain it is that a physician is the person who has direct contact with the patient and so they have already gotten consent to send the person—me, you—to a specimen collection centre to have a particular test done. So we really don't have to do that because it has been already done between the patient and the physician.

My counsel is telling me that we are the agent of the physician, which is a much better term to use. In essence, when a physician orders a requisition, we basically provide the service on behalf of the ordering physician or nurse practitioner.

Mr Wood: The question of consent doesn't really, I gather, engage you very much one way or the other.

Ms Turner: Not today, but that is our worry, as I alluded to, in terms of the federal bill and why we were so concerned and asked for clarification. Because in Ontario we have many partnerships of a medical laboratory which may in fact have the management arrangement for a laboratory in a hospital, under Bill C-6, we would be considered commercial activities for the purposes of law. We are concerned that in a hospital setting, where one of my members may manage a laboratory for a hospital, would we have to get a patient's consent in a hospital

every time a physician indeed asks for a test to be done in that lab and that lab may be operated by one of my members. To us, that's still really unclear. But thank you for your question.

Mrs Pupatello: That was my question, that once the private labs got into the hospital setting, what changed in terms of how the lab does its work in this regard? It's a relative novelty over the last, say, five years that the private labs actually moved into the hospitals. Has anything changed at all?

Ms Turner: I think that's kind of out of the scope of what I feel I probably can address today properly. I believe that certainly the work is being done and it's being done well, that people are happy with those arrangements.

Mrs Pupatello: Has it changed their methods of data—

Ms Turner: No. The same arrangement of one of our members in any one of its collection centres and the same high standards would be there in a hospital environment as well.

Mrs Pupatello: Do you transfer any results of tests via the Internet, e-mail, telephone? How do you give results?

Ms Turner: As one of our physicians often tells me, "Virginia, we do it by phone, we do it by fax, we do whatever it takes," in order that a physician gets the response they need in order to treat their patient.

Mrs Pupatello: Do you have any concerns over privacy with the onset of additional Internets or bouncing it off the satellite or something?

Ms Turner: It's certainly a larger discussion for another day and we continue to work with those individuals who are trying to work in this area. We've been long involved in the areas of the impending smart system in Ontario and lab information systems, so we continue to be vigilant, we continue to work in that and to ensure the protection of patient information.

The Chair: Thank you very much for taking the time to appear before us here today.

FRANCES TEXTOR

The Chair: Our next presenter will be Ms Frances Textor. Good afternoon and welcome to the committee. Ms Textor, it's protocol for us, when it's an individual who might not have experience presenting before us, that we like to read something into the record. I understand that our next presenter after you is also an individual and he's in the room, so to kill two birds with one stone, while the MPPs themselves enjoy parliamentary privilege and certain protection, pursuant to the Legislative Assembly Act, it's unclear whether or not these privileges and protections extend to witnesses who appear before committees. For example, it may very well be that the testimony you have given or are about to give could be used against you in a legal proceeding. So we caution you to take this into consideration when making your comments. In other words, govern yourself as if you

didn't have parliamentary protection. With that on the record, the floor is yours.

1640

Ms Frances Textor: My name is Frances Textor. I'm a housewife, a health care consumer and an avid reader of newspapers, with an interest in health care issues.

I wish to discuss two very important points relating to Bill 159. The first is how observers and recorders of personal health information may be lacking and how inaccuracies in their records and documentation may negatively impact upon their patients' assessments, treatment plans, diagnoses and present and future treatment. Patients' families are also affected.

The second is how medical systems are lacking accountability to patients and how they also put patients at risk by virtue of inaccurate data.

Observers and recorders whose documentation may negatively impact on patients; the negligent, non-recovered addicts and the unstable—their records may be absent, incomplete and flawed—the biased and prejudiced; the unethical, ie, who edit and censor, delete, remove and/or destroy records, ie, muzzlers of whistle-blowers.

Health care workers within a roster system for a health maintenance organization—HMO, corporate power—who are assigned X amount of dollars for each patient yearly, with a large number of patients, who get to keep the money left over, not used up for each patient's care at the end of the year, might use the personal health record or computerized database to rule out the disadvantaged, vulnerable, seriously ill, needy, disabled, infirm and aged to select young and healthy patients for personal monetary gain.

HMO custodians of personal health information may charge excessive fees to patients for a copy of their record and may control access to patient data; sellers of personal health information and also the selling to tertiary sources for computer data linkage; muzzlers of whistle-blowers who threaten and abuse health care professionals who report and expose the workplace violations of security, health and safety; providers of sub-standard patient care who lack adequate training and expertise and those who lack the necessary education and skills re privacy, ethics and communication skills; those who invalidate the patient who supplies his or her personal health history, signs and symptoms, ie, leave out the recording of the patient's input—this concern may include professionals whose code of conduct encourages non-disclosure of patients' complaints re professional colleagues in the document—health care providers and custodians of medical data who deny the patient basic information and clarification of their record; those convicted of a criminal offence may be dishonest in their documentation; those who do not secure, protect personal health data—this concern would also include spies who jeopardize individuals' privacy—insurance representatives and custodians of the client-patient records who mistreat and use unfair practices at times with patients and clients, threaten, intimidate, harass, coerce and give

uninformed consent; hidden agendas of insurance representatives who misrepresent their real purpose to gather the clients' personal health data, not to help the client but to win the insurance claim case, and those who want to stop the mediation process by threatening the client with exposure of their personal health records to the public record.

Restricted individuals, by means of the capping of fees, are hampered in their efforts to provide thorough patient care and documentation. Medical systems lack accountability and put patients at risk by virtue of inaccurate data.

The complaints and discipline process of the CPSO: KPMG Consulting, LLP is currently conducting an independent review commissioned by the Ministry of Health of the complaints and discipline process of the CPSO. Fewer than 4% of the complaints ever make it to discipline. On June 8, 1998, Georgina Hunter, an Ontario citizen, in her Queen's Park release, asked for an independent review. This video is free from Queen's Park.

OHIP fraud squad investigation process: patients who lodge a written complaint to this body re their doctor are further victimized. They do not receive a response. They are not permitted to attend the hearing re the doctor. They are instructed to search the newspaper daily to see if their doctor was charged. They cannot get their erroneous health/OHIP record changed.

Informed consent: patients need informed consent re sharing of their health record and treatment. In order for the patient to have informed consent as a consumer of medical care to select the best choice of treatment and care by a practitioner, the patient requires information regarding the following: criminal record—CPSO needs to obtain a police check rather than ask the doctor whether he or she has a criminal record, ie, Dr Jacquelyn Robinson—problems, complaints, malpractice, negligence charges, ethical concerns, ie, the track record, civil proceedings, bonding. As these individuals are in possession of and are the custodians of a very valuable commodity—health data—they should be bonded. Foreign-trained background check: Dr Jacquelyn Robinson, Dr Death, who I believe trained in South Africa and had been practising out west. Professional qualifications and ability: to date no doctors criminally convicted of OHIP fraud have lost their licences, according to the Toronto Star documentation that I read.

Doctors' malpractice insurance: it is a conflict of interest for citizens' tax dollars to pay 50% of doctors' malpractice insurance. Bill 159 would permit abusive and/or negligent doctors to access the personal health information of patients they have harmed. For this reason, it would be contraindicated for doctors to act as the gatekeepers of patients' health data, ie, of the computerized personal health information database.

Privatization: HMOs' primary purpose is to make money and be accountable to stockholders, not to the patients. HMO roster systems tend to abuse the patients by forcing rigid contracts, controls and rules inhibiting

access to quality patient care to save money for the corporation.

Cutbacks to medical care: the result is less and less time for health care practitioners to provide the quality health care that is needed, to function effectively and to document patient care.

Recommendations:

(1) Stop the cutbacks and stop the abuse of our health care providers. Give support, improve working conditions, give credit for work well done, pay health care workers what they are worth, listen and respond promptly to their concerns—pension, security, education expenses—and learn by the wisdom and instinctual abilities of the experienced health care practitioner, or it is likely stress and illness will occur, affecting health care providers and their families, and ultimately the patients suffer.

(2) Patients must be given informed consent re the pros and cons of Bill 159 re treatment and the choice of practitioner.

(3) Independent bodies investigating professional misconduct.

(4) Professional bodies of health practitioners are more accountable to the public and involved in health education.

(5) Instruct the patient to sign a bill for receipt of services rendered, and the practitioner sends a copy to OHIP, a cost-effective method to monitor OHIP practitioner fraud; patients' privacy maintained.

(6) Doctors maintain their Hippocratic oath by obtaining a consent from patient before release of personal data.

(7) Doctors pay their own malpractice insurance to avoid conflict of interest.

(8) Education as an ongoing requirement of health care providers, with audits of professional standards, education and skills re certification.

(9) Involve the patient in their care by consulting with the patient and asking for their help.

(10) Immunity for whistle-blowers.

(11) Strict controls governing insurance companies to prevent conflicts of interest and the complaints that complainants make regarding not being treated in a proper fashion.

Bill 159 is harmful to patients and individuals. It is fake and full of loopholes. Using the words of Canada's Privacy Commissioner, George Radwanski, quoted in the *Toronto Star*, page A22, February 9, 2001, "Scrap it."

Bill 159 permits in an instant our personal health information on the Internet to be everywhere and anywhere, and if it's erroneous we can't change it for an eternity. Everywhere, anywhere, quoted in newspaper article, "Electric Vision—Bigger Profits and Fewer Jobs," Frank Zingrone, York University professor, communications, co-author with Eric McLuhan, *Essential McLuhan*.

Question: was our Ontario Integrity Commissioner involved in the drafting of Bill 159?

Treat all individuals equally re criminal offences. No one should be above the law.

Specific consequences for those who abuse and coerce patients, and those who act unethically.

Save medicare, or just say not to privatization.

The Chair: Thank you very much. We appreciate your quite varied presentation here before us today.

1650

MARIO PALISKA

The Chair: Our next presenter will be Mr Mario Paliska. Good afternoon. Welcome to the committee.

Mr Mario Paliska: Good afternoon, ladies and gentlemen.

The Chair: You did hear my caution that I read into the record before that last presenter?

Mr Paliska: Oh, I know that, but those people obviously cannot hide. They're not criminals, right?

The Chair: Oh, no. It's a caution to you that while we're protected for anything we say in this room, no one else is; or at least the courts have not decided that. So govern yourself accordingly.

Mr Paliska: I've decided to show what they really are, what some doctors can be actually, how they caused me a lot of troubles.

The Chair: I'm just making sure that you heard my caution earlier.

Mr Paliska: All right.

The Chair: The floor is yours.

Mr Paliska: My name is Mario Paliska. I'm representing myself and ordinary citizens. I just would like to read this letter.

Dear Chair and members of the committee:

Protecting best interests of Ontario citizens who you are supposed to represent must be the main objective and not supporting bad-apple professionals who engage in wrongdoing or criminal activities.

Producing false, slanderous, unreal malicious information and locking it in official files or documents out of personal gain, malice, incompetence or other "up to no good" reasons is serious misconduct or a criminal act.

If a police officer would engage in false reporting activities he would be in serious trouble.

That the Ministry of Health intends to push Bill 159 is an obvious indication that this Ministry is up to no good and is acting contrary to the public's best interest. They are taking the side of wrongdoers or criminals and not the public.

The bill, if passed, will produce a significant level of mistrust for doctors in the eyes of the public. This might seriously effect and jeopardize public health in a way simply put: many members of the public will not see the doctor until it is too late. I personally did not see my doctor for years due to my justified mistrust and doubt of his competence when dealing with conditions for which holistic alternative therapies are more suitable. Unfortunately, holistic therapies are not covered by OHIP while conventional medicine is.

Since then I have become interested in natural holistic therapy and natural healing. I am also a holder of numerous holistic natural healing certificates, which would also qualify me to be licensed as a holistic practitioner under present Toronto municipal bylaws if I decide to practise, in some modalities, at least.

Holistic therapy or healing is absolutely no replacement for conventional medicine in many cases except in some conditions, but the issue here is trust for doctors, which Bill 159 would seriously undermine and which would not be fair to good doctors and patients who would need them but would stay away because of this bill. I don't say everybody would stay away, but many would, or some at least.

Bill 159 will do nothing but jeopardize public health by generating a significant level of mistrust the public will have for doctors, which might result in fatalities in some or many cases if because of this bill people stay away from doctors until it is too late.

Bill 159 would also produce serious problems in the justice system when patient files might play an important role in criminal justice for either defensive or offensive purposes if the patient is falsely accused or is a victim of a crime.

Most doctors are honest, hardworking professionals, and such a bill would not serve any purpose for them. Bill 159 would only serve the criminals and incompetent doctors who might benefit from this bill.

Bill 159 must not be passed and should instead be replaced by another bill which would not only protect the public from damage to their reputation but would also punish the criminals and incompetent doctors this bill is supposed to protect.

My personal "living hell" experience with some diabolical neo-Nazi fascist criminals, whose leader for North America was Toronto doctor Marin Sopta, clearly identifies the potential destructive damages that false files, slander and lies can have on ordinary citizens who for some coincidental reason becomes a threat to conspirators. In my case, the conspirators were also members of the Canadian government, because they cover them up and provide them with training facilities. I didn't put this, but I just want to explain that.

Mary Sopta, a Canadian scientist who is Dr Sopta's wife, who was a member of the Liberal Party of Canada who ran in the Etobicoke-Lakeshore riding in the federal election, prompted an angry demonstration of Canadian Serbs which caused her downfall.

Dr Sopta's associates were also involved in numerous unlawful activities, including the mid-1980s bombings in New York and Toronto. They were also involved in paramilitary terrorist training in Ontario, which was actually preparation for the upcoming war in Yugoslavia, involving them in crimes against peace, war crimes and crimes against humanity as clearly identified in some media information. Such criminal activities are contrary to international laws founded at the Nuremberg trials, Article VI, A, B, C (I) and (II), which also implicate the Canadian government in breaking such a law in covering

up such criminals and providing the training facilities for their programmed war crimes activities which took place later.

The United Nations law founded in the Nuremberg trials, Article I, II, III, IV, V and VI A, B, C and (I), (II) clearly identifies that no one is above the law regardless of position in society or any country. Canada signed that law, which is also part of the Criminal Code of Canada, but the Canadian government in this case broke this law by being an active participant. The Canadian government was a willing participant in the breaking up of my country, the former Yugoslavia, but never acted to ensure the rights of my nation, which is Istria, in the new country which is called Croatia, which also has no respect for Istrian rights for autonomy and self-government.

I was considered at that time a serious threat to criminals associated with Dr Sopta and his strong connection with the Yugoslav—Croatian section—secret service—UDBA. According to findings, they also were one of them connected to the CIA—well, everybody knows that; I'm not the only one—and the government of Canada. As soon as I became a threat to their identity they immediately resorted to well-proven tactics short of murder: assassination of character and reputation.

In 1988, in Yugoslavia the secret service—UDBA—orchestrated the death of my brother when he became a threat to their identity by him knowing of their slander and conspiracy against me and how they used the police to generate lies and false information. They also used in Canada too as they did in the former Yugoslavia. Such lies were similar to those used in 1977 when I was continually verbally harassed at my workplace in Toronto, which forced me to abandon a secure and well-paying job.

It is your duty and responsibility to protect the public and not the criminals, so I ask you to please reconsider pushing Bill 159 for the sake of everyone concerned.

Thank you for your attention.

I also attach this letter. This is for your information, so the connection between those criminals—my case is how the doctors can be a very influential source for the good or for the bad of the citizens. In this case they would have to be neutralized for some reason, which is for instance because somebody knows something about that. Especially in this case, it clearly said that he was actually, the Serbian community organized a demonstration at Queen's Park here against him. I don't know if you knew about that. He was a doctor. He was the head of the neo-Nazi organization called Ustasas. This is his friend. You can see him saluting—the neo-Nazi salute. This guy, named Kapular, he is now a general. He used to work in that working place where I was forced to leave because I had asthma. At that working place also used to work one Toronto police sergeant who was involved in the shooting of the black gentleman with the sword on Bathurst Street, above you, a few years ago. That sergeant used to also work with me as a part-timer. He used to go in the police academy. His brother was there. I was myself a

vice-president of the Jane Finch Concerned Citizens Organization for some time. Linda Morowei, you know her; her brother was actually shot by this police officer.

That police officer used to work with that general and me. That general became involved here with paramilitary training. This top guy next to President Tudjman, Mr Gojko Sušak, a Canadian businessman, he's the one that actually promoted him to general. It's his sister that started with this slander conspiracy against me in the place called Weston Bakeries in Toronto. The lies that they make here and back in Yugoslavia caused my brother's death. So just generally the lies and false information can destroy people's lives.

Acting on behalf of those kinds of cases, how can doctors have such power to do something evil? As they have for good, they also can do something bad and get away with that. The information about them being in war crimes I got from the newspapers, so they can blame the newspapers or sue them if they want. I don't care about that.

The Chair: Thank you very much, Mr Paliska, for your presentation. We appreciate your taking the time to come before us here this afternoon.

1700

ONTARIO NURSES' ASSOCIATION

The Chair: Our next presentation will be from the Ontario Nurses' Association. Good afternoon and welcome to the committee.

Ms Barb Wahl: I'm Barb Wahl, president of the Ontario Nurses' Association. The Ontario Nurses' Association is very pleased to have this chance to comment on the Personal Health Information Privacy Act.

We represent 45,000 registered nurses and allied health professionals working in hospitals, long-term care, community centres, community nursing and so on. It's our obligation and our duty to act on behalf of the professional interests of our members and also to speak for the public good.

We understand that the privacy commissioner believes this legislation should be redrafted completely because it's not compatible with federal legislation. We agree with this and we hope that the provincial government will in fact completely reconsider the direction it has taken.

We're here to provide feedback on the legislation as it currently stands. Many other groups have already appeared before you, so I'll try to be fairly brief. We submitted a document detailing our concerns to the Ministry of Health and Long-Term Care last September and were disappointed that the act does not reflect what we sent in that submission.

I would like to focus on three areas. First of all, disclosure and access: it pertains to the legal and ethical obligations of registered nurses and allied health professionals to maintain patient confidentiality and to protect the rights of individuals. This will also deal with our concerns related to who has access to information.

Our second point is the double penalty for legislative violations. ONA is deeply concerned that health professionals can be penalized twice, once for violating this act and once for failing to meet their obligations under the Regulated Health Professions Act, which already exists.

On the third point, unrestricted government access to private health information, ONA believes the government should be subject to the same restrictions and limitations as all other parties.

Health professionals have a moral and a legal obligation to ensure that a patient's personal health information is kept private and that an individual's rights are protected, and that a patient's consent to disclose health information is current and genuine. This legislation allows too many exceptions on what information can be disclosed and to whom.

First of all, more on disclosure and access issues: we agree that consent should be the standard in the act. Disclosure must be based on the right of consent. Disclosure without personal consent must only take place in extreme and exceptional circumstances that need to be clearly defined in legislation.

ONA is deeply concerned that the legislation allows the Minister of Health and other parties the authority to disclose health information without consent, based on vague and undefined provisions. For example, disclosure to a researcher is subject only to the approval of the research ethics committee. This research ethics committee may determine that the researcher needs to obtain consent, but it isn't obligated to do so under the legislation.

The ethics review body has been granted the legislative power to assess whether adequate safeguards are in place to protect the privacy and confidentiality of individual personal health information. We're greatly concerned about that.

The non-specific language in the legislation is of great concern. For instance, in sections 24 and 27, there are extremely open-ended terms with restrictions on the use and disclosure of health information to third parties. We believe this creates a loophole that leaves the legislation open to abuse.

The legislation also states in section 36 that it is permissible to release a patient's personal health information without consent to such groups as the regulatory bodies of health professionals for administering and enforcing their respective acts. How will the government ensure that health professionals will be informed of the rules that govern a health discipline aside from their own, keeping in mind there are over 20 different health disciplines?

ONA also strongly believes that the need for safeguards will be even more essential as the health care system becomes increasingly dependent on information technology. ONA supports the need for a single integrated health care system linked by information technology. However, this seamless system for the delivery of services must ensure that the appropriate care provider

is able to access health information and still ensure a patient's privacy and confidentiality.

We're also very concerned about the restrictions in the act relating to individual access to personal health information. For example, section 44 contains a loophole that has the potential for preventing individuals from accessing certain types of information about themselves, which will be determined by regulation.

Regulations may also attach fees for access or copies of personal health information. We believe that could pose a barrier.

Our second concern is about the double penalty for legislative violations. The legislation sets out a penalty for wrongfully disclosing personal health information, including a fine of up to \$50,000 against an individual. In addition, a professional provider could also be subject to professional misconduct penalties for violating the Regulated Health Professions Act, which already exists. There are provisions there on confidentiality. This could bring the severe penalty of the loss of licensure and a fine of up to \$35,000. ONA believes this would unfairly penalize health professionals twice for the same violation.

Regulatory colleges mandated under the Regulated Health Professions Act set out the parameters for professional practice and should be the final arbitrators on professional practice. These regulatory bodies are created to safeguard patient care. They're the arbitrators of the standards of practice and professional conduct. They're empowered with the legislative accountability to determine what is a reasonable action for health professionals in certain circumstances, and they have already established safeguards for the protection of the public and procedures for imposing enforceable and appropriate penalties.

There are many situations where a health professional may have to disclose private information without the consent of the patient or a substitute decision-maker. This can occur, for example, when a health provider must deal with police, coroners, public guardians, children's aid societies and public health boards. Some but not all of these examples are set out in the legislation as personal health information that may be disclosed for a specific purpose.

1710

The legislation has left it up to health information custodians to develop safeguards and practices on disclosure of health information without consent. ONA believes it's the role of government to set the provincial standards. There must also be recognition for the possible conflict a health care provider may be in between the competing principles of public interest and the protection of individual privacy.

We're concerned, thirdly, about the unrestricted government access to private information. The Minister of Health, or designate, is granted unlimited access to private health information and is not subject to the restrictions that apply to other parties on what information can be accessed and released. We believe government

has the same moral obligation and accountability to protect the rights of private citizens.

Currently there is no limitation on the type of information that can be disclosed to the Minister of Health. Does the government really need all of a person's health information, including health status, to meet the purposes set out in the legislation, that is, the management of the health care system? We believe the government really should only need information relating to a person's registration, such as name, address, phone number, gender, date of birth, marital and employment status, identification number and so on, in order to verify it has accurate information for the management of the health care system. My experience with patients is that they wouldn't want the government to know all of their personal health information.

There should be limitations on what personal health information should be disclosed. The limitation described in section 31 is weak, and in practical terms the government will seldom have to justify to Ontario's privacy commissioner why it is requiring personal health information. We believe the government must be held accountable for how the information will serve the public's interests.

ONA agrees with the opinion of George Radwanski, the Privacy Commissioner of Canada, who says that this legislation seems designed to ensure that the Ontario government and a "virtually unlimited range of other organizations and individuals" have unrestricted access to the most private health information of every citizen in Ontario.

Here is what we recommend.

Eliminate the fines and penalties directed at individual health providers for the violation of Ontario patient privacy laws and leave the regulation of health professionals to their mandated regulatory bodies.

The legislation must direct health information custodians to provide comprehensive education to health professionals so they can meet their obligations and accountabilities and can clearly understand what information may be disclosed and what must be protected. It is unreasonable to expect health professionals to be aware of all the statutory duties required under this legislation in addition to the laws regulating their own practice.

Health information custodians must develop policies that clearly spell out a process for health professionals who need guidance on decisions relating to requests for disclosure.

The government must be as accountable as all other parties for the protection and non-disclosure of confidential patient information and the government should have the same limitations to access and disclosure as other parties.

Health professionals need access to information to ensure they are referring patients to the appropriate care provider and services. The legislation should facilitate information-sharing for health professionals while protecting the rights of the individual. We believe the

legislation as it is set out is too broad and puts the privacy of individuals at risk rather than protecting it.

In conclusion, the judgment calls that nurses and other health professionals have to make on a day-to-day basis are difficult at the best of times. They are under constant pressure in understaffed and highly demanding workplaces to provide safe, quality patient care and also to make sound decisions about information disclosure. This is viewed as a very serious issue. The combined threat of a \$50,000 penalty and the possible loss of their licence to practise as a result of professional misconduct may have a significant chilling effect on nurses and other health professionals for whom the sharing of information is part of the integrated delivery of quality health services. One more time we see a threat delivered to professionals when in fact we need to retain our health care professionals and give them support so they can do their professional jobs.

This legislation is deemed to protect from liability health care providers who act reasonably and in good faith. However, it doesn't provide enough guidance, nor does it give comfort to health professionals who face situations every day where they are required to disclose information to public health boards, social agencies, group home workers, children's aid societies, or during police or coroners' investigations.

Nurses are already working under extremely difficult conditions as the result of health funding cutbacks and staffing shortages. Many are concerned that their professional standing may be at risk because they are unable to provide safe, quality patient care at this time. Because of this, thousands have left their practice to go to other jurisdictions or have left nursing altogether.

It is essential that this legislation be designed to enable nurses and other health professionals to protect their patients' rights and privacy and to fulfill their professional obligations. It must arm them with knowledge and effective tools for making fair and reasonable decisions on the disclosure of health information.

Thank you.

The Chair: Thank you very much. That leaves us about two minutes per caucus for questioning. This time we'll start with Mr Wood.

Mr Wood: Would you support a provincial bill based on the federal privacy act?

Ms Wahl: We would have to look at what the provincial bill looked like specifically.

Mr Wood: Do you think the federal act is a good act or do you have reservations about it?

Ms Wahl: We believe that's more appropriate.

Mr Carl DeFaria (Mississauga East): How would you deal with the right to access by someone suing a health care provider? You are advocating basically for the health care providers providing the rules of access to information.

Ms Wahl: This already exists in that we have the Regulated Health Professions Act. The Regulated Health Professions Act was created in order to protect the public from the health professionals. That act has within it a

number of—I don't know what you would want to call them—legislative bullets which ensure that if you, as the recipient of care, have complaints and concerns, you will receive all the information you want and—I'm quite aware of the process—all the information about the patient's chart, everything the individual practitioner has ever done and said. You are able to access this at this point in time. So this legislation isn't required for the person who wishes to sue to get that information; it already exists.

Mr DeFaria: That's not my experience. I've had constituents who tried to get records and they couldn't get them.

Ms Wahl: If you deal with the various colleges under the Regulated Health Professions Act, you have the right to get that information.

Mrs McLeod: We've heard a lot from the regulated colleges over the last couple of days and they certainly make a case that the colleges should be exempt as health information custodians and their regulatory framework should have primacy over what is in the health privacy legislation. I appreciate all the comments you've made about the amendments that need to be made to that health privacy legislation generally, but let's assume we have amended health privacy legislation and colleges are excluded but their regulatory provisions are protected. Does that still leave the front-line providers working under two very different sets of rules? I hear you saying it does in terms of the double fine.

Ms Wahl: Yes, it does.

Mrs McLeod: There would have to be clarity around that, but are there other areas where there are two sets of rules now?

Ms Wahl: I believe there would still be two sets of rules because over here, as a practitioner, I'm obligated under the College of Nurses to disclose information to a certain body. Under my professional practices and standards, I need to tell this body about what I've seen, what I've experienced etc, and over here it says that I can't do so.

In dealing with an elderly individual who may or may not be of sound mind at all times, I may not be able to find any family members. I may have concerns, I have to disclose information to someone, yet over here I'm not able to protect that individual's privacy. So we believe there should be one set of regulations.

Mrs McLeod: Or at least absolute consistency between the two?

Ms Wahl: Absolutely. My sense when I'm reading this is that my professional practice could in one situation be pulled in two different directions.

1720

Ms Lankin: Barbara, I appreciate very much the recommendations you've set forth. On the last situation you just commented on, I'm wondering whether someone could perhaps prepare a case study for us and give us a clear example.

One of the things the colleges have said is that there are areas in the new proposed legislation that are stronger

in terms of privacy protection which they think should be imported into the RHPA scheme. That might address the concern you're raising. I'd like a practical example, though, of where the professional code of conduct and the requirements under the RHPA are different with respect to the protection of privacy than what this bill proposes. If that's possible, that would be very helpful to us.

Ms Wahl: You think it would be useful to have that drawn up? Because there's actually other legislation that could impact on it as well. That's why I think the point about the amount of legislation that governs a professional in trying to make a decision with regard to a particular patient is actually mind-boggling. The standards of practice—you've got this much. You've got a lot of legislation here. You have other pieces of legislation that impact a decision that in fact must be made sometimes within a few minutes.

Ms Lankin: I appreciate that. I think your comments about the policies and education that have to be developed and provided to help professionals are really well taken as well. Also, this is, I think, the first time anyone has mentioned the double jeopardy with respect to the fines. That's a really good point. The committee will need to take a look at that. But if it's possible for ONA to provide us with a couple of case studies of the contradictions, I think we would find that helpful.

Ms Wahl: I think it's critical that legislation be supportive of patient care as opposed to throwing up another barrier.

The Chair: Thank you very much, Ms Wahl. We appreciate your coming before us this afternoon.

ONTARIO HOSPITAL ASSOCIATION

The Chair: Our final presentation this afternoon will be the Ontario Hospital Association. Good afternoon and welcome to the committee.

Mr Frank Norman: Good afternoon. My name is Frank Norman and I'm the chair of the Ontario Hospital Association board of directors. With me this evening are David MacKinnon, the president and chief executive officer of the Ontario Hospital Association; Murray MacKenzie, who is the president and chief executive officer of North York General Hospital and my immediate predecessor; and Deborah Tarshis of Weir and Foulds, our legal counsel.

In the knowledge that this is the end of a long day, I'd like to make some very quick introductory remarks and then pass on to others who are much more knowledgeable in this world than I am, as I am neither a health care professional nor am I employed in the world of health care; I'm a volunteer.

I'd like to start by acknowledging the sensitivity and complexity of this issue. The OHA applauds the government's initiative and commitment to addressing the issue of privacy and personal health information and supports the introduction of legislation.

The privacy of our personal health information is of paramount importance and it merits special protection under the law. We believe that laws designed with the commercial sector in mind cannot respond appropriately to such sensitivities and, as such, we support the need for comprehensive health privacy legislation. It is vitally important that appropriate safeguards are in place to protect individuals' privacy.

The enhanced use of information technology is crucial to our continued efforts to promote integration and accountability in the health care system. The challenges of striking the desired balance between an individual's right to privacy and the information needs of the health care system are serious.

While the OHA has a number of concerns respecting some of the provisions within Bill 159, we're committed to working collaboratively with the Ontario government to ensure that privacy legislation for personal health information is enacted. I think our track record with the consent legislation bears out our commitment to working in these areas.

Mr MacKenzie will discuss what can be done to achieve the balance between protecting personal information and our ability to provide care and plan for the future in greater detail. Mr MacKinnon will also comment on the relationship between the need for privacy and technological change.

Mr Murray MacKenzie: Privacy issues, while always of fundamental concern, are particularly important when dealing with matters related to an individual's health. They're important and they're unique. At the same time, health care providers are increasingly under pressure to improve planning and to be more cost-effective—gains which will largely be achieved through the use of information technology.

The challenge of striking the desired balance between an individual's right to privacy and the information needs of the health care system is a difficult one. Health privacy legislation has to be tough enough to protect personal privacy but it also must be flexible enough to enable integration, future planning and policy decisions. It must allow for the gathering and exchange of information by many different providers in many different locations. It must guarantee that an individual's personal health information remains confidential, while providing a foundation for the future—a future that will rely more and more on technology, electronic communications and the transfer of the very information that we must protect.

The OHA acknowledges that achieving this balance is a formidable task but believes that such challenges should not impede the establishment of a comprehensive legal framework for personal health information. We need it and we need it in Ontario now.

The OHA has long been a proponent of using information technology to integrate care, whether it is integration of care and transfer of information between multiple sites of a single corporation—and health care restructuring has left us with many of these. I include, for example, my own hospitals at Finch and Bathurst in

Toronto or at Leslie Street, and my own long-term care facilities at Finch Villa and the seniors' health centre. I work in a multi-site corporation which is truly integrated. Patients move, as they're in different stages of their care, from one site to another. This current legislation, under some of its definitions, leaves us with major problems.

The OHA believes that the use of confidentiality of personal health information is an essential part of the continued integration of health care services. It is also an integral part of promoting accountability within the health care system. If patients are truly going to benefit from emerging technologies to get the right care in the right place at the right time, their care providers need access to health information. If we are to adopt modern technologies and make full use of the advances in information technology, we need to be able to share information within institutions and across the entire health care system.

Earlier today, my own hospital and York Central Hospital signed an agreement of collaboration in pediatric and maternal-newborn care. Patient records must flow sufficiently and effectively through the system with the patient every day if this type of collaboration is to be successful. With this need for balance in mind, the OHA does have a number of concerns with regard to certain provisions in Bill 159.

Several very important issues, namely, research and directed disclosures to the minister, require further study, sometimes much further study. It is our view that, as currently drafted, the provisions of Bill 159 need revision in order to more fully balance between patient rights and system needs. To achieve this goal, the government must hold meaningful consultations with the affected stakeholders to ensure that the intent of the legislation is reflected in all of the bill's provisions. They are not, in many.

We also have a number of specific concerns respecting the definition of "health care custodian," the electronic transfer of personal health information, accuracy of information, permitting discretionary disclosures to assist investigators, and the powers of the privacy commissioner. The provisions respecting offences, penalties and immunity may potentially deter many from assuming the responsibility of hospital directors. These and other specific concerns can be found in detail in our submission.

On a more positive note, we are pleased that the quality of care information has been treated as a separate category of information, and appreciate that special consideration was given to use of information for charitable fundraising purposes. The OHA further acknowledges the efforts made to provide for continued system improvements in respect to continuity of care and accountability, which are so essential to the continued evolution of our health care system.

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The OHA also supports the creation of the position of assistant commissioner with expertise in dealing with privacy issues in the health care sector.

In conclusion, we support the efforts of the government to introduce privacy legislation for personal health information. Given the complex and sensitive nature of this issue, we acknowledge that the legislative process may prove both difficult and protracted. It is our position, however, that such challenges should not pose an insurmountable obstacle to the establishment of a comprehensive legislative framework for the privacy of personal health information. We need to work at it, and we need to work at it intensively with many stakeholders. The OHA certainly is willing to commit to that effort.

Mr MacKinnon will now comment on the relationships between privacy issues and technological change.

Mr David MacKinnon: Thank you very much, Murray. I'd like to really deal with two aspects of that question: first of all, why the sharing of information routinely is so important to us, of course always assuming appropriate protection for privacy; and second, what are recent changes with respect to the risks attached to those kinds of information exchanges.

I guess the first reason it is so important to us, building on some of Murray's comments, is that if we, for example, can have processes and procedures in place whereby we transfer information about people instead of the physical transfer of those people, think what we can achieve. If someone's got a real problem and is lying in a small hospital, perhaps if we can exchange electronically advanced MRI or X-ray images and have that person treated by a physician in a hospital 300 miles away, we have a more comfortable patient because he or she is not being moved. We probably have less risk in transit, in terms of, in some cases, ambulances, and we probably have more timely treatment. So in some ways, improved sharing of information is very much in the interests of patient care. That of course is always central to the questions we ask.

The second reason transfer is so important to us is because if you think of most of the people in this room as taxpayers, what they're really buying as taxpayers, in a sense, is a hospital system, because they travel, because they are members of families who have people located in different communities. Most of us in the room are in that position. So if people are to get the full value of the system which is there for them, they need to be able to deal with that system and other parts of the health care system on the understanding that data can be shared in the best possible way to support their treatment—always taking, of course, precautions on disclosure.

The third reason sharing is particularly important to us, second only to the patient care, is because it can bring serious efficiencies and cost savings to the system and to the taxpayers. The avoidance of repetitive testing and, again, the real costs of transfers of people are both areas where if we can get a better system of sharing data, with all the obvious safeguards that are necessary, we can achieve better patient care, we can provide better system service to the people of Ontario, and we can probably achieve some cost savings which would otherwise not be

possible. So sharing of information has a very positive side to it that I'd like to draw to your attention.

The second issue I'd like to comment briefly on relates to the issue of risk. In recent years there have been a great many developments that affect the actual risks attached to the transfer of information with appropriate safeguards. The first is that with computer systems and new encryption technology we can achieve, we think, the transfer of patients' data back and forth between hospitals and other health care providers with degrees of safety and access that probably would have been unknown several years ago. That is a very important, very recent technological development that has profound significance for this debate.

The second thing I'd like to draw to your attention is that the present systems of storing and transferring data have risks of their own attached to them and we need to understand them. If you think to your own personal experience of the number of times you walk into offices of any kind, wherever you see paper filing systems and complex procedures surrounding them, you see a risk of inadvertent access. If we can modernize the system, move to more advanced technology and share it more safely, in many cases that will actually provide a higher level of protection to patient data, not less.

The final area in which we think the risks attached to this have been to some extent illuminated relates to what other organizations in society have been able to achieve. If you think, for example, of financial institutions, very large volumes of vitally important, highly personal data are shifted around the systems under very explicit protocols with relatively few—and in thinking of the media in Toronto in recent years, almost none—real problems that have arisen of a profound nature that have merited a major social debate arising from that.

So in summary, there are major opportunities here to actually improve patient care, get costs under control, and improve and reduce patient discomfort, and we think the risks are different from what they were a few years ago.

I'd like to just enlarge on a comment that Frank made in relation to the consent act. On the way out the door as we came here, our internal counsel mentioned to me that she had been present and very much involved in the consent act the last time the government either reviewed it or passed it; I'm not sure exactly what the detail of that was. But she did indicate that the OHA had worked with the government on 200 amendments. If it is necessary to expend that kind of effort to get a good act which you as legislators feel balances the risks and which everyone involved feels really moves us forward in terms of both patient care and privacy, that's the effort we'll put in. The devil in this kind of thing is often in the details. If for this legislation we have the opportunity over the next few weeks and months—which we certainly hope we will—we'll put in enough effort to deal with the 200 or 500 amendments or issues in order to move forward as a society on this vital issue.

Thank you.

The Chair: Thank you very much. That leaves us about three and a half minutes per caucus, and this time we'll begin with Mrs Pupatello.

Mrs Pupatello: Thanks so much for coming today to speak with us.

Of the 200 amendments that the OHA presented to the Minister of Health, how many of those are included in this bill?

Mr MacKinnon: I'm sorry. I was referring to another piece of legislation on an earlier occasion. I was not referring specifically, in using that number of 200, to this particular bill. There are, though, many issues, as both Mr Norman and Mr MacKenzie have commented, where we would really want to work through the detail on it. All I was really indicating was that if that's what it takes, to work with 200 or 500 possible changes or separate discussions, that's what we would do.

Mrs Pupatello: There were some key areas that you had expressed interest in that did not appear in this bill?

Mr MacKinnon: It's a very complicated bill, and many of the areas that we are concerned about and would like to discuss further are included in the bill. There almost certainly would be several things that we would want to talk to the committee about at a later point, but we believe the bill, on balance, addresses or puts an overall infrastructure or structure along health information that is a significant step forward. I think there are literally hundreds of issues of omission, of perhaps commission, of things that maybe we haven't even thought of at this point and that would probably be necessary in the later stages, but we hope we will have the opportunity to have that discussion.

Mr Norman: Perhaps I could add to that from a different point of view. In the situation which has been occurring with the individual in the Hamilton hospital who has a medical condition that we're still having difficulty diagnosing—although she is improving, thank God—this particular piece of legislation at the moment has within it as an unintended consequence the fact that the Hamilton hospital concerned would be unable to consult either to Winnipeg or to Atlanta, Georgia, to the centres for disease control, unless they in fact had similar legislation in place which would guarantee the same privacy of information. This does place us in an interesting position when one starts to attempt to work on that.

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Another aspect deals with technology. The technology exists at the moment whereby we can do scans of various natures, be they MRIs or CAT scans or others, in one place and have somebody interpret them in another place, which can be some miles apart, and some considerable amount of miles apart. As long as they're part of the regulated health professionals, obviously certain things happen, but they won't all be. We will within the next three to four years be seeing a great deal more of the consultative work being done at long distance, and in order to do that we need to transfer information.

Mrs McLeod: Can I raise an issue directly related to that, then? There are a lot of issues we'd love to discuss with you, including the concerns around directed disclosures, but specifically on the ability to transfer information, I think the first instance you mentioned might be addressable in terms of not using personally identifiable information. But setting that aside for a minute, the second instance where you want to be able to share information with other health providers, as Mr MacKenzie mentioned, or to provide for some treatment options at a distance through technology raises a concern about the lockbox. As we get into this process of looking at amendments, one of the dangers is that things were put into this legislation because people had a concern about it; now there are amendment proposals to put things back in, like the lockbox that's a recommendation of the privacy commissioner. If you were saying to people, "We need your consent to share information with other health providers," do you think they would not grant that consent except in really unusual circumstances, and why would they not be given that choice, in any event, when it's their own risk that they're taking?

Mr MacKenzie: Let me just make a quick comment about the lockbox, which I think is a dangerous provision. I think it does put patient care at risk and it puts health care professionals at risk. I'll be glad to elaborate more about that, but I want to get back to your prime issue with regard to consent.

I think the vast majority of people would be pleased to consent. The problem is that I have approximately 600,000 patients in one form or another whom I see every year in my organization, and to collect another 600,000 consents, and maybe more, is logistically a bit of a challenge at the moment. Not that we shouldn't be thinking it through, but it's not immediately obvious how to do it.

Mrs McLeod: They can't sign a consent as they come in as part of the admission? That's not reasonable?

Mr MacKenzie: There can be an argument made whether that is in fact the appropriate time because it is free and informed consent when you're on your way in? Maybe yes, but maybe not quite yes. Those are the types of issues that I think we need to think about a little more carefully.

Mr Norman: This is, I suggest, the sort of detail that David was talking about at the end, of the need to be able to come together and literally work through each of these items to make sure that the unintended consequences, which were not in the minds of those who drafted the bill, can in fact be examined in order to put the privacy of the individual—and I have no doubt about this, we would not be here if it were any other way—ahead of all the other needs. But we do need to have those other needs very clearly debated, and on occasion we may well need to change that balance slightly.

Ms Lankin: I wish we had considerably more time; there are a lot of specific questions I would like to ask. But let me then go to the process of where we go from here, because we're drawing to the end of these com-

mittee hearings and I'm concerned about how this bill makes it to law at some point in time, how we have a health information privacy legal framework in the province of Ontario.

We have as a committee given some thought to looking at the proceedings from the last three days, and what we will hear tomorrow, and prioritizing some of the areas that we think we would like to give advice to the ministry on that they address and look at in making some changes, seeing where there's some consensus among us as legislators from what we have heard, and hoping that we can have a discussion with the ministry that would facilitate some redrafting of the legislation. Where it goes from there is a question. I put to you one possible scenario: that the ministry goes away and, based on all of the very valuable input, the technical advice that's been given here, they do a redraft and a new draft bill comes out. Then we can sit down and have the detailed consultation with people that you're proposing.

I remember the 200 suggestions from the OHA on the consent legislation, and it's a better law because of it, David, absolutely. Have you given any thought to the consultation process and/or, if not today, offering what you can? Would you make some recommendations to the committee and then in the near future with what you think should happen to the bill?

Mr MacKinnon: I would think that if the committee could produce a report outlining areas of consensus, or otherwise, that would really help clarify the issues for the later process, which I think should be very much as you outline. It would be really useful to us in terms of making the suggestions that we would want to make to the Ministry of Health to have a useful report from this committee that reflects all the testimony you've heard. I think I can safely say we would greatly welcome that.

Mr Wood: Number one, I'd like to thank you very much for the very generous offer of help, which will be taken up by the ministry. I thank you for that. I gather from what you said that you favour one regime for health privacy information protection in Ontario. Is that a yes?

Mr MacKenzie: Yes.

Mr Wood: As you probably don't know, I'm a lawyer by trade, and over the last 11 years electronic information processing has quite literally revolutionized my profession. Do you see the same kind of impact on hospitals?

Mr MacKenzie: Yes, a million times over, which is one of David's favourite topics.

Ms Lankin: Careful. He has a 45-minute speech on this.

Mr Wood: You've got 10 seconds.

Mr MacKinnon: We think the path to the future for better patient care, better patient privacy and a more sustainable system relates to technology, its early adaption, its creative use and its respectful application to health care. There are just huge possibilities before us. That's one of the reasons why we attach so much importance to this. If we do not modernize our capacity to use new technologies by making whatever appropriate adjustments to the legislative provisions respecting privacy, I

think we'll have real difficulty in moving to the system of the future, and the future of the system is very much more technological than the past.

Mr Wood: Could I ask you a bit about the lockbox? I gather you do not like the lockbox as a concept, and I wonder if you can explain to us why that's the case.

Mr MacKinnon: I'll just turn that back to Murray.

Mr MacKenzie: I'll make a comment or two. To have information that is not available to health care professionals who are charged with the responsibility of providing care creates almost an impossible situation. There are huge residual issues related to liability for the care provided when the information is being withheld. I think it's simply inappropriate and unrealistic to expect that—although consumers are certainly much more informed than they've ever been, they in many cases will not understand the full significance of withholding that information. They are not health care professionals.

Mr Wood: I'd like to turn briefly to the question of consent. Where the current draft requires informed consent as opposed to plain consent, have you addressed your minds to the issue of whether or not that would create any problems and what the implications are of asking for informed consent as opposed to simply plain consent?

Mr Norman: I wonder if I could put that question to Deborah, who's been looking at a number of these things

in the detail that you would like as a lawyer to have back as an answer, but she doesn't get too long to say it.

Ms Deborah Tarshis: I think, in fairness, that is not an issue we have focused on in detail. There are other of the broader issues that are addressed in the submission that have been focused on. That certainly is an issue that we would like to focus on more specifically.

Mr Wood: Can we invite you to do that and perhaps give us the benefit of your observations once you've done that?

Ms Tarshis: We would be pleased to do it.

The Chair: Thank you all for coming before us here today and ending today's session. We appreciate your submission.

Mr Norman: Thank you for the opportunity to be here. Good luck as you do tomorrow. We look to the recommendations that will, I think, very much aid in clarifying some of the issues which need to be addressed.

The Chair: Just a reminder to committee members, we are starting tomorrow morning with video conferencing to accommodate submissions from people who were not in the GTA. We will be starting sharp at 9 o'clock and we will be in room 151.

If there's nothing else for the committee, we stand recessed until 9 o'clock.

The committee adjourned at 1751.

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Mr Bob Wood (London West / -Ouest PC)

Also taking part

Mr Phil Jackson, director,
strategic health policy branch, Ministry of Health and Long-Term Care

Clerk / Greffière

Ms Anne Stokes

Staff /Personnel

Mr Andrew McNaught, research officer,
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Jeudi 1^{er} mars 2001

Standing committee on general government

Personal Health Information
Privacy Act, 2000

Comité permanent des affaires gouvernementales

Loi de 2000 sur la confidentialité
des renseignements personnels
sur la santé



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LEGISLATIVE ASSEMBLY OF ONTARIO

ASSEMBLÉE LÉGISLATIVE DE L'ONTARIO

STANDING COMMITTEE ON
GENERAL GOVERNMENTCOMITÉ PERMANENT DES
AFFAIRES GOUVERNEMENTALES

Thursday 1 March 2001

Jeudi 1^{er} mars 2001*The committee met at 0900 in room 151.*PERSONAL HEALTH INFORMATION
PRIVACY ACT, 2000LOI DE 2000 SUR LA CONFIDENTIALITÉ
DES RENSEIGNEMENTS PERSONNELS
SUR LA SANTÉ

Consideration of Bill 159, An Act respecting personal health information and related matters / Projet de loi 159, Loi concernant les renseignements personnels sur la santé et traitant de questions connexes.

The Chair (Mr Steve Gilchrist): I call the committee to order, as we continue our hearings on Bill 159, An Act respecting personal health information and related matters. We're very pleased this morning to be reaching out to the far reaches of the province.

Ms Frances Lankin (Beaches-East York): Sudbury's not that far.

The Chair: It gets farther than that, though, in the next group. We're very pleased to have some deputations from different sites all across Ontario. I would say to the committee members there is a bit of a time lag. As we each speak, there's a bit of a lag getting that message out to the other end, so I would ask you to respect that when we're into the question-and-answer period. Just allow a little bit of time after your question or else we'll be talking over each other.

SUDBURY AND DISTRICT
MEDICAL SOCIETY

The Chair: With that, we'd like to welcome to the hearings the Sudbury and District Medical Society. Good morning. The floor is yours for the next 20 minutes.

Dr Rayudu Koka: Thank you, Mr Chairman and members of the standing committee. We are extremely pleased that you gave us the opportunity to be able to express our concerns and our views on this very important bill. My name is Rayudu Koka. I am the president of the Sudbury and District Medical Society. I have been a practising psychiatrist in this community for the last 15 years. I have with me two colleagues: Dr Pierre Bonin, who is the vice-president of our medical society and a family physician; I also have, to my right, Dr Chris McKibbin, who is a rheumatologist and has also been

active in our society as past president and also as an OMA board member.

With this introduction, I would like to let my colleague, Dr McKibbin, present the information and our issues, and then we'll go on from there.

Dr Chris McKibbin: Mr Chairman, honourable members, fellow citizens, I want to thank you for the opportunity to respond to Bill 159, the Personal Health Information Privacy Act. I'm Dr Chris McKibbin and I'm a practising physician specializing in the treatment of people who are struggling with arthritis and rheumatism. Like you, I'm a representative. I'm elected by physicians in northeastern Ontario to represent them on the board of directors of the Ontario Medical Association.

I'd like to begin by saying something surprising, even provocative, and that is that we need legislation dealing with personal health information privacy. We live in an age when information is constantly being collected. Marketing agencies are gathering information about our personal preferences, our tastes and our habits. Financial institutions are maintaining records about our economic transactions. Political parties of all persuasions are tracking us relentlessly. Statisticians are gathering data as squirrels gather nuts. Never has personal privacy been under such unrelenting attack.

Never before have we had the capacity to know so much, particularly in medicine. We stand just inside the door of unravelling the genetic code, with all of the possibilities and pitfalls that entails. We're well along the road of peering into the human body using sophisticated diagnostic imaging and even more extensive laboratory technology. We have increasing capacity to store, to link and to share information. As this capability increases, we need legislative boundaries to protect personal privacy.

The practice of medicine is rooted in trust, in a very special relationship between a physician and a patient in the confidence that you can share with your physician your darkest fears, your deepest secrets, your worst indiscretions, confident that when personally, physically or emotionally vulnerable, you will be neither violated nor betrayed. Bill 159 places this special relationship at risk, and it does so in many different ways.

Firstly, it does so by allowing unfettered access to identifiable patient data. I can't imagine any situation in which governmental or bureaucratic needs justify direct access to a patient's chart. Planning requirements are predicated on an appreciation of the status of populations,

not individual persons. Where there are questions of fraud or quality of care at issue, access to information necessary to look into those things is obtainable by means that are already available: a court-ordered warrant or an audit conducted under the oversight of a profession's regulatory body.

Secondly, Bill 159 excessively expands the list of those who are entitled to access to personal health information and fails to qualitatively differentiate between them. Surely we can develop legislation which recognizes the differences in the information needs of those who intend direct benefit to patient care and those whose needs for health information are not so specifically and personally directed. Clearly, the needs of a podiatrist making footwear for one of my arthritic patients are different from the needs of one of my psychiatric colleagues treating the same patient's depression, and the needs of a health planner are different yet still. By not clearly differentiating among those who might potentially have access to sensitive information, the legislation undermines the trust and confidence that's fundamental to the physician-patient relationship.

Finally, I'm concerned about the bill's direction with regard to regulation of how patient information will be coded or stored. While it is true that development needs to proceed on a core data set and a common strategy that allows for sharing essential information using new developments in information technology, the bill does not seem to set the limits necessary so as to permit the acquisition and transmission of only that data which is relevant to the particular patient's care at a particular time. There does not seem to be a strategy for the patient to identify and protect his or her record from transmission or adequate encouragement for clinicians or so-called custodians to exercise judgment in sharing some, but not all, of the information that may have been disclosed or discovered within the context of that privileged relationship.

This committee will know that the people of the province want less government, not more. My patients and my colleagues are genuinely concerned about what they perceive as both a real and potential intrusion into one of the most privileged and private relationships. They understand, too, that an efficient and effective health care system needs legislation which facilitates communication and coordinates care. But they demand that the balance favours the protection of their privacy.

Governments should be congratulated for having the courage to ask tough questions about difficult issues. I would return to the statement with which I began: we need legislation dealing with personal health information privacy. Unfortunately, while it begins to address the right questions and shows courage in doing so, it doesn't give us the answers that we need to move forward. We need to recommit ourselves to working collaboratively toward the development of new personal health information legislation which will protect our privacy, deserve our patient's confidence and enhance our ability to deliver care.

I want to thank you for the opportunity to speak to you today. I'd certainly welcome the chance to respond to any questions after my colleagues have had a chance to present.

Dr Koka: Mr Chairman, now I would like to request—sorry, can you hear us?

The Chair: Yes, we can.

Dr Koka: I would like to now request my friend, Pierre Bonin, to do his presentation and then we'll take it after.

Dr Pierre Bonin: I'm Dr Pierre Bonin, a family physician and also vice-president of the Sudbury and District Medical Society. First, I'd like to respectfully thank the members of the committee for granting me the opportunity to speak on this delicate subject. I don't pretend to be as eloquent a speaker as our president, Dr Schumacher. I can only offer you my thoughts and echo the OMA's position.

This is going to sound cliché, but I'm not a health information custodian; I'm simply a doctor from northern Ontario. I appreciate the changing environment we practise in and the need to share electronic information, and also that changes need to be made to the legislation. But this bill goes too far.

We, as citizens, need privacy legislation. Bill 159's intent is good, but it is not pointed enough. We need to define limits on what information the government can obtain. We need to be very sensitive to the possibility of abuse. This law is structured in such a way that fundamentally changes the trust relationship between the patient and his doctor. This is the cornerstone to any successful patient-doctor relationship. At the end of the day, the patient must trust his doctor, rather than wonder which of a long list of custodians may use his private information and for what purpose. People disclose things to me that are very sensitive because they know that it affects both their mental and physical health. Physicians have an interest in that information and a duty to protect their patients' confidentiality.

I'm not clear what is designed with this notion of health information custodian. I don't believe for a minute that the Ministry of Health requires identifiable patient information for planning and management purposes. I think that it is dangerous to allow government to be in a position where it can direct, ie, force, the delivery of sensitive patient information to government. Any release of identifiable patient information is an affront to the trust patients place in their physicians.

0910

Although I think physicians would generally agree that patients should have the right to know how their information will be used and to consent to uses beyond the direct provision of health care services, Bill 159 raises some practical questions.

Bill 159 adopts the approach to informed consent that is found in Ontario's Health Care Consent Act. On the surface that seems reasonable, but as a practising physician I'm not sure how I'm supposed to know, never mind explain, all the possible uses to which the in-

formation may ever be put. There is a key difference between consent to treatment—what I know about the risks and benefits of the medication that I’m recommending—and being responsible to describe or justify the dozens or hundreds of legitimate disclosures that Bill 159 would allow. It’s not reasonable to require me, as a physician, to anticipate what might happen to the information after it leaves my control. If the government wants physicians to have this role, then physicians should be able to control what happens to the information.

If this legislation is passed, I fear that patients will ultimately distrust their doctors. I can’t see Mr Jones disclosing that he has abused drugs and that’s why he has cellulitis on his arm if he knows that disclosing this to me may lead to hundreds of “legitimate” disclosures to other health information custodians for purposes that are out of my control but, most important and lest we forget, out of the patient’s control.

I echo Dr Schumacher’s sentiment that this bill allows sweeping intrusion by the government into its citizens’ personal lives. We, as physicians, cannot and do not support Bill 159 in the form that it is before us.

Dr Koka: Thank you, Pierre. Mr Chairman, I’m going to make some comments about what my colleagues have already mentioned. I am a practising psychiatrist. We feel that, at least at present, we have a very good privacy act in position already. When my patients come, the first thing they ask is, “Doctor, tell me, where is this information going to go? Who will have access?” Now at least I tell them, “Nobody else without your written consent with the details.” The judge is the only one who can summon the records, nobody else, whereas in this act, if it goes through, we don’t know who will be accessing this information. I cannot explain to the patient, “Look, the whole world will have the information, but I have no control over it.”

In that situation, how can you expect the patient who has been traumatized—and 30%, say, of our female patients with depression have a history of sexual trauma—to tell me? I have had a 60-year-old, for the first time ever in her whole lifetime, disclosing that information to me. With this Bill 159, if it passes through, Mr Chairman, I think this is something that will be sort of censored and we will not be able to treat the patients as they deserve. That’s one thing.

With regard to custodians, I think my friend mentioned about the custodians. Of course, we are front-line custodians, but there must be some difference between the custodians as the family physicians or the psychiatrists or individual physicians to hospitals and other institutions or regulatory bodies. So there must be some way of differentiating between the two.

Already now we have a problem with third parties getting information because they get this consent signed under coercion of the patients: “If you don’t sign this form, you won’t get your benefits.” We have a problem with that. If this government can do something to stop that abuse by the insurance companies, I’d greatly appreciate it, because we do report to these people, but on top of that they want every sentence of my clinical notes to

give these benefits. They don’t need that information. There is very sensitive information not only about the patient, but about the relatives and friends, everybody else. I cannot go on censoring every sentence that I have written. I don’t know what is there. So I think if you can do it justice and help, please try and do something about that one.

With those comments, I will end my presentation, and we’ll be happy to take some questions.

The Chair: Thank you very much. We’ll start the rotation with the Liberals, and I must remind folks that we are on a very specific timeline here, so it’s about a minute and a half per caucus.

Mrs Lyn McLeod (Thunder Bay-Atikokan): Thank you very much for excellent presentations raising the concerns of front-line providers. We know that a lot has to be changed, including that directed disclosure by ministers, but may I ask, if the patient had the ability to say, “I want my medical record not released. Put a lockbox on it,” would that interfere with your work as front-line practitioners?

Dr McKibbin: If I could respond, the problem with the lockbox notion is that there are times when that kind of information is crucial to protecting others: hospital workers who may be exposed to risks from blood-borne infections; other patients in hospitals who may need to know that a patient is at particular risk for a communicable disease.

I think the correct way to respond to this is to put our faith in the trust relationship and to allow the physician to communicate with the patient and explain to them the reason why any particular bit of information needs to be released. My experience has been that patients, knowing that and knowing specific reasons why things need to be released, are greatly understanding of that. It’s when they have no sense of the control, no sense of where it’s going and no relationship directing it that they have the greatest difficulty and where we offer them the greatest threat.

Ms Lankin: Good morning, Doctors, and thank you very much for your presentation. Many of the presenters have agreed with you that there is a need for the committee to recommend to the minister that this legislation be tightened dramatically to protect private information.

The key question I have to put to you, however, relates to the ability of health providers to share information among each other. The relationship that you identified between a patient and a doctor, the special nature of that, is also true of the relationship, for example, between a patient and a nurse practitioner or other regulated health professionals. The core of the matter with respect to that sharing of information: if we are truly to have integrated health delivery, if we are to be able to move to primary care reform, there’s going to be a need to have some ability to share information and to standardize the form in which that information is recorded. There seems to be some resistance from some parts of the medical community to that. Could you give us your views on that?

Dr Koka: I was going to comment about sharing information between the health care professionals as well

as specialists or other physicians. With regard to standardizing the information gathering or charting, it's very difficult, because what I need in psychiatry is different from what my colleague in rheumatology needs or what my colleague in the surgical field needs, or a family physician. If I try to touch a patient, you know, when there's no need, of course I'll be in trouble. So you can't check just everything. The problem each patient comes up with is different. So it's difficult to standardize.

We already have some forms that we've come up with, like neonatal forms and other things. So we do come up with some standardized forms as necessary, but we cannot standardize charts as it is. Maybe if my friends have any comments about it, I'll let Chris or Pierre—

Dr McKibbin: Basically, if I could, the patient is always the ultimate custodian of his record, and if the patient directs freely for that information to be released to any other member of the health care team then it's really quite proper, right and helpful for the patient to release that.

The question is that the patient knows at that point where the information is going. If I ask one of my colleagues to see one of my patients, my patient knows that I've asked them to see them and I've communicated those details that were necessary for their care. It's out of the ambience of that relationship that trustful care happens. The matter with Bill 159 is that that relationship is not there. Within a primary care network, within a co-operative care arrangement between physician and nurse practitioner, that relationship exists and in fact is extended and perhaps deepened. The problem is when it happens outside a relationship of care.

Mr Bob Wood (London West): One of you gentlemen referred to the question of informed consent. I'd like to now invite you to suggest a solution. I'll give you one that you might want to comment on. What about just asking for plain consent as opposed to informed consent?

Dr Koka: It's difficult to say plain consent. It has to be informed. The patients are intelligent. They know what they're doing. They know where the information is going and what it's going for. It has to be informed. When we prescribe some medication or any treatment we prescribe, we have to make sure we have informed consent. We can't just say "blanket consent." I think it's not acceptable.

0920

Mr Wood: One of your colleagues said that he was concerned about the onus placed on the physician if you asked for informed consent rather than plain consent. One solution to that concern would be simply to ask for consent as opposed to informed consent, which has, as you know, a very defined meaning in the medical context.

Dr Bonin: I'm not exactly sure how to respond to that. When a patient consents to a treatment, they understand the risks, they understand the consequences and the benefits of what's about to be done. If they enter any relationship with their physician and they're going to disclose sensitive information, I can't just ask them to

consent to giving me this information if they're not going to know where this information is going to go.

I'm not sure I understand the distinction between consent and informed consent, but I can't justifiably ask a patient to tell me something sensitive if I can't tell them what's going to happen to that information, and just ask them to give me a blanket consent that anybody from the Ministry of Health can request this information. He has to know before he discloses this information what the consequences are going to be.

Dr Koka: I work under the Mental Health Act legislation, so I have to get the patient to sign each time. Any information that goes to anybody, he or she has to sign the consent form, a form 14. That's laid out by the law. If any information is going to anybody else without their consent, I'm liable. There's a fixed penalty and punishment for that.

The Chair: Thank you, gentlemen. We appreciate your being part of our high-tech outreach here this morning. Thank you very much for the content of your presentation as well.

Dr Koka: Mr Chairman, thank you very much. Of course, it's a very short period of time. We can't put all our views and impressions on this bill. I'll try and see if I can put together some form of information to you in writing.

The Chair: Thank you very much. The clerk will make sure it's distributed to all the committee members.

Committee members, we'll have a brief delay while they get the next presentation in Sudbury in position.

Good morning. I was expecting to see a Patricia Hatala.

Dr Samuel Berger: That may be me in another life.

The Chair: Who might you be, sir?

Dr Berger: My name is Dr Samuel Berger.

The Chair: Well, Dr Berger, I think they've gone and dialled in our 9:30 instead of our 9:20, so the clerk is just trying to resolve this little glitch in our travels down the electronic highway. Bear with us, please, just for a second.

Dr Berger: All right.

Mr Bert Johnson (Perth-Middlesex): Where is he?

The Chair: Dr Berger is in Little Current.

Mr Johnson: Patricia, where is she?

The Chair: She's still in Sudbury. I'm surprised they didn't just change chairs.

PATRICIA HATALA

The Chair: Good morning. I take it we're joined by Ms Hatala.

Ms Patricia Hatala: That's correct. Good morning.

The Chair: We have 10 minutes for you here today. Thank you for joining us in our deliberations.

Ms Hatala: Ladies and gentlemen of the panel and all concerned in the opinion-gathering re Bill 159, the Personal Health Information Privacy Act, thank you for giving me this opportunity to make this presentation.

As in any issue or complaint, it is much better to accompany such with suggestions as to how a situation

may be approached or possibly resolved. I am making this presentation with this in mind. I do not intend any of the comments herein to be taken as accusations or personal or general affronts.

Am I not correct in believing that, as a condition for employment in the health care field, all workers are sworn to keeping information contained in all health care matters strictly confidential? If this requirement is not in place, it should be in place. If this requirement is in place and is not being monitored and/or respected by those involved in care, including volunteers, appropriate action should be taken. If confidentiality matters are in place and being respected, it would seem that privacy of personal health information would almost be a non-issue.

Having myself worked in the health care field for some 30-odd years, I can say I did so knowing and believing that any transgression of confidentiality on my part could result in the termination of my employment. I wholeheartedly agreed with this provision then, and I still do.

This being said, my own wish in this matter is that all my health care records, whether these records contain sensitive material or not, be available to whomever happens to be my health care provider at any given time, to enable optimum, most efficient care or, to put it another way, to enhance the ability of the caregiver to provide the most appropriate care at any given time under varying prevailing circumstances. This would, of necessity, include all health care providers, not just medical care providers; for example, naturopaths, chiropractors, acupuncturists, not just MDs and nurses.

Health care staff should be discouraged from discussing cases in hallways and cafeteria settings where these areas are shared by the public.

If a possible transgression of confidentiality seems to have taken place, we must keep in mind that just because a person's health history becomes public, this does not necessarily mean it was medical personnel who made it so. Individuals share their health status information with friends and arbitrary acquaintances on what seems to be a continuing basis.

In my view, the more relevant information that is available to those carrying out testing analysis and/or hands-on care, the greater the degree of detailed, accurate and comprehensive diagnosis that can be made and the greater degree of appropriate care that can be given resulting in greater benefit to the patient/client.

If health care records—regular type as well as sensitive type—are available to health care workers at any given time, then results of recent tests are therein contained. This may well contribute to cost-cutting, as unnecessary repeat testing could be avoided.

Although in health care it is advisable to deal with all patients/clients with utmost care and precaution, if so-called sensitive contents such as a diagnosis of AIDS are not made available to staff, cohabiting partners and health care people who are dealing with the person, either person to person or in analyzing material for diagnosis, these people are unnecessarily put at risk and may not be appropriately cautioned. This situation may result in a

person not taking extra precautions in order to ensure self-protection.

Health care records belong to the patient, as I understand, and should be readily available to same. At the present time, if I wish to choose a different physician, for instance, my records would only be transferred to the new physician, and then only those records which the present physician deemed relevant. I happen to consider all of my medical health care records relevant.

0930

At present, if one physician leaves town, it is sometimes nearly impossible to access one's records. Computerizing all records and making them available to those who require them at any given time would be a large undertaking. However, in this day and age of computerization and communications refinements, I have no doubt that such could and can be accomplished and could and would be to the benefit of all concerned. Such a move may very well be most cost-efficient in the long run.

Perhaps a system—and this is going to bring up exceptions in your mind, I'm sure—which would allow a patient-client to choose whether the patient-client wishes to have all records available or wishes to keep records or parts of records private could be set up. If this is pursued, identification, for example, by thumbprint might be a good way to ensure that an individual's records are not confused with that of anyone else. This mode of ID, of course, would be a voluntary one.

In conclusion, I would like to say that as for my health care records, I would like them to be specifically identified to me—example, thumbprint—made available to me and made available to whichever health care assistant is serving me at any given time. Thank you for your time and attention.

The Chair: Thank you very much, Ms Hatala. If you're so inclined, we've got a couple of minutes. I'll give the time to the next party in rotation, which is the NDP.

Ms Lankin: Thank you very much, Ms Hatala. We appreciate your presentation and joining us here today.

I think that the last statement you made really sums up the opinion of a lot of citizens we've heard from by letters and some who've appeared before committee that our health records are our own. We want to have full access to them as individuals and we want to ensure that those health professionals we're dealing with, who we have a trusting relationship with, have access to all of the information that we want them to have.

A minute ago you also made reference to the possibility that an individual patient may not want all of their health records released at some given point. That's been referred to as a lockbox provision. The symbolism of that is that you'd be able to take some information and put it in a file cabinet drawer and lock it away and it wouldn't be passed on from health care provider to health care provider unless you changed your mind and gave approval to that.

Some of the health care professionals we've heard from, doctors in particular, have said no, they believe that

the doctor or the health care professional is in the best position to judge whether or not information can or should be shared, and that it would be dangerous to leave that to the patient to decide. I think it's obvious, if you have a good, trusting relationship and you've talked that through, you're going to come to some consensus between the health care provider and the patient. But if it comes down to it, in the end, do you believe that that information belongs to the individual and that you should be able to make a decision that some aspects of it perhaps are not shared, or do you think that once it's in that health record, any health professional you choose to share the whole record with should have access to all aspects of the information?

Ms Hatala: I think that health care workers know what they're doing. They're credible people. They know what confidentiality really means. I can't help but think how making all the information available to them could be a detriment to me. Right now I'm being treated, trying to heal my lungs from my asthma symptoms. A situation like this is occurring now. For instance, something that happened earlier in my life and has medical records attached to it that aren't available at this time might not clue somebody in as to how my body reacts to different things, because each individual, of course, is an individual, and our chemistry's all different. So I think, yes, they should have the access.

I think as far as privacy goes, patients are already choosing to keep diagnoses under wraps. As I said, I did work in the medical field. When the AIDS situation did come up, sometimes some of the requisitions we would get wouldn't tell us as health care workers that this person had this particular disease. We, of course, are supposed to deal with everything with the utmost care, but we could be exposed. I don't think that's really correct for somebody who already knows the confidentiality system is in place and it's expected of you.

The Chair: Thank you, Ms Hatala, for appearing before us here today. We appreciate it very much and thank you for a thoughtful presentation.

Ms Hatala: Thank you very much. Have a good day, everybody.

INTERCILUM

The Chair: Dr Berger, we're back with you again in what I suspect is a first: legislative hearings in Little Current. Good morning and welcome to our proceedings. The floor is yours for the next 20 minutes.

Dr Samuel Berger: Thank you very much. I actually intended to leave some of the time for questioning, so I don't know that I'll speak the full 20 minutes. I just would like to say in introduction that I'm extremely impressed with the equipment at the Manitoulin Health Centre in Little Current. This will change the face of rural medicine. This is a pilot project here among several associations, but I was quite taken aback to find that I could speak with you from the island.

I'd like to ask, first of all, whether the comments that I submitted have been received by the committee.

The Chair: Yes, they have; thank you.

Dr Berger: Good. I'm just going to give a word of background initially. I've worked in the area of medical informatics for the last seven years and I'm currently chairman of an Internet privacy company, which is Intercilium Inc. We are developing a product which has to do with health privacy, so my interest in this area goes back for the seven years that I've worked in the field.

I'm particularly concerned about what I believe are the deficiencies of the act to address head-on the whole issue of the Internet age. I'm going to elaborate somewhat on the comments that I made in the preface. Although I've submitted several comments, there are really four main issues that I want to cover. Number one is, again, the issue of the Internet age. The second issue is legal access to personal health information.

The Chair: Doctor, could I ask you to either pan the camera to your right or move slightly to your left?

Dr Berger: OK, how's that?

The Chair: That's much better; thank you. Oh, now you've gone a bit too far.

Dr Berger: OK, one second.

The Chair: There, stop.

Dr Berger: I can hold this position.

Thirdly, I think that the act is perhaps the weakest in the areas of consent. Finally, although I didn't elaborate on this in the preface but I do refer to it in terms of 7 (a), I think that the whole issue of genetic testing and the privacy issues surrounding it must be addressed by the committee.

0940

First of all, in terms of the Internet, we have a situation here where there are commercial companies and other Web sites which are very involved in the collation and collection of personal health information. I believe if this is not specifically spelled out, if these sites are not spelled out as health care custodians, they can fall between the cracks of the entire act. Several commercial companies, for instance, are offering personal health records, personal health diaries, on the Internet, or they are involved in diet management, sports management, many different areas where they are actually asking all sorts of questions. You could go to an aerobics site that might ask questions such as, "Do you have any heart disease," or, "Do you have high cholesterol?" You've got an absolute plethora of sites out there that have tremendously sensitive information about individuals and they are able to use and distribute this information without any particular act of legislation curtailing it.

I feel it's very important to stress that the act should define—in my view, a health care custodian should be anybody who has personal health care information, whether it be a school or an employer. My particular interest is that, in the Internet age, the committee specifically delineate that Web sites which hold personal health information must protect this information. That's the first point I strongly wish to stress.

Of interest, I will mention as an aside—and I didn't address this in the brief but it's something the committee

may wish to consider—there is a very big issue of physician privacy which is coming to the fore, because many of these commercial sites actually ask people, “What is the name of your family doctor?” or, “What is the health care institution that you attend?” In fact, these sites can compile databases on physicians and health care workers without the health care worker or the physician knowing that these questions are being asked about them. I think, at best, it’s an invasion of privacy; at worst, it’s extremely dangerous because, as you know, physicians who perform abortions, for instance, have been shot in this country. So you don’t really want that information being pulled out by people on sites.

I think the committee has to look a little bit at the two sides of the coin: both the protection of personally identifiable health information of the subject whom it concerns but also to keep in mind the health care providers and their issues of privacy. But that is an aside.

Secondly—and I really debated whether to bring this issue to your attention, because I think it’s the central issue that is talked about in the United States and Canada, as well as in many other jurisdictions, that being that law enforcement can summons a medical record. I must tell you, the most uncomfortable question I’m probably ever asked as a physician is when a patient says to me, “Is this information confidential?” I have to answer them, “With the exception of if your medical record is summonsed.” I believe that destroys the patient-physician interaction and gives law enforcement and the judicial system a privilege that supersedes and is greater than our own privilege. I think physician-patient privilege should be at the level of solicitor-client privilege, which is recognized as the highest privilege in terms of these matters.

The concerns are becoming more acute. I refer you to an article just published by the Wall Street Journal the other day. Where court records become public, there is a new strategy out there of both individuals and organizations publishing public court documents. These court documents, based on summonses, often contain information of a medical and psychiatric nature. Again, when you enter these themes into the world of the Internet and the very strong search mechanisms on the Internet, these issues easily become very apparent. There is not the so-called practical obscurity.

In fact, there is already anecdotal evidence. One woman was searching the genealogy of her family with her daughter, and a divorce court proceeding came up in the search which referred to an affair she had had. Now, this isn’t a medical matter but it came up in front of the screen—easily obtained. So anything medical and psychiatric that is contained in any public court record is going to be fair game for the world of the Internet and I think opens up tremendous privacy issues. So I would urge the committee to consider that side of things.

The other side is that nothing is sacrosanct. When you need information from people and they realize law enforcement can have access to it, it tremendously influences the medical care you can provide and the whole realm of privacy that you want to guarantee to patients.

There are very good studies done by the California HealthCare Foundation in the United States which showed that one out of six Americans have done something actively to protect the confidentiality of their medical information. Usually that active thing is either withholding information or lying to health care providers. I don’t believe the situation is any different in Canada. It’s important to know what drugs people are using, what sexually transmitted diseases they may be susceptible to and so forth, but if people have the fear of this information being able to come up in a court document or otherwise, they will be withholding the information, which skews medical research and skews good medical care.

There was a section that I referred to in my comments about labour relations, and I’m particularly shocked by that because employers are very interested in getting information about individuals. I worked in a lot of rural communities where the employers are very actively involved through the Workers’ Compensation Board—it’s under a new name now—and other areas, and it does influence hireability and employability and job promotion and so forth, so I’m a little bit perplexed at the entire section where labour relations are left out of the picture by the act.

I’m going to move to the area of consent, and I can very briefly summarize this. The feeling of ourselves as a company and I think of most privacy advocates is that the principle that information given with consent for one reason should never be used for another reason without further consent should be adhered to. While I commend the committee for addressing this in terms of a research and ethics committee, that researchers, if they want to use information given for one reason or another, should have to clear an ethics review board, I think, more importantly, they should have to clear the person who first gave the information.

The concern is, if there is cover-all consent—and that’s why I suggested that it’s very important to put a time limit on any consent given, because sometimes you have people who say, “Yes, my medical record can be used for research,” and two years later they have a positive HIV diagnosis and they don’t want their records used for research any more because they don’t feel comfortable with who may be getting their records, yet they signed a blanket consent without time restraint. So I would urge the committee to place into the legislation that consent must be on a per-use-with-time-limit basis in all instances and the consent must be obtained from the person from whom the information is obtained.

It’s important for you to know that Minnesota has legislation that adheres to that principle. The Mayo Clinic in Minnesota actually cried a lot about that information because they do a lot of retroactive research on very good files from decades ago. They felt, “Now we have to go and ask somebody from 30 years ago or ask their heirs if we can do a new research project,” but in fact the Minnesota legislation said, “Yes, you have to do that.” They are finding out that most of the time it’s going without problem and greater than 97% of the patients

who come to the Mayo Clinic are giving widespread consent to their information being used for research. But the issue is, you have to get the consent from the individual involved.

Finally, I want to say something about genetic testing. You have a clause 7(a) which talks about individuals being dead for more than 30 years, that it's open game to find out anything. This is extremely troublesome, particularly in the world of genetic testing. I'll give you some examples.

0950

You could have somebody who at age 44 dies of Huntington's chorea. At that time, they've got a four-year-old or an eight-year-old child. Thirty years later, that child's going to be 34 years old. Maybe that child is in a position to become a CEO of a Fortune 500 company. Incidentally, about 60% of Fortune 500 companies look into the health backgrounds of prospective employees before prospective job advances. That record will be open game. If they want to solicit any record from the father of a patient, they'll be able to.

In fact, this is a very hot topic that was just addressed the other day, because in the United States there is a company that has been doing genetic testing for carpal tunnel syndrome. It's a syndrome that affects the activity of the wrist. They were doing it largely unbeknownst to employees. But what I wanted to point out is that the Genetic Alliance, which is a coalition of patient advocacy groups, did a study just of 220 respondents, but 16% of them cited bias at work and in the military based on documented cases of genetic discrimination. The survey included such cases as a woman who alleged she was denied long-term disability insurance because the company said she had a predisposition for Alzheimer's disease. Its decision was based on a doctor's scribbled notation in her medical record that her father might have the condition. Again, one has to understand that when you have 50-year-olds dying of diseases, and 30 years later their information can be studied, their own children are only going to be 50 at that time and can face tremendous discrimination for themselves and their children and so forth.

I think the act has not been cognizant enough of the entire Human Genome Project and the implications. I think a good starting place would be to say no, somebody being dead for 30 years isn't enough. I think we should increase it to at least 150 years. You use the figure of 150 years at another point in the act, to say that in terms of recorded information, it doesn't apply to information longer than 150 years.

Those are the main points that I'd like to address. I'd be happy to take any questions.

The Chair: Actually, Doctor, you've timed it very well. We have almost seconds left. Knowing myself and my colleagues, we can hardly get our names out in that amount of time, never mind pose a question and have a reasonable answer. But I do appreciate your very detailed and thoughtful presentation before us here today. If you have any supplementary thoughts, please feel free to send

them to the committee. I'm sure if the committee members have any questions, we've got your particulars on file and hopefully you'd be able to respond to their questions at that time. Thank you again for joining us today.

MAVIS LIPMAN

The Chair: Our next conference presentation is from Ottawa this morning. Good morning. Ms Lipman, I assume?

Ms Mavis Lipman: Yes, it is Mavis Lipman.

The Chair: Good morning and welcome to the committee. We look forward to hearing your presentation. The floor is yours for the next 10 minutes.

Ms Lipman: I thank you very much for the opportunity to submit my brief today. I actually did prepare 20 copies of my brief with supporting research and professional statements. I'm not sure where I should send them, but perhaps you could tell me after.

The Chair: We will do that; thank you.

Ms Lipman: Although I am from Quebec, and my profession is a medical laboratory science technologist, I have something in common with many individuals and families in Ontario. Some of our wonderful children went into therapy in the last decade with no memories of childhood sexual abuse. They were exposed to recovered memory therapy, which elicited in many of our children the most horrendous and horrific accusations of childhood sexual abuse, mostly against their parents, and mostly against their fathers.

We have had a great deal of difficulty having access to therapy records. In the past, I possibly could have respected the need for complete confidentiality and privacy in protecting medical and mental health records. However, when unsafe and unproven mental health practices are being used by mental health caretakers or practitioners, I think we have to question how protected those therapy records can be. Those therapy records contain the information that shows how those memories emerged in the therapeutic setting and how suggestive those practices were.

The professional associations today, since 1993, such as the American Psychological Association, the American Psychiatric Association, the Australian psychological association, the Canadian Psychiatric Association and the Royal College of Psychiatrists in Britain, have now condemned these practices. Especially the last one, the Royal College of Psychiatrists from Britain, has condemned all of those suggestive practices that therapists were using in their therapeutic setting to elicit these memories, like journalling, guided imagery, age regression, hypnosis and sodium amytol interviews. Some of our children were exposed to this.

The two cases that I present in my brief went into the criminal court system. One is my husband, AG. A daughter from his first marriage, whom I knew very well for 16 years, who visited our home with her friends, with her boyfriends, and lived with a daughter of mine also for

close to a year in Ontario, was his loving, loyal daughter. After going into therapy for pain management of a back injury, and maybe some other issues in her life that I am unaware of, she emerged with the most heinous, horrendous, terrible accusations about her father.

Since my husband for close to 20 years had an extremely severe case of myasthenia gravis, this had a major effect on his health. He had a major exacerbation requiring major invasive procedures, was hospitalized for seven weeks, had numerous syncope, fell down stairs, broke ribs, broke teeth, and was unable to defend himself. I was in and out of the courts for four years. He lost his entire family. He lost his entire life's savings and a legacy that can't even be passed on to his grandchildren. The daughter was in therapy in Toronto.

The other case is a friend of mine whose daughter also received therapy in Ontario. His case was presented before the courts in 1992, when judges were not familiar with the now-discredited and inadmissible, in many courts, cases related to recovered memory therapy cases. He was incarcerated for six years. Because he was taken to the Millhaven Assessment Unit in a protective cage situation, considered a dangerous sex offender, he was assaulted several times just when he was being assessed, and that continued throughout his incarceration. He lost his children, his job, all his assets and even his good health in the process, and he's not 60 years of age yet. It is a major concern for myself and other people so affected that we have to know what went on in those therapy sessions and what kind of practices were utilized by the therapist. We don't want this to happen to other people.

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As a medical laboratory science technologist, every method in my laboratory is scrutinized and given accreditation by qualified boards in my field. Every test system I have must have three quality controls: a normal level and two abnormal levels. We can't practise without disclosing that type of information. Patients would die if our test systems were not working. Physicians would not be able to diagnose and treat patients effectively.

In my rationale I have stated that just as medicines are tested for safety and effectiveness before they are used on patients, therapies should be tested for safety and effectiveness before they are used on clients. Informed consent to mental health care treatment is based on a full, fair and truthful disclosure of known and foreseeable risks and hazards of the proposed treatment and of alternate treatments. This process allows the patient, client or legal guardian of the patient to exercise free and independent judgment by reasonably balancing the probable risks against the probable benefits.

A standard of care in mental health treatment reforms the mental health industry as a whole by establishing a firewall of testing for safety and effectiveness and to stop fads like lobotomies in the 1960s, recovered memory therapy, multiple personality disorder and satanic ritual abuse, which swept the profession in the last decade and a half. This would provide an incentive for the mental

health profession to keep themselves and their clients informed about therapies that do and don't work.

I also think a client should have access to the therapist's credentials, the experience of the therapist, the type of therapy the client may or may not want to engage in and also the right to cease that therapy if it seems harmful and ineffective.

In looking at Bill 159, part I, "health care practitioner" means (d). I was unsure if this could include unlicensed people, self-styled people who touted that they were health care practitioners who were untrained, who received payment without any accountability for who they were and for somebody monitoring what type of practices they were using on their clients. So I have included "must be a certified member of an accredited organization where a recognized standard of care is maintained."

In part VI, disclosures in proceedings, which I'm particularly sensitive to at the moment, I thought that an addendum—perhaps I haven't written it in the best words, but if it was of interest to adopt something—could include that mental health records and therapy records should be produced, if subpoenaed (i) when malpractice is strongly suspected, (ii) when a witness's testimony is unreliable due to mental illness, (iii) when a witness's testimony is unreliable as a result of suggestive or unproven mental health practices, and (iv) when a witness's accusations remain uncorroborated.

A major problem with many cases of repressed or recovered memory therapy that went through the courts was that those men were either charged or convicted based solely on the uncorroborated testimony of the complainant, who had never had memories of abuse and had gone into memory retrieval therapy.

In part VIII, I was concerned because I have been a parent of children who have had epilepsy and other problems in their lives. I had to be the dominant caring parent until they were of age, and of course they still needed a great deal of care, monitoring and assistance with physical problems. I was concerned, if I understood it correctly, because I feel that a parent should be able to access a record of counselling, if the child is under 16 years of age, if the health service appears harmful and ineffective to the child. Maybe I didn't understand it correctly, but I don't think that information can be withheld from a valid, supporting, caring parent.

I don't know if I have time, but I have just sort of highlighted some other recommendations. I feel it is vitally important that we—

The Chair: Ms Lipman, I should have mentioned, but I didn't want to interrupt you, that the clerk has in fact distributed a copy of your presentation to us, which I guess you sent in by fax. We have gone a fair bit over time already, but I wanted you to get through all your recommendations on Bill 159. Perhaps I could just ask if you've got any brief closing comments?

Ms Lipman: My brief closing comments are, I think we really need to inform the public through the Ministry of Health, professional organizations or other key areas

that we have to watch out for therapy that is damaging patients. I believe licensed therapists who are mismanaging the treatment of their patients must be held accountable and brought before their boards. Unlicensed therapists should not be able to treat and diagnose patients, and if they mismanage their clients, they should be brought before the courts. That's my message.

The Chair: Thank you very much. On behalf of the committee members, we very much appreciate the fact you drove all the way to Ottawa this morning and that you took the time to prepare and make this presentation before us today.

Ms Lipman: Thank you very much for your time.

The Chair: Ms Lankin, before we go on to the first group, you apparently—

Ms Lankin: Yes, a request to legislative research. Yesterday, research officer Susan Swift circulated a memo to us that included a copy of the model state health privacy legislation that has been drawn up by two Georgetown professors. Also, in a number of presentations we've heard reference to the Minnesota legislation, and we heard that again this morning. I was wondering if it would be possible to ask legislative research—perhaps our research officer here could get some assistance with this, because I know he'll be busy doing the summation—to take a look at the model state legislation and the Minnesota legislation and give us a summary of the philosophical underpinnings of those pieces of legislation and, if possible, the difference in approach between those and Bill 159. If it is possible for that to be done and appended to the summary of the proceedings the committee expects to receive next Wednesday, that would be very helpful.

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SURVIVORS OF MEDICAL ABUSE

The Chair: Our first group here in Toronto this morning is Survivors of Medical Abuse. I call them forward to the witness table, please. Good morning and welcome to the committee.

Ms Josie MacPherson: My name is Josie MacPherson, and I'm going to be representing my group here today. I'm a facilitator of SOMA, Survivors of Medical Abuse, a self-help group respecting patients' rights.

I have read the bill and have several concerns. The first is that the number of organizations and persons designated as health information custodians is too lengthy. It includes a health care practitioner, a drugless practitioner, a long-term-care service provider, a child and family services service provider, a person who operates a hospital, an independent health facility, an approved charitable home for the aged, a home for special care, a home for retarded persons, a retirement home for the elderly, a pharmacy, a laboratory or a specimen-collection centre, an ambulance service, a community health program or service, a program or service funded under the Developmental Services Act and a program of employment supports.

It also includes an evaluator within the meaning of the Health Care Consent Act, an assessor within the meaning of the Substitute Decisions Act, a medical officer of health, the minister, a district health council, a college within the meaning of the Regulated Health Professions Act—and I will refer to this again later—Cancer Care Ontario, a person who maintains a registry of personal health information that relates to a specific disease or condition or that relates to the storage or donation of body parts, a person or class of persons who maintains a repository of personal health information for the primary purpose of data analysis or research. A health information custodian does not, however, include an aboriginal healer, midwife or spiritual healer.

The bill provides protection from liability to health information custodians and persons employed by or in the service of custodians if they act in good faith and reasonably in circumstances.

This list is too exhaustive. It leaves a lot of room for error and abuse and leads me to believe it will be extremely difficult to police and safeguard. According to Ontario's privacy commissioner, "Under this bill, individuals have little control over the collection, use and disclosure of their personal health information."

I made a submission to the federal Office of Health and the Information Highway information, analysis and connectivity branch on November 13, 1998. They have put together a report providing strategic advice and recommendations to the Minister of Health regarding the development of a strategy toward a Canadian Health Infrastructure. Has this report been used in drafting Bill 159?

My second concern is that this bill will be difficult to police and safeguard. Patients' rights will be violated. Under the proposed bill, a patient may appeal to the privacy commissioner if they feel their health care information has been misused. However, the bill provides liability protection to health information custodians as long as they can say they were acting in good faith. This provides a large margin of error for health information custodians. What guarantee do patients have that there will be greater accountability in this system than there is in the health care colleges, specifically the College of Physicians and Surgeons of Ontario? Fewer than 4% of complaints made to the College of Physicians and Surgeons of Ontario ever make it to a successful closure for the patient at the discipline stage of the process.

In 1997, HPRAC, the Health Professions Regulatory Advisory Council, retained a consultant to review the complaints and discipline process at the College of Physicians and Surgeons of Ontario. Currently, another review is underway by an independent consulting firm, KPMG Consulting, commissioned by the Ministry of Health, to conduct a review of the complaints and discipline process at the College of Physicians and Surgeons of Ontario. Under Bill 159, professional colleges are designated as health information custodians. Why should patients trust them with this privilege? Clearly, it provides them with more information to invalidate patients' needs and concerns.

There are numerous accounts of the lack of accountability at the College of Physicians and Surgeons of Ontario. More recently, Dr Deep, a Toronto cardiologist who allegedly defrauded OHIP in the amount of \$1 million and has been under their scrutiny for 30 years, is still practising and has not been convicted of any charges. In fact, the OHIP fraud unit, a secret inner body within the College of Physicians and Surgeons of Ontario, has failed to bring successful closure to this case. Refer to "Secrecy Laws Hamper Probe of MD," the Toronto Star, February 13, 2001.

The Chair: Ms MacPherson, I probably should put this on the record here again for your benefit. When individuals get into mentioning specific names, it's appropriate to caution witnesses that while MPPs enjoy parliamentary privilege pursuant to the Legislative Assembly Act, it's unclear whether or not these privileges and protections extend to witnesses who appear before our committees. For example, it may very well be that testimony you've given or are about to give could be used against you in a legal proceeding or elsewhere. We just caution you to—

Ms MacPherson: OK. I wasn't aware of that, but I'm simply referring to newspaper articles.

The Chair: Let me just say that it's no different than what would happen if you had a conversation out on the street. I just don't want people to have the perception they're covered as MPPs are covered.

Ms MacPherson: Thank you for sharing that. I do want to continue because I am referring to newspaper articles and I'm backing up everything I say with newspaper articles.

The confidentiality rules of the CPSO disabled the college from serving its mandate to protect the public, and I do have a newspaper article that attests to that.

A patient who went to see Dr Deep for heart-related problems and later learned her medical files contained misinformation about psychotherapy, for which he billed OHIP, now has an inaccurate, false medical record. Under Bill 159, this inaccurate file will be given to virtually everyone, except for an aboriginal or spiritual healer, and will follow her everywhere. She can attach a letter to her file saying she disagrees with the psychotherapy segment, but chances are future physicians will regard her as a difficult patient and ignore her plea for accuracy of her record. Will it affect her health care? In a word, yes.

My third concern is that when a patient's medical file is inaccurate with her history or symptoms not taken down as they are stated, then the patient's best health interests are not served. I will use the example of a Beeton mother of two young children, one a newborn, who died at the Southlake Regional Health Centre on January 7, 1998, due to human error, and I've attached the newspaper article for this one. I want to make a correction. It's the Era-Banner, February 27, 2001.

There is an inquiry taking place at this time into the death of this woman who was found dead in her hospital bed. She told her common-law husband days before her death she did not feel her medical complaints were being

taken seriously by the hospital personnel, and this again is backed up in newspaper articles. "Although Desrochers had been having between three and 25 bloody bowel movements in the weeks" preceding her death, doctors failed to diagnose her with extreme inflammatory colitis. The day before her death, she had 22 bloody bowel movements. The day of her death she had 17 bloody bowel movements. The purpose of the inquiry is not to assign blame, but to ensure that a similar situation does not happen again. However, the patient's loss is total and irreversible. I ask, why would a patient, such as Ms Desrochers, who was experiencing such severe symptoms in an Ontario hospital, not be taken seriously? Were her medical charts and files accurate? Again, I'm posing questions.

In summary, I would like to say I do not believe Bill 159 will serve patients. It may very well serve medical research corporations, giving them greater access to patients' health information, but at what cost to the patients? What about the Hippocratic oath? Whatever happened to doctor-patient confidentiality? It cannot possibly be honoured under this proposed bill.

Finally, I agree with the federal Privacy Commissioner, who stated the bill should be scrapped. Thank you for your time.

The Chair: Thank you very much. That affords us about three minutes per caucus for questioning.

Mr Wood: Maybe I can come back to your last statement. I got the impression you don't like this bill very well. What the federal commissioner suggested in effect was a bill based on their act, Bill C-6. I don't know whether you've had a chance to look at the federal act. Do you like the federal act? Are there things you don't like about the federal act?

Ms MacPherson: I haven't had a chance to read that bill separately, so I can't really comment.

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Mr Wood: At the moment, professional disciplinary bodies have quite wide access to patient records for the purpose of the work they do. The issue has arisen before the committee: should that continue, should there be restrictions on that? I wondered if you might share with us whether or not you think there should be some restriction on the access of disciplinary bodies to medical records? In other words, right now they can access, without your consent, your records for the purposes of disciplining a physician. Should that continue? Should we put restrictions on that? What's your view of that?

Ms MacPherson: I certainly don't feel these should be health information custodians and, carte blanche, be able to go in there and have access to all of our medical records. Do I feel there should be restrictions? I think there should be restrictions and, unless it affects the case in question, a person's health records from their entire history should not be presented publicly. Yes, I do.

Mr Wood: Let me ask you about another issue we've heard about, and that's the question of research. We've heard some people say that for certain kinds of research, because of the small sample size, you can't do the re-

search unless you can access information without the patient's consent. Consent isn't practical for reasons I won't bore you with. That's what we've heard. Now if we come to the conclusion that's right, there are a certain number of research projects that can't be done unless we allow access without consent. There are two things we can do. One is to say, "OK, we'll allow access in those limited circumstances with oversight," or we can say, "No, you just aren't going to be able to do that kind of research in Ontario." I wondered which side of that issue you might come down on.

Ms MacPherson: I cannot agree with taking a patient's files without consent. I still feel that medical information belongs to the patient. It is their private, confidential information, and if you can't access it with their permission, you should not access it at all.

Mr Wood: If we reached the point where we say what you just said, we have to say there are certain kinds of medical research you cannot do in Ontario. You'd be prepared to say that?

Ms MacPherson: I'm not familiar with those types of—

Mr Wood: By the way, I'm not saying we've come to that conclusion. I'm just inviting you to comment. If we reach that point.

Ms MacPherson: Does that situation even exist?

Mr Wood: I'm putting you on the spot here.

Ms MacPherson: I know.

Mr Wood: What would you do? If we reach that point, would you be prepared to say no research of that nature in Ontario or would you be prepared to allow access?

Ms MacPherson: First of all, I just want to qualify that and say I'm not aware of a type of research going on in the health field where the sample size is so small that you have to resort to going into patients' health records without their permission. Then my other point is, if it's a valid piece of research, chances are the patients would give consent because they want to get better and they want to find solutions to the problem as well. I feel there could be something underhanded about it because we're talking about having to take these files without the patient's consent. That's where I stand.

Mr Wood: Thank you. Those are my questions.

Mrs McLeod: I too want to start with the issues you've raised about the long list of people who are identified as health information custodians.

Ms MacPherson: That's my main concern.

Mrs McLeod: I think your concern is probably that these people, by virtue of being defined as health information custodians, also have a privileged access to patient records, and there's a long list. Certainly the federal Privacy Commissioner raised the same concern, I think particularly around the district health councils and members of district health councils.

But I want to flip it around for a moment, if I may, and ask, first of all, do you think we need some legislation that puts rules on people who are going to hold health information because of the nature of the work they're

doing, whether it's a physician or a long-term-care institution? We all believe the legislation needs to be tightened up, but if the focus of it is on putting rules around these people who get access to health information because people go to them or they're staying with them, would you think the list is too long then?

Ms MacPherson: I like the idea of putting rules and restricting access to people's health files and not, *carte blanche*, allowing anyone to have them. I think putting a set of rules there with restrictions is important. The other point which I think is very important is the inaccuracy that can be found in health records. I use the example of the patient who complained in the Dr Deep case. Basically she didn't go for psychotherapy. She went for a heart-related ailment, but according to her file she was a psychiatric patient. I'm sure she'd like to have that cleansed from her records, and it's not easy to do. We've come across in our group many cases where patients have found inaccuracies in their medical records. You can't really change that; you're stuck with that, whether it's a label or whatever.

Mrs McLeod: That's certainly an issue the committee has heard before and, in fact, a concern that Bill 159 makes it even more difficult to correct a medical record.

Ms MacPherson: I'm concerned about that.

Mrs McLeod: One of the suggestions that was made to us was, while questioning the College of Physicians and Surgeons of Ontario, that when they have convicted somebody of fraud, there is an obligation to go back and inform the patients who may have been affected by that individual's malpractice and that those records would then be automatically corrected.

Ms MacPherson: Is that in place right now?

Mrs McLeod: No, that's a suggestion that's come before the committee. In fact, what's in the legislation right now would say that you don't have the right to appeal to the privacy commissioner if the health practitioner has attached a statement of disagreement to the correction of the record, which takes away even the ability to appeal to the privacy commissioner. That's definitely a concern we've had.

Ms MacPherson: And I hope you will address it.

Mrs McLeod: I hope so too.

Ms Lankin: Thank you very much for your presentation. My colleagues have covered the questions I had, so I have no further questions.

Ms MacPherson: Thank you very much for your time.

The Chair: Thank you for coming before us here today.

ONTARIO ASSOCIATION OF OPTOMETRISTS

The Chair: Our next presentation will be from the Ontario Association of Optometrists. Good morning and welcome to the committee.

Dr Christopher Nicol: Good morning, ladies and gentlemen, honourable committee members and Mr

Chair. I have a bit of a cold, so I hope you can bear with me and I can come through loud and clear.

My name is Christopher Nicol. I'm an optometrist in private practice. I also act as a policy consultant to the Ontario Association of Optometrists. I'm presenting comments to the committee on behalf of the Ontario Association of Optometrists today.

The Ontario Association of Optometrists—and I'll use the short title "association"—represents approximately 80% of the optometrists in Ontario. Optometrists are primary eye care providers regulated under the Optometry Act and the Regulated Health Professions Act, 1991. Optometrists assess, diagnose and treat vision disorders and prescribed diseases of the eye. We are presently requesting an extension to our scope of practice to include the controlled act of prescribing some therapeutic pharmaceutical agents.

For the purposes of Bill 159, optometrists would be considered as health care practitioners and health information custodians. I'd like to thank the committee for this opportunity to present the views of the association on Bill 159 to the committee.

The process of review has been open and all stakeholders have been provided ample opportunity to comment on the legislation. My brief comments today will present an overview of our impressions of the proposed act.

The association's interests in Bill 159 relate to the following three objects: (1) the interests of our members as practising optometrists; (2) the principles of privacy legislation in general; and (3) the public's expectation of confidentiality in matters of health care.

Most people would consider health information as the most private of all personal information. In our analysis of the bill, the association used as criteria the basic principles and guidelines for general privacy legislation established by the Canadian Standards Association in 1996. We understand the federal government, as the basis for federal privacy legislation, has adopted these guidelines. You may be aware of them, but I'll just read them again.

The eight guidelines are the following: (1) accountability for abuses or breaches of confidentiality; (2) demonstration of a purpose for the information; (3) consent for collection and disclosure of information; (4) limit the collection, use and disclosure to a demonstrated purpose; (5) maintain accuracy of information; (6) safeguard information; (7) ensure openness of collection practices; and (8) provide individual access to information.

Generally, the association has determined that the proposed bill is consistent with the basic tenets of the federal guidelines on use, collection and disclosure of personal information.

Additionally, the association notes that the changes to the previous draft legislation have addressed some of the concerns expressed in our initial and subsequent responses to the early drafts. These concerns were mostly that the requirements for the collection, use and disclosure of health information should not interfere with

the normal and usual process for the transfer of health information within the health care system and between health care practitioners.

Furthermore, the association wanted to ensure that any requirements under new legislation, additional to patient confidentiality requirements under regulations in the Optometry Act, would not create obstacles for the efficient delivery of patient care. Presently, optometrists are required to maintain the confidentiality of patient health information through professional misconduct regulations under the Optometry Act. The regulations not only restrict the release of patient information to anyone without the consent of the patient, but they also require patient access to the information upon request.

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The three broad optometry regulations effectively ensure the privacy and disclosure of personal health information in the control of the optometrist or other health care practitioners. The association is unaware of any evidence that the Regulated Health Professions Act, 1991, has been ineffective in maintaining confidentiality of patient information.

Bill 159, among other purposes, creates specific circumstances in part VI where health information custodians may disclose personal information without the patient's consent. This provision in the bill therefore expands the criteria for disclosure from the present exemption for optometrists, that is, as required by law, to several categories of disclosure requirements. Consequently, the public will have somewhat less assurance of privacy than under existing legislation.

Even though much of the bill is acceptable to the association, we have identified four specific sections of the bill that merit further comment. These sections are, first, sections 30 and 31, which require that a health information custodian disclose personal health information upon the direction of the minister. Although the minister is obliged to consider the public interest and the privacy interests of the individual, and the privacy commissioner is to be consulted in the process, our interpretation of the section suggests that the minister has independent authority to direct and require compliance.

The bill purports to confer powers to the privacy commissioner, however the commissioner's role is more of an adviser. If the commissioner considers that a direction is inappropriate, there appears to be no mechanism in place to influence ministerial discretion, provided that the direction is consistent with the purpose of collection and disclosure.

While access to information that is necessary for effective management of the health care system is important for the government, the guiding principles of accountability and consent should not be overlooked.

The association questions the need to disclose the identity of individuals for the purposes of health management and research. Anonymous information should be sufficient to accomplish the objects requiring disclosure. Perhaps the committee can consider a mechanism for the review and approval of a ministerial direction through a

body with some public accountability, similar to the proposed research ethics review body.

Secondly, section 32, in part, establishes by regulation a research ethics review body responsible for the approval of the disclosure of personal health information for research purposes, and subsection 76(1), paragraph 15, designates "a body or a class of bodies as a research ethics review body for the purpose of section 32." However, the paragraph is non-specific as to the composition of the review body. As an assurance of public accountability, and to ensure that health information is collected and used appropriately, the association recommends that there should be some statutory requirement for representation from the public sector on a research ethics review body.

Thirdly, subsection 47(1), in part, requires that a fee accompany a written request for access to personal health information. The association supports this provision. The requirement for a fee to accompany the request for access to a record will protect practitioners from patients who refuse to pay a fee once they have obtained their records. The establishment of a reasonable fee will be difficult considering the various health information custodians and the variety of records. We anticipate that the profession will retain some autonomy in the determination of fees for record access and transfer.

Subsection (4) of the same section, and part II, subsection 11(2), appear to exempt the requirement for non-disclosure under the authority of the Regulated Health Professions Act, 1991.

The association recommends that the provisions for non-disclosure in proceedings under the proposed bill be extended to the quality assurance program under the RHPA. It appears that under Bill 159 there are requirements for non-disclosure of evidence in proceedings, but that doesn't apply to the RHPA in quality assurance programs. We would like to see that apply universally under the requirements of Bill 159. The association recommends that the provisions for non-disclosure apply as well to the RHPA.

In summary, with the exception of certain specific disclosure requirements, the association is satisfied that Bill 159 offers adequate protection of privacy for personal health information. The proposed act is unusually comprehensive compared to present confidentiality requirements under profession-specific acts. New rules for access, use and disclosure will unfortunately create additional administrative responsibilities for practitioners over and above the requirements under present regulations. Consequently, all health information custodians will require considerable knowledge and understanding of their responsibilities under the new legislation or risk significant penalty.

The challenge for both the Ministry of Health and Long-Term Care and health care professional organizations will be the task of educating health information custodians on their broadened responsibilities. The association is prepared to assist our members with compliance to their expanded requirements.

Thank you for your interest and attention.

The Chair: That leaves us just under three minutes per caucus for questions. This time we'll start with Ms Papatello.

Mrs Sandra Papatello (Windsor West): Thanks so much for your presentation. Could I understand from your remarks that the powers within the RHPA with the colleges in terms of their investigative powers etc—you can see the need to keep that level of access for the colleges and that's the level that ought to be in Bill 159?

Dr Nicol: The comment I made was related to the requirements for practitioners to maintain confidentiality and access to records for patients. However, if I understand your question, your question is what powers will a college have with respect to obtaining information directly.

Mrs Papatello: Several of the colleges have come forward to say that it literally clips their wings in terms of their mandate and what they're supposed to do, and that is, ensure the quality of service delivered by their professionals. They need these access powers in order to do proper investigations, and it's essentially clipped with Bill 159. It makes one essentially redundant.

Let me ask you about some comments you made regarding the commissioner and the role of the commissioner. Just to emphasize, many of those who have come forward suggest that, if 159 passes, the role of the commissioner would be very restricted in a number of ways. I don't know how practical it would be, but it seems to me if the commissioner could actually vet all of these health custodians' requests in terms of access and flip the responsibility around so that while they're listed as custodians, their request to information still needs to be vetted by the commissioner, that may be of significant comfort to everyone who realizes the number of people who are listed as custodians. While they're listed, they still don't have the power unless the commissioner approves the access and/or disclosure of health records. Do you have a comment on that?

Dr Nicol: I would support that. I would support giving the privacy commissioner more authority. However, as I read the bill, it doesn't appear that the commissioner has any authority over ministerial directions at all. It's only to act as an adviser and comment on it. So there don't appear to be any checks and balances on the minister's power.

Mrs Papatello: I guess we're going to hear again later from the Ontario commissioner, but she made her point fairly strenuously when she appeared here a couple of weeks back. It would take a significant rewriting of the role of the commissioner within Bill 159.

Ms Lankin: Thank you for your presentation, Dr Nicol. I think you hit the nail right on the head when you talked about the lack of power vested in the commissioner to oversee this legislation, to enforce this legislation, combined with the very broad discretionary powers of direction to disclose which the minister has within this bill.

I understand the premise of Ms Papatello's question. We could ask Dr Cavoukian herself, but there are mil-

lions of requests for access to information every year and it would take perhaps the Ministry of Health's size doubled and half of it put with the privacy commissioner to accomplish that. But having said that, the rules as they're set out—and we've heard this over and over from people—are much too broad. They need to be tightened and the commissioner needs to be given new powers.

I wondered if I could ask you about your proposal that perhaps, even with tightening the rules, there should be some oversight body that reviews the minister's directions to disclose. You suggest it could be an independent, arm's-length body. One of the things I'd worry about is that the whole world of health is kind of an incestuous world. Those of us who spend a lot of time in it know the lingo, get the sense of it, and we're quite expedient in terms of our thinking that certain pieces of information are needed for certain research or for systems management, yet that's not the public's point of view. Do you think you could actually put together an oversight body like that which wouldn't get drawn into the world of health, or do you think it's best to leave that oversight power with the privacy commissioner, whose sole focus, of course, is dealing with information, both freedom of information—to access it—and protection of privacy, where it should be protected?

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Dr Nicol: Not to create additional bureaucracy, if the privacy commissioner has the expertise and authority to oversee some of the powers of the minister, I think that would be quite satisfactory. In the alternative, you could create another body, but if the minister's direction involves a lot of requirements, as you say, that's going to make a lot of work for another body.

Ms Lankin: One of the things we've heard over and over again is that health information belongs to the individual. It's our private health information and we have a right to have access to that. In your brief, you present support for the fact that there should be a fee to accompany a request for access to patient records and that the health profession should retain autonomy over the determination of that fee. We've heard very significant presentations here about how fees can be a real barrier to access and that in fact there should be a statutory system that not only keeps it affordable and accessible, but has measures for waiving fees altogether. I worry about your suggestion that health professionals should retain autonomy. That could lead to differences from doctor's office to optometrist's office to nurse practitioner's office. Could you comment on that?

Dr Nicol: Usually the practitioners will determine what fee is reasonable for services they provide. I think some access to records or information may take a lot of time and involve a lot of work on behalf of the practitioner, and some others may just be writing a note and giving that to the patient. If you have a fee established by someone else, then practitioners may not receive adequate remuneration for those services they're providing. I'm not suggesting there should be a fee that would prohibit access to information by patients, but consider-

ing the services that practitioners provide, there should be some fair remuneration for those services.

Ms Lankin: I guess it's a question of whose record it is, the patient's or the practitioner's.

Dr Nicol: It's the patient's.

Mr Wood: You've made some comments in your submission about oversights research. One model we could consider would be to say that the final sign-off on all research projects where you're accessing information without consent is the privacy commissioner. Is that a model that appeals to you?

Dr Nicol: Yes.

Mr Wood: Let me share with you something we've heard. I'm not saying it's right or wrong. Ultimately, we're going to have to decide whether or not we agree with this submission. Some researchers have said that because of small sample size, there are certain kinds of research you can't do if you require consent. If we find ourselves persuaded by that argument, that there really are research projects of that nature, we've either got to say, "You can do these without consent, subject to proper oversight," or, "You can't do that kind of research in Ontario." If we reach the point where we're faced with that decision, which side of that would you come down on?

Dr Nicol: As long as there are sufficient checks and balances on the disclosure of information without consent, and it's absolutely necessary, then I'm in favour of that. But as I see it now, as I read the bill, it doesn't appear to be that. Although there is an ethics review body, I don't see where the constitution of that body is clear. Are you suggesting that the commissioner, then, be an overview for the release of that information? That's satisfactory.

Mr Wood: The proposal, I think, is to set up the composition by regulation. The government is going to say, "Here's how these have to be composed." It does, however, raise the question, who exactly are these people? To whom are they accountable?

Dr Nicol: That's my question. That's right.

Mr Wood: An answer to that, which I gather from your previous answer appeals to you, is, "We'll make it a public official, who after all is accountable to the Legislature, is confirmed by the Legislature when he or she is appointed." I gather you find that kind of public official to be a better final sign-off person than simply people who would be appointed under regulation.

Dr Nicol: Yes.

Mr Wood: I gather you ultimately would do the research and take the information rather than decline to do certain types of research in Ontario, if we reached that point.

Dr Nicol: I'm sorry, I didn't understand that question.

Mr Wood: If we got to the point that I described earlier, where you've got to decide, "Either we're not going to do the research in Ontario or we're going to permit disclosure without consent," you would, in the right circumstances, permit the research to proceed.

Dr Nicol: Permit it to proceed, provided there are checks and balances on that disclosure, yes.

The Chair: Thank you very much for coming before us here this morning. We appreciate it.

OMBUDSMAN ONTARIO

The Chair: Our next presentation will be from Mr Clare Lewis, the Ombudsman of Ontario. Good morning and welcome to the committee.

Mr Clare Lewis: Thank you, Mr Gilchrist, members. If I may, Ms Laura Pettigrew, counsel in my office, is with me. She might be needed.

Thank you for receiving me this morning. It's a pleasure to be before you. I can tell you that I expect, subject to any questions you may have, to be somewhat less than 10 minutes.

I'm very much a one-trick pony in this appearance. I am here to seek the removal of ambiguity regarding an authority which I believe I have under this act but is unclear. As a matter of principle, I generally support the jealous guarding of personal health information, but I do have a specific concern regarding Bill 159 as it relates to my office and my investigative authority. Although I recognize the need for and support having clear rules respecting the privacy of personal health information, it appears that the proposed legislation may impair my ability to conduct investigations of provincial governmental organizations.

As you know, I have the authority to conduct investigations relating to a broad range of provincial governmental organizations including the Ministry of Health and Long-Term Care and agencies such as the Health Professions Appeal and Review Board and the Health Services Appeal and Review Board. Provincial correctional facilities, which include health care units, also come within my jurisdiction. Relevant personal health information, including third party information, is often obtained in the course of my investigations of provincial organizations. I frequently conduct investigations on my own motion, particularly in cases involving systemic or system-wide issues impacting a large group of individuals. In these circumstances, it is critical that I have full access to relevant personal health information without the need to obtain consent.

The Ombudsman of necessity has been given broad statutory powers of investigation. It is fundamental that I continue to have full access to personal health information in order to fulfill my role and ensure that government is accountable in its administration. To be truly effective, an oversight body, including, I might add, the Information and Privacy Commissioner, requires legislative authority to conduct thorough investigations relating to the issues within its mandate to consider. I note an anomalous departure from that principle in that under the Freedom of Information and Protection of Privacy Act and Bill 159, the Information and Privacy Commissioner is not empowered to conduct full investigations into matters relating to privacy complaints. In the case of my office, while I have statutory powers of investigation, I am concerned that my authority will be restricted as a practical result of Bill 159.

I would like to assure the committee that I appreciate the sensitivity relating to personal health information. However, the Ombudsman Act and regulations contain strong confidentiality provisions to ensure that the information obtained in my investigations is not unnecessarily disclosed. I took an oath of confidentiality when assuming office in accordance with subsection 12(1) of the Ombudsman Act. Every member of my staff is bound by my obligations of confidentiality. Subsection 18(2) of the Ombudsman Act requires that my investigations be conducted in private and section 2 of regulation 865 provides that neither my staff nor I can disclose information to third parties except when permitted by the act.

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My office is also not an institution subject to FIPPA. Accordingly, members of the public cannot obtain disclosure of information within my custody and control through an access request to my office under FIPPA.

It will no doubt be argued that clauses 36(1)(h) and (i) of Bill 159 permit my office to obtain information, as disclosure is permitted to a person carrying out an investigation authorized under an act of Ontario or if required under an act of Ontario. However, allow me to advise you of my office's practical experience with FIPPA, the Freedom of Information and Protection of Privacy Act. Based on this experience, I believe that the interaction between Bill 159 and the Ombudsman Act will lead to my office having increased difficulty accessing relevant personal health information.

FIPPA was amended in January 1991 to delete reference to the Ombudsman's office in a section permitting disclosure of personal information for certain purposes. At that time, the reference to my office was considered redundant in light of the general exemption in that legislation, FIPPA, authorizing disclosure for the purpose of complying with an act of the Legislature. A memorandum in support of that principle from the director of the freedom of information and privacy branch, Management Board of Cabinet, to all information and privacy officers of government dated November 18, 1991, confirmed that the Ombudsman continued to be authorized to require access to personal information. In addition, on June 19, 1992, the Information and Privacy Commissioner, then an assistant commissioner, responded to a complaint concerning disclosure of personal information to my office by finding that the disclosure was indeed permitted under FIPPA.

Despite the information from Management Board of Cabinet and the Information and Privacy Commissioner's office and the section of FIPPA which permits disclosure to my office, I continue to experience resistance when attempting to obtain access to information, particularly personal health information, without formal written consent from the individual to whom it relates. It is a credit to those officials who resist my requests that they are attempting to follow the rules and exercise due caution, but they do so incorrectly and based on a misconception of the law, in my respectful opinion.

Unless Bill 159 clearly refers to disclosure to the Ombudsman being permitted, and there is no room for ambiguity, I foresee, based on my office's past experience, that I will face resistance in my investigations involving personal health information.

I note that in section 36 of the proposed legislation, reference is made to a number of organizations to which a health information custodian may disclose personal health information. In order to ensure that I continue to have the necessary access to relevant personal health information, including third party information, without the need to obtain consent, I believe that specific reference should be made in the proposed legislation to my office being permitted disclosure.

Accordingly, I believe it is necessary that Bill 159 expressly provide that a health information custodian may disclose personal health information without consent to the Ombudsman for the purpose of enabling me to carry out my functions under the Ombudsman Act. The best way to accomplish this, in my view, is to add a separate section to the legislation, in part II, which addresses the application of the act, stating, "Nothing in this act shall apply to prevent or restrict disclosure of personal health information to the Ombudsman of Ontario."

I believe that the confidentiality provisions in the Ombudsman Act and the integrity of my investigative process strike a balance between the public interest in having an Ombudsman with the right of access to personal health information and the private interests of individuals in having their personal health information protected. I believe that Bill 159 intends to preserve that balance. However, my own experience has shown that in the very sensitive area of personal health information, any legislative uncertainty will inevitably lead to challenges to my investigative authority.

Thank you for your consideration. I would be pleased to receive any questions you may have.

The Acting Chair (Mr Toby Barrett): Thank you, Mr Lewis, for that presentation. That would leave about three minutes for each caucus.

Mr Lewis: I must have underestimated my time.

The Acting Chair: Extra time for questions.

Mr Lewis: Oh, for each caucus. That's not bad.

The Acting Chair: For each caucus. Ms Lankin, any comments or questions?

Ms Lankin: Absolutely. Thank you very much. Welcome, Mr Lewis and Ms Pettigrew. I appreciate the point that you have drawn to our attention. It parallels in some ways the concerns that the regulated health professionals' colleges have raised with us, their concerns that the construction of the bill may interfere with their duty and obligation right to investigate in certain circumstances. The ministry has assured us that it was not their intent, and I think you recognize that it would not be their intent, to interfere with your powers at all. I believe there is a way that we can construct the bill that will address those concerns.

Having said that, I have a couple of questions. Could you give us some examples in terms of the kind of com-

plaints that you may have received and investigated in the past that actually required you to look at personal health information as opposed to facility procedures or policies?

Mr Lewis: Yes, indeed, I can. I could use the correctional institutions as an example, and I deal a lot with those. Health care is a very real issue in those institutions and we do receive complaints of inadequate health care which must be investigated. On occasion, there is a need to do an investigation on a system-wide basis to determine if the type of health care that the institution is claiming is being granted is being granted generally or not. In order to ascertain that, I need to look at the health records of other persons who have been incarcerated in that or other institutions in order to make a comparison of the complaint. The fact that I look at it does not mean that it will be revealed. I'm quite capable of anonymizing, I think is the word, any information I receive.

Ms Lankin: Let me just ask you: could it be anonymized before you look at it?

Mr Lewis: It wouldn't bother me, as long as I had assurance that it was an accurate record of another individual that I needed to look at in order to make comparisons. Yes, I believe so.

Ms Lankin: The proposal that you've put forward to us in terms of a recommended amendment—and it may work in that construct, at least the idea behind it—have you had a discussion with the privacy commissioner about that and is she comfortable with your recommendation?

Mr Lewis: I have spoken to the privacy commissioner and I'll certainly have to leave it to her to comment on it, but I felt as a courtesy I needed to go before her and to find out what her opinion would be because I didn't want to transgress. I don't think she's uncomfortable with it. I think she is comfortable, but please ask her that question.

Ms Lankin: We'll do that.

Mr Wood: If we were to accede to your request, there are a few issues that arise from that and I'd like to get your reaction to a few issues that we might have to address. Suppose we allowed access without consent with a sign-off by the privacy commissioner. What would you think of that?

Mr Lewis: It's an interesting jurisdictional issue. We officers of the Legislature don't often find ourselves subject to being approved by the other, but it's something I would certainly consider and I'd be willing to get back to you on.

Mr Wood: What about sign-off by the courts?

Mr Lewis: I think that's more cumbersome. There have been occasions in the past, I believe, when we've come very close in our office—not during my time—to actually going to the courts to assert our jurisdiction. We think it's there under FIPPA and we think it's there under this act, but it's not well recognized as there. I would be prepared, if necessary, and in a significant enough case, to take the matter to a court to assert my jurisdiction. But I wouldn't think that we'd want to go to the court on a regular basis because I know you know, sir, how ex-

pensive and resource-intensive and lengthy that process can be. The Information and Privacy Commissioner would be preferable, in my view, and in fact much more expert.

Mr Wood: There are a few restrictions we might place on your ability to access information without consent. For example, a third party might have to decide it was a needed investigation. The courts or the privacy commissioner might have to decide first whether or not it's a needed investigation.

Mr Lewis: I would take some considerable exception to that. That has never been the expectation of this Ombudsman Act or any other that I'm familiar with in the western world, that the courts make the determination whether an investigation is necessary. I'm subject to the Legislature and the Legislature can certainly tell me if they think that I have erred in initiating improper investigations. But I don't believe that I would agree with your proposition that the courts ought to look at that.

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Mr Wood: What about you not being able to access more information than is needed to achieve your purpose? In other words, a third party decides what that is, that you don't decide yourself.

Mr Lewis: The Ombudsman is supposed to be the oversight agency on governmental organization. The Legislature has granted the Ombudsman a certain degree of integrity and capacity to make those decisions, just as has been granted to other officers of the Legislature, such as the Provincial Auditor, the elections commissioner and so on. I think what you're saying is who shall watch the watcher.

Mr Wood: That's right.

Mr Lewis: I used to be the police complaints commissioner in this province, too, and while I had to take my slings and arrows in the public forum, and I would as Ombudsman before this House, I don't believe that that encumbrance would be appropriate. In fact, I think it would undermine the concept of the Ombudsman very significantly.

Mr Wood: Who would you suggest should guard the guard?

Mr Lewis: You. I report to you. I report to you through the Speaker. I appear before the standing committee of the Legislative Assembly.

Mr Wood: That's hardly a practical matter in each case.

Mr Lewis: In each case?

Mr Wood: How often do you report to the Legislature?

Mr Lewis: I report annually, but I have instituted an appearance before the standing committee on a quarterly basis and I would go on any occasion that they requested.

Mr Wood: What about a restriction that you can't access information if your purposes could be achieved with anonymized information?

Mr Lewis: I'm sorry. Would you repeat that?

Mr Wood: We could put into the statute a provision that you can't access information if you could achieve your purpose with anonymized information.

Mr Lewis: I'd still be accessing the information, but I'd be accessing it in an anonymized fashion. Yes, I think I've agreed that it is perhaps possible. I would request that that be third party information, not the information of the complainant who I am supposedly investigating for at that point.

Mrs Papatello: A quick question for you, Ombudsman. It was a pleasure to listen to your presentation today. The experience I've had with your office—and we have many constituents we refer to the Ombudsman—is that you currently have lengthy investigations and it's never an overnight response, for a whole bunch of reasons. One, I think, is resourcing to your office and satellite offices. Is the reason for the significant delay today in some of your investigations due to this difficulty in access?

I guess I'll preface that by saying throughout these proceedings I think the general public is becoming aware of a number of people who have been able to access records already that we frankly weren't aware of, but through virtue of their mandate they can access, and yours may well be one of them. I didn't realize the difficulty that you've had historically in gaining access. Does that cause considerable delay?

Mr Lewis: Perhaps I could divide the layers that I think you've raised. We do in certain individual cases in which we have required personal health information of third parties experience delays of significance because of resistance within the ministry. But I do not think our investigations as a whole are any longer under considerable delay. A huge number, over 75%, of our cases are completed within six days.

Mrs Papatello: For those that are delayed, are—

Mr Lewis: There are some that are, but we don't have a backlog. Some of these investigations are extraordinarily complex. They really are. I can only say that I'm not trying to lay any delays which are perceived in my office on this issue other than those very few cases—and very significant cases—in which I am denied and a lot of time is taken by me and the ministry in trying to work out the problem.

But I'd like to say, in conclusion, if I may, that I think the act provides me with the authority that I'm asking, but it's not understood to provide me with that authority. I don't want to have to go to court to get it. I don't want to have to keep negotiating these matters, because that's where delay occurs.

Mrs McLeod: If I may, I think the point that you're making is even more important for us to consider if we proceed to make amendments to Bill 159 as it's written. Ms Cavoukian's recommendations for amendments are around 36(1)(h), which I think you say would be the right way—

Mr Lewis: It would be one way of doing it. I also recommended putting it in part II as a separate statement.

Mrs McLeod: I think that recommendation is something the committee should look at very seriously, if we proceed to change that clause (h), which I personally think is far too open in terms of—

Mr Lewis: I understood that.

Mrs McLeod: The recommendation from the privacy commissioner would restrict—as I understand it, clause (h) would now read, “If required for the purpose of an investigation under or enforcement of an enactment of Ontario respecting payment for health care, or ... respecting a fraud relating to payment for health care,” which might indeed shut the Ombudsman’s office out if we didn’t include it specifically somewhere else in the act.

Mr Lewis: That’s right.

Mrs McLeod: I think we do need to look very seriously at that.

The Chair: Thank you for that presentation, sir.

INFORMATION AND PRIVACY COMMISSIONER/ONTARIO

The Chair: Our next presentation is from the Ontario Information and Privacy Commissioner, Dr Cavoukian.

Dr Ann Cavoukian: Good morning, Mr Chair and ladies and gentlemen. I am very pleased to have this second opportunity to address the committee regarding Bill 159. I would like to use this opportunity to reinforce the main points from my first presentation and to respond to some of the comments made by the other stakeholders.

Let me begin by saying that I support the many voices that have called for health information privacy legislation. My office has been advocating the need for such legislation, as you know, for a number of years, since the inception of our office in 1987. Along with many other stakeholders, we’ve been waiting for the introduction of this type of legislation since Justice Krever’s report on the royal commission on confidentiality of health information in 1980, over 20 years ago.

However, the need for health privacy legislation has, in my view, never been greater, especially with the increasing electronic exchanges of health information. I was looking, just anecdotally, at a survey that crossed my desk, *Computing in the Physician’s Practice*, which looked at the electronic uses of information by physicians. It said that more doctors are communicating by e-mail with both professional colleagues, up to 55%, and support staff, up to 34%. This includes the transmission of some clinical data. This takes place without any standardized rules or controls. Again, we need this legislation, despite the fact that it is extremely difficult to get right. In my 14 years with this agency, I have personally witnessed at first hand the repeated but failed attempts to introduce this type of bill.

Despite the fact that we are in such serious need of legislation of this kind, we cannot accept a bill which is widely acknowledged as being seriously flawed. Bill 159, in its current form, is without a doubt a flawed bill. In fact, the bill is so flawed that the federal Privacy Commissioner, Mr George Radwanski, has called for it to be scrapped and the process to start anew. Despite the fact that I may disagree with him, I can certainly understand why he would take such a position. Bill 159 needs a major overhaul, not simply a little bit of fine-tuning.

But perhaps the term *carpe diem*—“seize the day”—may never have been more appropriate than now. The current opportunity to provide Ontarians with privacy protection for their most sensitive information may be lost if we don’t act now, because the process of balancing competing interests is not going to get any easier the next time around. There’s no reason to think that something’s going to magically change. This is the first time that a health information privacy bill has ever made it thus far: to the stage of actually being introduced as a bill in the House. So let’s try to take advantage of that.

Let me be perfectly clear, however. While I am very much aware of the danger of missing this opportunity before us, I cannot support the passage of Bill 159 in its present form. While it may not be fatally flawed, it is most certainly fundamentally flawed. This bill must be substantially rewritten to provide the types of protections for health information that the public expects and deserves. There is also the danger, again raised by the federal Privacy Commissioner, that this bill will not be deemed to be substantially similar to the new federal private sector privacy legislation, an outcome clearly to be avoided.

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I’ve already offered the resources of my office to work with the ministry until the concerns raised about the bill have been addressed. We are very committed to working with ministry officials to make this a truly privacy protective bill. To this end, my office has already tabled with the committee both a written submission and a list of proposed amendments that we drafted, which are also accessible on our Web site. These documents represent our starting point for discussion. What we need now is a serious commitment from the government to undertake a significant redrafting of the legislation. Without this commitment, I would have no choice but to withdraw my support for the legislation.

Let me now turn to my major areas of concern with the bill. I’ll simply touch on these three areas today.

One of the most glaring areas in need of attention is the broad disclosures of personal health information permitted without the consent of the individual. This must be changed.

One of the basic premises of this legislation, as outlined in section 28, is that the consent of the individual should generally be obtained before personal health information is disclosed. However, the legislation contains numerous provisions for the use and disclosure of health information for a wide array of purposes without the consent of the individual. In fact, under this bill, individuals would have very little control over the collection, use and disclosure of their personal health information.

Let me turn to directed disclosure, section 31. Under Bill 159, the government could direct health custodians to disclose any health information to a third party for a wide range of purposes related to the management of the health system. This could be virtually anything and is clearly far too sweeping a power. Because we’ve seen no convincing evidence from the ministry that it requires

such broad powers in order to collect information needed for planning and administrative purposes, I ask that the directed disclosure provisions be removed from Bill 159. Just take it out, full stop.

Let me talk briefly about regulation-making power under Bill 159. The extent to which this legislation creates regulation-making powers is very disturbing to us and it is one area that requires significant amendment. While we understand that some matters must of course be left to regulations—it is neither practical nor desirable to include every minute detail in the body of the legislation—this bill goes too far. Our review indicates that at almost every key decision-making point, the bill includes the ability to deviate from the established rules by way of regulation. In almost every part of the legislation, key issues are left to be addressed later in the regs, again leaving far too much to be decided at a later date in a non-public forum, without opportunities for debate. Overall, the proposed legislation provides the Lieutenant Governor in Council with the power to make regulations in 30 areas. But it's not just the sheer volume of the regulations that gives us cause for concern, but also the scope and the significance of the matters that are left to be addressed at a later time. The regulation-making power, in short, must be narrowed.

Finally, I'm going to touch briefly on the powers of the commissioner, or lack thereof. Part XI, which sets out the oversight and enforcement regime relating to personal health information, raises a number of serious concerns for my office. This part establishes the powers of the commissioner to review complaints under the legislation and to conduct inquiries into complaints about access and correction of personal health information. The provisions in Bill 159 are totally inadequate and fail to provide Ontarians with an effective oversight of their most sensitive information.

I respectfully recommend amending the legislation to ensure that the commissioner's office has clear and explicit powers to do the following: to investigate all complaints; to review decisions of custodians that relate to requests for the correction of one's personal information—this is very important; to conduct privacy audits to ensure compliance with any provision of the act. Without these powers, my office will not be able to effectively carry out its mandate, and many of the public's rights and protections provided under this legislation will be virtually unenforceable.

I should also point out that the federal Privacy Commissioner, Mr Radwanski, possesses these investigatory powers now under Bill C-6, and the absence of these powers in Bill 159 would, I think, serve as a further obstacle to obtaining a determination of being substantially similar with the federal legislation.

When I spoke to this committee last month, I concluded by urging you not to withdraw this bill but rather to make significant amendments to it. Today, the same bill remains in front of the committee for consideration, yet there have been no assurances that significant amendments will be made. I will, therefore, conclude my

remarks today by saying that unless fundamental changes are made, I cannot support Bill 159. I ask that you consider the detailed recommendations my office has made in our written submission and the draft language we've proposed for amendments to the bill.

I thank you very much for your consideration, and I'd be pleased to answer whatever questions you may have.

The Chair: That leaves us about three minutes per caucus. This time, we'll start with Mr Wood.

Mr Wood: We've heard a good number of suggestions over the past couple of weeks and a few of them have been to give you some functions you don't have now. I want to get some reaction from you as to whether you might be able to be helpful in these areas. One thing we could do, in circumstances where access is going to be had for research purposes without consent, is to give ultimate sign-off to your office so that each of these projects would be reviewed by, say, an ethics committee, and then it goes to you, who obviously would set the ultimate policy and determine that it was applied in each case. Is that something you think your office could do?

Dr Cavoukian: I think it would have enormous resource implications, Mr Wood. The sheer volume of the projects that would come before us and the expertise we would be required to obtain in order to properly assess such requests would create a lot of resource implications. It's something we would certainly consider. My preference would be to develop some type of guideline that would outline what the privacy considerations would have to be that research ethics review bodies would have to consider.

I think they're very good at what they do in assessing the merits of the research before them, in terms of how worthy it is of the research being contemplated, but I don't think privacy is something they have much expertise in. We could draft a set of guidelines that we could not only distribute but perhaps hold a workshop or have some way in which we could train existing research ethics review boards and thereby give the benefit of our expertise on privacy to them and have that incorporated into their practices.

On the face of it, that would be my first response. I understand the federal Privacy Commissioner doesn't have sign-off on research matters either. Matters go to him and he must be informed of various research activities, but he does not have sign-off. That would be my first reaction.

Mr Wood: For time considerations, let me jump to another issue. One thing we could do is require your sign-off on directed disclosures. What would be your reaction as to your ability to do that?

Dr Cavoukian: It's certainly something we would consider. My first request, as you know, is to eliminate the directed disclosure, because from our perspective we have not been convinced of the need for it. In order for us to understand the need, we would have to have a better understanding of the ministry's reasons for wanting it. We have been exposed to them. It's not that this has taken place in a vacuum. We have different perspectives

on the need for this information. It's certainly something we would consider. I'll just reiterate that our preference would be to eliminate the directed disclosures, but certainly narrow them, if not—

The Chair: Sorry, Mr Wood. We have to move on.

Mrs McLeod: I wish we had more time with you, and I trust we will have an opportunity to spend more time with you as we get into the amending process. It's hard to know where to focus a question in three minutes.

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I want to note that in your recommendations you've recommended deleting section 12(8), which is the exception on limitations. I'm not going to ask you about that, Ms Cavoukian. I just wanted to note it because I think it goes hand in hand with the recommendation on deleting the directed disclosures and also the circumscribing of regulatory powers and not having access to records without a subpoena.

Although I'd like to discuss all of those things with you, what I wanted to focus on is your recommendation around what I interpret to be a lockbox in section 29(1)(a), that information can be provided etc unless the individual has instructed the custodian not to make the disclosure. I think this is one of the issues that we're all anguishing over, perhaps more than any other single issue. We're hearing from health care providers and others that there are circumstances in which they need to have access to a record, they will argue, for the protection of the individual—but doesn't the individual own the record?—but perhaps of even greater concern, for the protection of others, whether it is somebody who has a physical condition which could put a health care provider at risk or whether, in the case of a mental health condition, it could put people in the larger community at risk. Could you comment on how we deal with those very real concerns?

Dr Cavoukian: From a privacy perspective, the notion of a lockbox or some method in which an individual can control and prevent the disclosure of some information is very important. It maintains control over the uses of one's most sensitive information in the hands of the individual. Privacy hinges on the ability to control such uses of one's information.

Having said that, I recognize your concerns and I'll speak first to physicians' concerns, which are very legitimate. They feel that if they don't have access to everything, their ability to treat a patient may be impeded in some way. They may not be aware of some critical information, which a patient may not know is critical but a physician would be able to set. Having said that, I think arguing in favour of a lockbox comes with a bit of responsibility that has to be taken by the individual to accept the consequences of placing such information in a lockbox. There has to be that understanding that you might place yourself at risk by placing certain information in a lockbox, and you accept that risk.

With respect to danger to others, I've always been a very strong advocate of universal health care precautions which people in emergency units, the police and others

are trained in and advised to use in dangerous situations. The reason I say that is that it's not that there isn't a legitimate need on the part of such individuals—if they happen to be in an accident, or something has taken place, and they are concerned about having contracted something—but it's the ability to know with any certainty about the medical conditions the individual from whom the disease in question, or whatever, has been communicated. It's virtually impossible to know what conditions that individual may have.

I'm going to use the example of HIV. I know it's been raised earlier. In order to know if someone has HIV, you have to have a positive finding. Many times, that doesn't exist, so there isn't one source you can go to and find if this individual has an HIV-positive status. You won't get that determination, generally speaking. Most people either haven't been tested or they've been tested anonymously or that finding won't reside with whoever it is you're asking. The ability to get an accurate answer to that question by going to some health care provider or some health source is very limited. So my response would always be, use universal health precautions and, if you're concerned about having been exposed, do what you need to do to protect yourself, because you're not going to have a definitive answer. Obtain the treatment you need. Assume that you may have contracted it and protect yourself, because a definitive answer is simply not going to be available. It doesn't matter where you go to access the information. That's my long answer to your question, Mrs McLeod.

Mrs McLeod: I suspect that it's also my time, Mr Chair.

The Chair: More than so.

Ms Lankin: I want to primarily talk about process from this point out. I think—and I'll speak for myself—I have been convinced, and I suspect from the questions and comments Mrs McLeod and Mrs Papatello have made, they've been convinced, and other members of the committee, that we need to deal with the issue of the powers of the commissioner, we need to deal with the issue of unfettered regulation-making powers, we need to tighten up or eliminate directed disclosure—something has to happen there—and the issue about greater control by the individual. I think the extent to which that goes is still something we are all struggling with. I really do appreciate your comments about seize the day. Every group that has come forward has said, "We need this legislation." They may have said, "Scrap it, rewrite it," but "We need the legislation." We do not want to miss an opportunity to put our minds to the very difficult job ahead of redrafting and making a workable piece of legislation.

The committee itself has proposed that a subcommittee, a representative from each caucus, together with the Chair of the committee, meet with ministry staff and begin the process of reviewing the submissions we've heard, prioritizing some of the areas that we think need to be addressed, giving some of our recommendations to the ministry and the parliamentary assistant to go back and

talk to the minister, and we've offered to keep involved in an ongoing process there. You may know there are rumours that the House may prorogue. The bill may die on the order table in any event, but that doesn't mean the redrafting can't go on and it doesn't mean that we as a group can't meet as MPPs who are volunteering to be involved on an ongoing basis even if we're not formally constituted as a subcommittee.

Does your office have any interest in being part of those discussions with the three committee members and the ministry staff as we're trying to sift through the information, see where there is consensus, where there are differences and narrow the issues down?

Dr Cavoukian: Very much so. I would appreciate the opportunity to participate in such an exercise. As you know, my office has reviewed this bill at great length and has really turned their mind to what are some appropriate amendments we could consider. So we would be very pleased to participate and offer you whatever assistance we can.

Ms Lankin: There is one piece of actual advice that I think would be very helpful for us if you and your staff have the opportunity to take a look at this. In a few of the presentations we have been told to look to a document that is model state health privacy information that has been prepared by two university professors from Georgetown University in the States. A copy of that has been available to the committee, so the clerk could give that to you. We've also been referred to the Minnesota legislation and have been told that is model legislation. We have asked legislative research to prepare a summary and comparison of those pieces of legislation with Bill 159, looking at the philosophical underpinnings and the major similarities or differences.

If your office could take a look at those two as well and provide your comments to the committee, I think that would be tremendously helpful to us.

Dr Cavoukian: Done. We'll do it. We may already have done it and I don't know about it.

Ms Lankin: Thank you very much.

Mrs McLeod: Mr Chair, I don't want to extend the questioning. I appreciate the fact that the time has expired but I'm wondering whether the committee would consider asking the privacy commissioner as well to give some consideration and advice to the committee on a new issue that we haven't had a chance to consider before and it falls out of the hearings we had yesterday and the case that was raised by Mr Murray about access to records and the government's initial response is to consider the mailing of OHIP statements to individuals.

We're the group that's been dealing with privacy issues now for some time. I do believe that potentially raises some very significant privacy issues in terms of who could in fact be the recipient of a mailed record. I'm not sure that it's something that needs to be addressed in legislation but it does raise an issue that I think we need to at least consider in the legislative process, and I'm wondering if the commissioner would be prepared to give some thought to that and to the ability to protect

privacy in the event of that being a direction the government goes.

Dr Cavoukian: We have already turned our mind to it. As soon as I learned of that, of course the privacy considerations were top of mind. We're presently preparing a written piece on that and we have contemplated a model that would be much more privacy protected in the event that direction was pursued. We'd be glad to forward that to you.

The Chair: Thank you very much. We appreciate that. We thank you for appearing before us again today.

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INSURANCE BUREAU OF CANADA

The Chair: Our next presenter will be Mr George Henry.

Seeing no sign of Mr Henry, the Insurance Bureau of Canada is next on our list. I'll ask them to come forward. Good morning and welcome to the committee.

Mr Mark Yakabuski: Good morning. Thank you very much, Mr Chair. My name is Mark Yakabuski. I am the Ontario vice-president of the Insurance Bureau of Canada. With me this morning is Lee Samis, who is legal counsel to the Insurance Bureau of Canada.

First of all, I would like to express my pleasure in being able to appear before this committee to address some of the issues in Bill 159. This is an important bill. The protection of personal information, including personal health information, is a preoccupation of long standing with the auto insurers of Ontario whom I represent this morning.

The Insurance Bureau of Canada represents the auto, home and business insurers of Canada. We represent an industry with a premium base of about \$20 billion, providing employment directly to about 40,000 people here in Ontario. As part of our membership, we represent the automobile insurance industry. We insure over seven million vehicles in the province of Ontario. Just to put this in perspective, there are more insured drivers in Ontario than there are taxpayers in the province. So when we talk about auto insurance and how it impacts on people across this province, we're talking about something that is of very real importance indeed.

Having said all that, I also want to point out that auto insurers are today major payers of health care services. You may or may not be aware of the fact that since 1990 Ontario has had some kind of no-fault auto insurance system under which those who are injured in an auto accident receive health care and other benefits required to return to them health according to a schedule of benefits which is set by the Legislature and which is administered by auto insurers. As a result of that no-fault system which Ontario has had in varying ways since 1990, the cost of health care for the auto insurance system has ballooned much faster than health care costs in the public sector have, for example.

In 1991, the first full year of no-fault insurance in Ontario, health care costs for auto insurers were \$312

million. In 1999, health care costs for auto insurers were \$887 million, and those costs continue to increase by double digits each year. So we are very large payers of health care in the province of Ontario. In fact, an interesting thing to note: auto insurers are the largest purchasers of rehabilitative health care in Ontario, significantly larger than the Ministry of Health and Long-Term Care and the Workplace Safety and Insurance Board combined.

We deal with health information, therefore, on a daily basis. I want to assure you, first of all, that it is not dealt with haphazardly. We are mandated by the Financial Services Commission of Ontario to collect data on all insurance claims, including health care claims. This data is communicated from a health care provider to an insurance company, which is obligated under the Insurance Act of Ontario to pass on this information to the Insurance Information Centre of Canada, which aggregates this information and then publishes this information under the auspices of the Financial Services Commission of Ontario. In other words, we collect information; it happens in a highly regulated context, but we are dealing with substantial amounts of health information, given the fact that on a yearly basis we pay for health care benefits for approximately 66,000 injured accident victims.

I think it's important to note that the health care information we are dealing with is not, in most cases, the personal health record or file of Mme X or Mr Y. It is billing information which we get from health care providers who are providing physiotherapy, chiropractic care, occupational therapy, speech-language therapy, these sorts of things. We get the information via the billings, in most cases, that these practitioners of course send on to the insurance company to pay.

We collect lots of information and the privacy of this information is of utmost importance to us. We have had a privacy code in the property and casualty insurance sector since 1992. That code was originally drafted according to the OECD guidelines on privacy of the day.

We subsequently participated directly and very closely in the exercise, along with a number of other public and private agencies, in developing the Canadian Standards Association model code for the protection of personal information. We were deeply involved in that exercise, and that finally resulted in a national privacy standard, as you might know, which was made public in March 1996. Subsequent to that, we revised our original privacy code to ensure that it conformed with the new national standard, and in February 1997, our new privacy code was certified by the CSA as being in compliance with the new national standard.

We run consumer information centres across Canada as part of our function. In 1998, for example, we received almost 120,000 consumer calls on various insurance-related issues. Of those many thousands of calls, 549, or less than one half of 1%, dealt with privacy issues and the vast majority of those were requests for information only.

I hope I'm giving you a context here for the fact that we are major payers of health care, we are major

recipients of health care information, and the privacy of that information is something we take very seriously. Having said that, I want to make some general comments about privacy legislation here in Ontario and more specifically later the bill you have in front of you.

It is very important from our perspective that any privacy legislation dealing with health information and other information be harmonized with the federal legislation, Bill C-6, and with the other provincial legislation regarding privacy across the country. As you will appreciate, Ontario is the largest head office centre in Canada, Toronto specifically. Many of our companies operate across many of the different provinces, and therefore our ability to provide insurance cost-effectively is dependent on there being some level of harmonization in the laws and regulations which we must obey across the country. We have worked very hard with insurance regulators across the country to get insurance regulation more harmonized across the country. We would hate to face a situation today where suddenly, having achieved a much greater level of harmonization in most other legislation, we are faced with repeating 11 solitudes of privacy legislation which companies have to respect. Moreover, if this legislation is not substantially similar to Bill C-6, the federal legislation, then we are all going to have a substantially greater problem on our hands. That's a general comment: being able to harmonize our legislation in Ontario with that of other provinces, and most importantly with the federal legislation, is a very important objective.

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The other thing I would say, by way of a general comment, is that this legislation dealing specifically with the protection of personal health information must synchronize with whatever the government brings forward with respect to general privacy legislation as promised when the Ministry of Consumer and Commercial Relations went out with its discussion paper last summer and fall. We submitted comments on that discussion paper. The ability to synchronize these two pieces of legislation will be of great importance to the auto insurance industry and to businesses throughout this province.

What the Legislature will need to take account of, as it looks at this bill and whatever further iterations we might see, is the fact that we are dealing, particularly here in Ontario, with a very complex health care system where the components are increasingly interdependent.

You may or may not know that while the Ministry of Health and Long-Term Care this year has an operating budget of \$22.5 billion, there is an additional \$10 billion being spent on health care in Ontario in the private sector. We are dealing with a health care complex in Ontario of considerably greater dimensions than \$30 billion. One of the largest components of this private sector health care is that of the auto insurance industry. As I said, this year we will probably come close to spending \$1 billion on health care claims for injured auto accident victims. It's absolutely essential that there be some measure of coordination between the different components of this system.

When we're dealing with an auto accident victim, for example, we have to understand that at any given time there will probably be three or four different payers of health care involved in trying to get that person better. If that person has to go to the hospital or see a doctor, hospital and physician costs are paid for by OHIP. Each year, auto insurers pay the Ministry of Health and Long-Term Care \$80 million in lieu of those health care costs, but the front-line costs are paid by OHIP. When that person comes out of hospital and physician care, they will need the services of a chiropractor, a physiotherapist, an occupational therapist, any number of other health care practitioners. That person's employer or employee health care package will pay up to the limits of health care for that portion, and all additional health care costs will be paid for by that person's auto insurer.

Here we have, on a daily basis, at least three or four different components of the health care system treating exactly the same person for the same injuries, and yet today, with a health care complex worth more than \$30 billion in Ontario, we have no capacity whatsoever to evaluate billings from one part of the system to another, to communicate basic billing data from one part of the system to the other.

I don't know about you, but I suspect most taxpayers are going to say, "That's not good enough." We absolutely need a system in place that protects the personal privacy of health information, but which at the same time permits the kind of basic data sharing that is necessary to manage what is an increasingly complex and costly system. Otherwise, there is absolutely no way for us to be accountable for the \$22.5 billion we're spending in the Ministry of Health and Long-Term Care and the \$10 billion we're spending in the private sector, and that \$10 billion we're spending in the private sector touches absolutely every one of us. For example, as I've mentioned, there are seven million insured vehicles in Ontario. If we are not able to properly manage health care costs in the auto insurance system, that is going to impact on absolutely every resident of this province.

It is essential, in our estimation, whatever health care privacy legislation we come up with, that it also permit the kind of basic data sharing that is essential for proper management of our health care system.

We are trying to help in better managing this very complex health care system in Ontario by working on developing a standard invoice, for example, for the auto insurance system. Anyone who bills for health care in the auto insurance system will have to bill according to a standard invoice. That currently is not the case, and there is no way currently where we can actually measure how much money is being spent on specific health care services in the auto insurance system. I don't believe that's good enough for our policyholders. So we are working with the Financial Services Commission of Ontario and with health care providers in Ontario to develop a standard way of making these billings so that they can be properly measured, so that certain fundamental data can go into a database and be available for the analysis and management of health care programs.

To the degree that Bill 159 does at least conceptually permit certain forms of data sharing, we think that these ideas should be applauded and perhaps further developed as this legislation goes forward.

Let me turn to specific comments on Bill 159. Clause 38(2)(d) of the legislation continues a provision that is now found in the Health Cards and Numbers Control Act permitting certain people to use the OHIP number—the health number, as it is called—for other purposes as prescribed by regulation. We think it's important to continue this provision in whatever privacy legislation we have for personal health information.

This would be a major improvement over what currently exists, for example, in our trying to develop a standard invoice. If because of the constant interaction between OHIP and the auto insurance system and other health care payers, we were all able to use a common health number, that would assist dramatically in being able to communicate, as I say, basic billing data from one part of the system to the other. So to the degree that this section permits the use of the health number in these prescribed instances, we think that is something that should be applauded.

I might point out to you that there's currently an initiative underway across Canada, which is being sponsored by the Canadian Institute for Health Information, in developing a national standard for the electronic communication of health care billing. The ability to use common health numbers would greatly assist in this process.

Similarly, we like generally the provisions to be found in subsection 30(2) of the bill. This section allows a health information custodian to disclose certain information for certain public policy purposes. We think that's important. There are some public policy purposes that have to be recognized. This section, for example, recognizes the importance of evaluating and monitoring programs, allocating resources, doing future planning, and detecting, monitoring and preventing fraud, for example. We think these are important objectives. However, in our view, this section is worded probably in a way that would not adequately capture the activities that insurers routinely engage in in order to analyze health care outcomes, services etc. It seems that this section is directed specifically at being able to analyze or evaluate a specific custodian's programs or services, and not directed at being able to perform a wider analysis of health care services in general.

The Chair: Mr Yakabuski, we've actually gone overtime. Might I invite you to make a final point?

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Mr Yakabuski: As you will find in my brief, we make suggestions in four areas. Section 30 should be amended in order to clarify the application of that section. We suggest that there be new clauses inserted into the bill which would allow for the proper detecting and prevention of insurance fraud, which costs insurance customers about \$1.3 billion a year. We like the distinction between recipient and health information custodian. We

point out that the Ministry of Health is a major direct provider of health care; the Ontario auto insurance industry is not. Therefore, the distinction is very important.

We also suggest that there be an amendment to subsection 24(3) which specifically will say that you're able to disclose information to other people involved in the course of doing the business for which the disclosure was made, taking into account that in the case of the insurance business, for example, in trying to settle claims, we involve lawyers, we involve adjusters, we involve investigators—all kinds of other professional people. They are an integral part of the settling of claims; therefore, that clause should be broadened to take that into account.

My last point would be that the bill has to set out some appropriate transition measures, because in many instances when you introduce privacy legislation, you may well require all kinds of groups to go out and get additional consents that they would not currently have because currently they're not required. There are no transition steps in this bill, and we think that would be an important addition to whatever legislation you ultimately come up with. Thank you very much.

The Chair: Thank you very much for your presentation. We appreciate it.

GEORGE HENRY

The Chair: Now we will go back on our agenda: Mr George Henry. Good morning and welcome to the committee.

Mr George Henry: Thank you. Sorry for being late; I was in the wrong room.

I would like to respond to Bill 159. I do not believe this bill should be passed for a number of reasons. First, I feel that it's an injustice to pass a bill which would allow information to be left on a person's record when that information is deemed untrue. These health records are not only essential at the time they are created, but also are very important for future references.

It is also my opinion that the entire system be fixed before amendments are made. I personally have trouble with regard to my health records. While I was under the care of the province of Ontario—the children's aid society—I was infected with hepatitis. For 38 years I was not notified of this disease which I carried. Over the years I may have infected many other people unknowingly. In the 1960s, the Minister of Health, the Honourable Dr Dymond, wrote a report to the Governor General of Canada stating that anyone who had infectious hepatitis, which I have, should be notified. Neither I nor my family were ever notified of this disease which I carry.

It is also my opinion that there should be only two people who have a person's medical records: the doctor and the patient. I feel that the government should have no right to infringe on the privacy of any Canadian citizen; for instance, through medical records. The information in

a person's health record is very personal and should only be used when needed for medical purposes.

In conclusion, I strongly disagree with the passing of Bill 159. I also feel that drastic changes should be made to ensure that all Canadians are given correct information with regard to their own health records. Thank you very much.

The Chair: If you're interested in taking questions, we certainly have a few minutes.

Mr Henry: Yes.

Mrs McLeod: I appreciate your presentation. I hope that we've made some progress in recent years and that this legislation can be changed in ways that will respect the concern for privacy, as well as access to your own records, that you've expressed.

Mr Henry: It took me over a year to get these records through there, right, which I shouldn't have had to go through.

Mrs McLeod: I appreciate that. Certainly, one of the concerns we've been dealing with around the committee table, and we've heard from other presenters, is that people need both access to their records and the ability to correct inaccuracies on their records. Those are both issues that I believe the committee will want to address. Thank you very much.

Ms Lankin: I don't have a specific question. I want to thank you for coming, though. I think that as we've heard from individual citizens who have come forward, overwhelmingly the sentiment we've heard is that there have to be strong protections for privacy and strong rights of access to the information. With those of us who are immersed in the system, sometimes we look at systems management issues and other needs and forget about that overriding public opinion, so it's very helpful for us to have that reinforced.

Mr Wood: I gather with respect to the correction of records, you think it would be a good idea to have some third party, by which I mean some—

Mr Henry: Yes, independent, if possible; like any political party or whatever, or health care provider.

Mr Wood: The kind of person, for example, who could be considered for that would be the Information and Privacy Commissioner.

Mr Henry: Yes.

Mr Wood: I don't know whether you want to answer this question or not, but I'm going to put you on the spot and you can decide whether or not you want to answer. We've heard from some groups that there are certain kinds of research, because of the small number of people who are affected by it, that you can't do in a practical way and get the consent of the people whose health records you're accessing. If we come to the conclusion that's right, and we haven't come to that conclusion yet, which side of that would you come down on? I'm going to put you right on the spot here and you can decide whether or not you want to answer it. If we got to the point where we saw there were certain kinds of research where we either had to allow access, under oversight and so on, or say, "No, you can't do that kind of research in

Ontario,” which side of that argument would you come down on, would you think?

Mr Henry: I would say I would be on the side of the research not being made available, or some deleted there, blacked out, so the person’s name doesn’t show or his health number. All the rest of the information could be used for research purposes. I don’t see why they have to have the person’s name or health number for research purposes.

Mr Wood: We don’t have time for me to explain to you exactly how some of these people come to that conclusion, but if we got to the point of having to say, “Yes, we will allow some access without consent,” or “No, you can’t do that kind of research in Ontario,” if we got to that very difficult point—

Mr Henry: I would say no to research in Ontario there, because research is going on in the United States with drug companies doing their own research and paying there, so I imagine they can go through alternative means than just grabbing somebody’s record.

The Chair: Thank you again, Mr Henry. We appreciate your taking the time to come before us here today.

CANADIAN CIVIL LIBERTIES ASSOCIATION

The Chair: Our next presentation will be from the Canadian Civil Liberties Association. Good afternoon and welcome to the committee.

Mr Stephen McCammon: Thank you very much for the opportunity to appear before you today. Alan Borovoy sends his regrets. He would have been here himself but he was reluctant to attempt another re-scheduling of our deputation, so he sent me in his stead. My name is Stephen McCammon. I’m associate counsel with the Canadian Civil Liberties Association.

CCLA welcomes Bill 159 on the basis that it generally advances the state of the law today in respect of privacy protection and privacy rights. To begin with, the bill strikes off in the right direction in light of two key features: first, it creates an almost uniform set of rules to safeguard some of the most personal and private information in the province; and secondly, it makes a fair start at providing for a single oversight mechanism to ensure that the bill’s written rules are respected.

At the same time, CCLA urges you to consider several key amendments. These amendments fall into four areas: on disclosures; on patient access to records and the correction of those records; on the role of the Information and Privacy Commissioner; and on the application of the bill.

On disclosures, I’d like to turn your attention to section 12 of the bill, which codifies some important general principles designed to limit the possibility that personal health information will be collected, used or disclosed improperly. However, subsection 12(8) of the bill takes us all needlessly down a wrong turn. Section 12(8) says that the basic principles—for example, the principle that no more information should be disclosed

than is reasonably necessary to meet the purpose—that kind of principle doesn’t apply where the disclosure is directed under the act or required under some other act. It’s very hard to understand, however, why such a basic, vital and flexible principle should ever not be a consideration in any decision about the wisdom of disclosing personal information. After all, why should any purpose warrant disclosing more information than is reasonably necessary to meet that purpose? It’s a contradiction; it doesn’t make any sense.

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The principles found in section 12, then, ought to apply across the board, including disclosures directed by the minister under section 31. Accordingly, our first recommendation is that you urge this bill be amended so that 12(8) is taken out.

In a number of provisions, Bill 159 spells out circumstances under which health information custodians may disclose personal information without a person’s consent. It should be clear by now, however, that such non-consensual discretionary disclosures ought to be the exception and not the rule. Indeed, in the not-so-distant past, the Krever commission propounded a great deal of wisdom on this very subject and suggested a number of safeguards.

More specifically, the law-enforcement-related discretionary disclosures permitted by subsections 36(1)(g) and (h) are far too broad. Doctors and other health information custodians ought not to have their special relationship with patients, so dependent as it is on confidentiality and trust, undermined by the pressures that inevitably flow from such a wide discretion to disclose to police and other authorities. Indeed, as a general matter, such disclosure should only be permitted where an overriding interest trumps general duty not to disclose. The bill ought to be amended to reflect the principle that health information custodians should not disclose personal health information to the authorities unless there is a reasonable basis to believe there is a significant risk of injury or harm. I want to clarify that that’s bodily injury we’re talking about. Even then, personal information amiable to a warrant application should not be disclosed until after a warrant has been obtained. These are the general safeguards we have in law around the Criminal Code and there is no reason to diverge from them here in the province of Ontario. None of this is designed to frustrate policing. All of this is designed so as not to erode public confidence in health care and health privacy.

Similarly, the bill should be amended to limit the discretion granted health information custodians when it comes to disclosing the personal information of people detained in penal, custodial or psychiatric facilities, and to those institutions and the officials thereof. Section 33, therefore, should be amended to ensure that unless such a person is determined to be incompetent or dangerous, no disclosures should be made that are not otherwise consented to or provided for in law.

One more matter on disclosures: in the bill, in section 36, there are a number of other permissive disclosure

regimes in relation to a number of statutes. I confess we're not up to speed on why social workers and various health regulatory professionals under section 36 need this disclosure room. We are mindful that managing the health care system involves some flexibility. What we propose is that if you go ahead with these permissive disclosures in section 36, then you amend the bill so that after one year the power to disclose under those sections lapses. You would have to re-enact it, and in the interim we would ask you to provide further information to the public about why such permissive disclosures are available and perhaps consider having the privacy commissioner conduct a review of those specific kinds of disclosures.

I'd like to now move on to discuss patient access to and correction of patient records. Most everyone would agree that, subject to specific and narrow exceptions, patients ought to have access to their own records and they ought to be able to dispute the accuracy of those records. While the bill acknowledges as much, there are three problems I'd like to draw to your attention.

First, section 44, specifically paragraphs (d) and (e) of the bill, allows government to limit access and correction rights by way of regulation. While future developments may mandate new exceptions to these or other important privacy rights, rights-limiting changes invariably ought to be creatures of legislative action, preceded by full and public debate. Leaving such matters to regulatory pronouncement means exposing all of us to unnecessary risks. While there is no way of ensuring that laws passed after a full debate will themselves be sound, there is even less reason to be confident that laws developed without such scrutiny would be wise or fair.

Every one of us has a finite amount of wisdom and, in any case, the fairest of governments are replaced, all of which is to say that any faith anyone has in a government of their own party is at best comforting themselves with cold comfort for the short run.

Last, if governments seek legitimacy in this kind of law-making, they must at a minimum engage those who will have to live with the law in a full and public debate. Accordingly, CCLA recommends that clauses 44(d) and (e) be struck from the bill. If there are other exemptions to consider, let them be set out specifically in the legislation.

I should note that this is a general concern that comes up from time to time in other provisions of the bill. We say again it's one thing to handle administrative matters by way of regulation, but rights-limiting provisions should be set out in legislation and not left to regulation. Time doesn't allow me to get into all the details, but I would ask to have particular attention in this regard given to section 76.

The second matter under access-to-information concerns: while it might be proper for a health information custodian to consider refusing a patient access to records collected or created under a properly authorized investigation, access should only be refused in fact where it is reasonably expected to interfere with such an in-

vestigation. As it stands now, section 48 appears to allow a refusal even in circumstances where an investigation is long over. Accordingly, subclause 48(1)(b)(i) should be amended so as to ensure that access will only be refused where it is reasonably expected to interfere with an ongoing investigation.

Third, while the bill rightly allows patients to dispute the accuracy of their own health records, the proposed remedy falls short of a cure. If a health information custodian attaches a statement of disagreement, it's game over. The record may indeed be wrong, the error may have serious consequences for the patient's peace of mind, well-being or livelihood, but the record stands. True, it stands beside a statement of disagreement, but you know as well as I that many of us trust experts over Citizen Jane or Joe. Of course sometimes the expert is right but by no means always. In any case, surely one of the main points of these sorts of dispute resolution mechanisms is to root out errors, especially gross errors.

As it stands, there's nothing in this bill that trumps a stubborn custodian's gross error; it just sits in someone's personal file looming over a statement of disagreement. Patients ought to be able to complain to the Information and Privacy Commissioner in such circumstances and the commissioner ought to be able to order a correction where the correction is warranted. Subsection 50(9) and clause 71(1)(b) ought to be amended accordingly.

I now turn to the role of the Information and Privacy Commissioner. The commissioner and the proposed assistant commissioner have a vital role to play in ensuring that rights that are written down on paper are actually respected across the province. Here too the bill heads off in the right direction. However, it needs at least three pushes to give it enough steam to ensure reasonable prospects of success.

First, the commissioner's role in reviewing disclosures directed by the minister is unduly fettered. Essentially, subsection 31(2) says that the minister must allow the commissioner to review plans to direct the disclosure of personal information ahead of time unless the information arises from a program or service that involves any public monies or administration. That would mean that any such disclosures in relation to the vast majority of health care would go ahead without any review at all. After all, the lion's share of health care is handled, or at least partially funded, by the public health care system, unless you've been tipped off about plans to privatize health care in Ontario from top to bottom. But in any case, we ask you to ensure that the bill is amended so that all directed disclosures are preceded by a thorough commission review.

Second, section 14 of the bill gives the commissioner too narrow a role in reviewing health information custodian plans to conduct computer matches of health information databases. Database matching is an enormously powerful tool and, as is usually the case, such a powerful tool brings with it a potential for tremendous benefits and terrible hardships. Accordingly, CCLA recommends that any plan to conduct computer matching

first face review by the commissioner, who ought then to be able to publicize any concerns not resolved through the review process. Such a system will allow for much-needed scrutiny, without unduly fettering the good use of innovative technology.

1210

Thirdly, one of the key roles the bill properly assigns to the commissioner concerns patient complaints about improper information practices. Under section 68, a person injured by an inappropriate collection, use or disclosure, for example, can lodge a complaint with the commissioner. What can the commissioner do then? Unfortunately, in the aftermath of attempts at mediation, very little.

To begin with, the commissioner's power to investigate such complaints comes up short. In contrast to the investigatory powers provided to deal with access-to-records concerns, the commissioner has no power, for example, to demand the production of relevant documents. The simple answer is to ensure that when dealing with complaints, the commissioner is provided with investigatory powers similar to those granted to her in relation to access-to-records concerns, as set out in section 69.

At the same time, we note that the commissioner's complaint-related remedial powers are overly narrow. While the commissioner can comment and recommend freely, she can only order a custodian to cease improper collecting practices or order her to disclose improperly collected information. What happens, however, if the complaint shows that the information wasn't collected improperly; instead, it has been used or disclosed improperly? Destroying such records will likely stop the misuse or wrongful disclosure, but it might also result in the destruction of properly collected and otherwise vital information. Surely the commissioner should be granted remedial powers suited to the range of complaints she will evidently face. Such powers should include the power to order a custodian to cease improper collections, uses or disclosures, as well as the power to order the disposal, retrieval or redirection of relevant information.

The final area of our presentation today concerns the application of the law. Employers and insurance companies are conspicuously absent from the list of those defined as "health information custodians." Nonetheless, virtually every such operation is already and will continue to be in possession of a great deal of highly personal information in the absence of oversight. While we are pleased that as recipients of such information, the bill will bind them not to use or disclose personal health information for any extraneous purposes not otherwise consented to or provided for in law, we nonetheless urge the committee to amend the bill so as to ensure that employers and insurance companies in possession of personal health information are included in the definition of "health information custodians."

I'd be happy to reiterate our recommendations, but I imagine my time may be short. I'd be happy also to entertain questions.

The Chair: Thank you. There are about two minutes per caucus.

Ms Lankin: I appreciate your presentation; it's very helpful. There are a number of key areas that I think the committee would be interested in pursuing.

I have two specific questions. First, in a situation where a health information custodian may disclose information where they believe there's been a criminal offence and/or where there is a significant risk to another individual—there are a couple of aspects to that—we have had presentations before us that suggest that the test of significant risk which you propose is actually a weaker test than what currently exists in the Mental Health Act, where I believe the wording is "serious and imminent danger of bodily harm" or something; I don't have the exact words in my head. When you use the words "serious risk," were you proposing a legal test or were you just describing that we had to have some more protection than what was in the act?

Mr McCammon: I was certainly suggesting we have more protection than what we have in this bill. I think you're correct in identifying a principal concern about the unique circumstances faced by psychiatric patients. Extra protections might well be needed to ensure that the kinds of information they disclose are not cavalierly disclosed without their consent or the authorities'. I think that's fair to say.

Ms Lankin: You may want to put your mind to that issue of the different tests of significant risk or serious and imminent danger.

Mr McCammon: Unfortunately, I think the imminence has been taken out of much of the mental health regime.

Ms Lankin: Only in certain respects, not in others.

The second question: when you talked about the section that has permissive disclosures by exempting certain other pieces of legislation—the Regulated Health Professions Act or whatever—we've had much evidence about their role and the differences in their role. But I wondered if you would be comforted if the section 12 principle of only disclose as much as needed for that purpose was built in and applied to any of these exemptions or areas where we're deferring to provisions in other pieces of legislation.

Mr McCammon: I read the bill to mean that those general principles do apply to discretionary disclosures, including those under section 36. So that's a partial comfort, but not necessarily comfort enough. I think when you outline explicit discretions to disclose, even there you have to have a valid purpose in mind. I'm just not aware at this time whether or not the range of disclosures considered under section 36 in respect of those regulated areas rise to that level of purpose.

Mr Wood: I'd like to ask about something that pops up at a number of points in this bill where we have disclosure without consent. I think there's probably a significant body of opinion that that's necessary in some cases, for example, for a regulatory body of a profession. The issue that some have raised is, should a regulatory

body of a profession, a college, have the right to access that information period, or should they have to go to a third party, ie, get a search warrant before they do it? In other words, where they're the enforcer, should they be able to decide themselves whether or not to access, or should they have to go to a third party?

Mr McCammon: I think in general the presumption is, if not consent, then a warrant-type regime; if not a warrant-type regime, then explicit and very narrow exemptions from the general principle of consent. Those statutory regimes themselves have to be justified in terms of some higher purpose that trumps the general principle of don't disclose without consent. I'm not sure I can answer the specifics of each—

Mr Wood: No, I'm asking generally.

Mr McCammon: Generally I would say again, if not consent, then have a third, independent party assess.

Mr Wood: I wonder if you'd share with us for the record why you say that.

Mr McCammon: Why I say that?

Mr Wood: Yes. What considerations have led you to that opinion? Why do you think that's important, in other words?

Mr McCammon: I think the main thread running throughout this is that health information and how it gets shared, why it's important that it is shared, all rests on this trust between people and their health care providers. They disclose a great deal of information that goes nowhere else, in their own minds. They want it only to go to their doctor. Often people disclose things to doctors that they wouldn't disclose to their friends or colleagues because they're looking for help with some problem that may in fact go to their well-being in life. That privacy concern, the dignity associated with it, the special nature of the relationship between a doctor and a patient, require some safeguards and require us not to put pressures on the doctors unduly to go beyond the confines of that professional relationship.

There are a wide range of perfectly valid possible exemptions. When should an exemption be one that isn't reviewed by a third, independent party? I say, only when the purpose of that exemption reaches a benchmark of significance to generally trump the principles of no consent and only no consent with a warrant regime.

Mr Wood: Why would it ever trump it?

Mr McCammon: Again, if a doctor, for example, learns from a patient and has reasons to believe that a patient is going to go out and do someone some terrible harm, that kind of harm might well trump the general principle of don't disclose without consent, but it's narrow, that exception to allow a permissive disclosure. For other circumstances, there's certainly good reason why authorities of all kinds want the information, but why not put them to the modest difficulty of having to justify it in order to safeguard the regime of health care and health care privacy, which is, after all, the thrust of this bill?

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Mrs McLeod: I appreciate the clarity of your presentation. I'm looking forward to having a written copy so that we can refer to it at numbers of points. We can obtain that through Hansard, if not otherwise.

I want to come back to the issue of the trumping of the rule of no disclosure. You had mentioned in your presentation that there's a general principle that there should be no disclosure unless risk of significant bodily harm to others. You also referenced safeguards in the criminal act. My first question is, in referencing the safeguards in the criminal act, are you referring specifically to law enforcement officers or more broadly, that that's the overriding principle that could be trump the no-disclosure rule?

Mr McCammon: If I understand your question, the principle of safeguarding no disclosure without consent certainly goes beyond merely to law enforcement officials. There are a whole variety of officials engaged in all sorts of different investigations, typically of a less pressing nature than the criminal law authorities. So certainly the same principle would apply to the lesser—

Mrs McLeod: So for others, that principle could trump the no-disclosure rule. With law enforcement officers, are you suggesting that should be a direction in legislation that governs even the granting of a warrant, that you should not even be able to subpoena health care records?

Mr McCammon: No. The warrant regime provides for a hearing in which the interests of privacy and the interests of law enforcement can be weighed and adjudicated by an independent judge.

Mrs McLeod: I ask the question for two reasons and I am focusing on the warrant issue for two reasons. One is because we heard earlier this morning in a televised submission that there is a concern about sensitive health records becoming part of court records, particularly in the sense now that they can appear on the Internet and can be readily accessed. That's the first concern.

The second concern is that we periodically hear about warrants that have been obtained to access health records in situations which seem to us a little hard to explain, and we wonder what governs a justice of the peace, for example, in giving a police officer a warrant that allows him to obtain sensitive health records.

Mr McCammon: I'm not prepared to take apart the whole warrant regime today. I am sure there are examples where warrants are unjustifiably granted, but there is a court system designed to check that from time to time. We can't design a perfect system today. We're not going to say, "No warrant applications for health care records." We just want to make sure that where consent is not going to be respected, there is an independent third party to adjudicate on the wisdom of disclosing this sensitive information for this particular purpose.

Mrs McLeod: And you don't think—

The Chair: Sorry, we're well over our time. Thank you very much for appearing before us here today. We appreciate your presentation.

TORONTO ASSOCIATION FOR
COMMUNITY LIVING

ONTARIO ASSOCIATION FOR
COMMUNITY LIVING

ONTARIO AGENCIES SUPPORTING
INDIVIDUALS WITH SPECIAL NEEDS

The Chair: Our next presentation will be from the Toronto Association for Community Living. Good afternoon and welcome to the committee.

Mr Gordon Kyle: Hello. I'm going to begin. My name is Gordon Kyle. I'm a policy analyst with the Ontario Association for Community Living. Also presenting with me today will be Bill Barber, whom I will let introduce himself more thoroughly in a moment.

I would like to thank you for giving us this opportunity to present on this important issue. We are actually here today representing three organizations: the Toronto Association for Community Living, Ontario Agencies Supporting Individuals with Special Needs, and the Ontario Association for Community Living. Collectively, our organizations represent more than 150 organizations across Ontario supporting people with intellectual disabilities.

Our organizations are committed to the creation of a society where all citizens are welcomed and have an opportunity to participate in all aspects of community life, including school, work, housing and leisure activities, a society where people are supported to carry out roles and responsibilities as citizens. For more than 50 years we have worked within communities, providing a wide range of supports and services to individuals with intellectual disabilities.

The description of our organizations and mission is provided here not just for background. In fact, it's important to understand who we are, to understand our feelings about Bill 159. The services we provide are funded primarily through the Ministry of Community and Social Services via the Developmental Services Act and the Homes for Retarded Persons Act, both of which are covered by Bill 159 as it is currently drafted. It is our position that the inclusion of services delivered under these two acts in the requirements of Bill 159 is inappropriate, essentially spreading the net too far with this legislation, and should be changed to exclude these two acts.

The programs and services delivered through the Developmental Services Act and the Homes for Retarded Persons Act are not health services by any means. The services provided through these acts are designed to provide key supports to individuals to allow them to participate in the mainstream of society. As this relates to health care, services provided under these two acts are designed to link individuals to appropriate health care providers in the community, but clearly our services do not provide any health care services.

In fact, people with disabilities in Ontario have worked hard throughout the history of our organizations

to avoid being seen as aligned with health care services. People with disabilities desire to be seen as regular citizens and, like other citizens, and sometimes to a greater degree than other citizens, require certain accommodations and supports to participate effectively in their communities. The need for such accommodations and supports does not mean that people are ill; this is a stigmatization that we have fought hard to avoid. We have insisted that funding for our services be tied appropriately to the Ministry of Community and Social Services, which has a mandate to build supportive communities. We are clear that the support services that people with intellectual disabilities require to participate in their communities should not be delivered through Ministry of Health funding and should not be seen as services that are required to help people overcome their "affliction," their disability.

This has been one of the key elements of our philosophy and approach throughout our history and we ask that Bill 159 be changed to respect this and to exclude the Developmental Services Act and the Homes for Retarded Persons Act from the legislation.

We would like to take a few moments to talk to you about some of the implications of the legislation if it were to be applied to the services that are delivered through these two acts.

I'm going to ask Bill to make a few comments on that.

Mr Bill Barber: My name is Bill Barber.

I appreciate the opportunity to speak to you today on the legislation. I am a volunteer board member of OASIS, an umbrella association that represents 75 agencies across Ontario providing services and supports to people with developmental disabilities and their families. I am also a volunteer board member of the Toronto Association for Community Living, which is one of the OASIS and OACL agencies which provides these services and supports in Toronto.

Most important, I am the parent of a child with a developmental disability, Nancy, who is now 25 years old. I am profoundly interested in her support, her care and her privacy.

The community living movement was begun more than 50 years ago by parents of so-called retarded children at that time. They had found that there were no services in the community for their children. The only option presented was to institutionalize their children, and they were advised to pretend they never existed. This was not a path they were prepared to accept, and so services and supports such as the Toronto Association for Community Living began.

The province of Ontario made a decision to provide these services and supports in the community for individuals with a developmental disability through transfer payment agencies that have a volunteer board of directors. It entered legal agreements with respect to the quality and quantity of service being purchased. The sophistication of these organizations varies greatly from organizations that would operate a single program at one location to organizations, like the Toronto association, that operate a multitude of services at numerous loca-

tions. Virtually none of these services have medical professionals on staff.

As stated in the opening remarks, we do not see ourselves as a group that should be covered by the legislation. We do not generate medical information. We do not provide a diagnosis and we do not recommend treatment. We provide supports that allow the individual to live, work and enjoy leisure time in his or her community. The only medical files we have would be second or third generation and used solely to assist staff in ensuring the person lives in a safe manner in his or her community.

All files pertaining to an individual being supported are kept confidential in a safe location. The majority of the organizations represented by OACL and OASIS would have medical information as a hard copy in the person's file. This information would have been obtained with consent, either from the individual, the parent or guardian, or the substitute decision-maker for the individual. This information could be kept in a program location or a central location, depending on the size and sophistication of the organization providing the service. In most cases, only a summary or the medical direction would be noted in a computer file. As stated before, most information would be provided as hard copy and attached to a master file.

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We're suggesting that the hardships placed on voluntary organizations, which do not have the means of generating more revenue except by contract changes with the Ministry of Community and Social Services, are unacceptable. Our experience has been that when other ministries or organizations have legislated or levied second-party increases—such as workplace hazardous materials information systems, pay equity, liability insurance increases, fuel rate increases—these increases haven't been recognized by the funder. This leaves the transfer payment agency in a position of having to cut services, deny services or pay their staff at a level that ensures an exceptionally high turnover rate for staff.

I'd like to tell you some of the practical effects this legislation would have on services for people with developmental disabilities at a large association like the Toronto association.

First, computers and databases: during last year's Y2K crisis, the Toronto association had to embark on the expensive task of replacing its non-compliant computer system. We elected to develop software that allows our services to share information and allows inputting to be done at a person's home, to ensure that staff working with an individual have the information necessary to provide the most appropriate support, and to do this as efficiently as possible.

While the Toronto association did receive some additional funding, the cost of this change was primarily covered by the Toronto association. While this did not compromise direct service, it was only accomplished by holding vacancies of management staff and stretching everyone to take on additional extra duties.

In the proposed legislation section 13 states that the Toronto association would have to comply with whatever electronic transfer requirements are prescribed in the regulations. It will be some time before the regulations are ready for review, but how can we be certain that they will not impose demands that cannot be accommodated by our new system? After all the efforts to create a system that really works for the individuals and families we support, what new parameters will it be forced to meet? More important, will it require increasingly scarce resources to be reallocated to meeting the needs of the computer system and consequently away from the primary goal of providing quality support services to people with developmental disabilities?

The second practical issue is one of fundraising. It's one of the critical issues facing agencies like the Toronto association. It's the need to raise funds and be less dependent on the taxpayers of Ontario. Fundraising has become a very important component of the agency, and direct mail campaigns are an important part of revenue generation. The proposed legislation requires that agencies provide written notice that their information will be used or disclosed for fundraising purposes at the time it is collected.

The problem is that this clause prevents us from calling family members to ask for a donation if we did not inform them in writing that their information will be used or disclosed for fundraising purposes. It should be pointed out that family information is routinely gathered at the first point of contact, and this is a particularly sensitive time in developing a relationship between the intake worker and the person and their family. We would also have to ensure that the database can reflect who has consented and who has not.

That brings us to the third issue, which is consent. Consent is an issue of some concern in the field of developmental disabilities. It's always difficult to determine who has the capability or the capacity to provide consent. We deal with concrete tasks around medical care, and in that case people with developmental disabilities can often provide consent. When we deal in abstracts, such as, "understand the subject matter ... and to appreciate the reasonably foreseeable consequences," which is section 54, it becomes increasingly difficult for many individuals with a developmental disability to provide informed consent. The legislation does recognize the variable nature of this in that the ability to provide consent may vary with respect to specific pieces of information and to the changing time of consent.

On a practical level, since we hold many pieces of health-related information on behalf of the individual, we will need to itemize who gave or withheld consent on each, and if the consent is time-sensitive due to the person's changing capacity and/or capability. This would be a huge task.

These are just three areas where the Toronto association will experience difficulty in implementing the proposed legislation. I am certain that similar associations and agencies will have substantially the same problems.

In summary, we do not support the concept that disability equals an illness. We think that a supportive community makes the best safeguard a person can have. I said before that my daughter needs privacy and respect, but she needs it as a regular citizen does, not because she will need services of associations like the Toronto Association for Community Living.

What is most distressing is that effort, energy and resources will be expended to comply with legislation that will not substantially improve the quality of life for people with developmental disabilities and will drain away much-needed funds from services which we so clearly and desperately need.

I therefore ask, together with the umbrella organizations—the Ontario Association for Community Living and the Ontario associations supporting individual services—that you exempt agencies supporting people with developmental disabilities from this legislation. Thank you.

The Chair: That affords us just about a minute and half per caucus for questioning, and this time we'll commence with Mr Wood.

Mr Wood: I got the impression from your presentation that you didn't have a fundamental objection to the bill but were concerned that you would not have resources with which to be able to implement it in the work that you do. Was I correctly picking up on that?

Mr Kyle: We haven't taken the time to do the analysis of what we would like to see changed, to put those comments forward on what we would like to see changed. Fundamentally, we would like to ensure that there's protection within the health services in the province and would encourage any work that can be done to ensure that.

Mr Barber: We're just not a medical service agency and, therefore, if we did have to put it into effect, we would think, do we have to hire doctors and nurses to ensure that the information is correct or are we going to need computer systems? It's beyond most small agencies—even large agencies—to implement.

Mr Wood: I got the impression that at the moment you don't have much of a handle on the cost to you if you did come within this regime.

Mr Kyle: Only that it would be more than we've got available in reserve. The point is that other developments within our sector and additional costs have been just crushing the organizations in recent years and we see this as another one that will be piled on. We really don't see the benefit of connecting these requirements to our services. Essentially, the safeguards that this is trying to ensure will be ensured through the medical systems that people are connected to. We don't provide those services, so it would be a duplication of the protection to connect them within our sector.

Mrs McLeod: I certainly hear your concerns about cost implications. I can assure you, if government were to require health care providers to put all of their records on to an electronic base, they would hear from a lot of people about very significant cost implications.

I did want to ask you about the basic concern you have with inclusion, because you're not the providers of health care. You serve a very different role with your community. You are, nevertheless, holders of individual health records, are you not, or is that in fact not true?

Mr Barber: The staff would have information like they don't eat lima beans or they're allergic to tomatoes, just day-to-day information that a parent would have for their own children, that they would know, and if a babysitter came in, they could say, "Don't let them eat this and be careful of that." It's not real, hard medical information.

Mr Kyle: In no case that I'm aware of do we have the transfer of medical records from a physician to our services, for instance. It would be notes for proper care of people that we keep on record—some of those health-related, obviously—to make sure that people are getting the care and support they need.

Mrs McLeod: So you would consider yourself a recipient, as defined under this legislation, rather than the custodian of health information.

Mr Barber: Yes.

Mrs McLeod: Are there protocols within the two acts you are governed by that would deal with the protection of individual sensitive information?

Mr Kyle: Yes, there are some. If there is any concern that there are inadequate protections, I think they can be dealt with through MCSS rather than through this legislation through the Ministry of Health. But there are currently some protections within MCSS.

1240

Ms Lankin: I appreciate your comment that disability is not equal to illness and your request to be exempted from the legislation. If I can, I want to suggest that I don't think the ministry ever intended to suggest that. Including your organization under "health information custodian" is because the bill is actually set up to define where health information may be stored and then how you collect it, disclose it, have access to it.

I'm going to ask you to turn that on its head because I think where we should be ending up is with legislation that says health information is private and should be protected, and there should be rules that apply to it wherever it is stored, not because it's in a health facility—whether it's in an employer's files or whether it's in an insurance company. That may be broader than others are prepared to go, but the concept being this is about health information and how it is protected.

That being the case, I am aware, for example—and you may have heard this—of the incident where the organization had a labour dispute on and something was happening. The executive director took the files and tossed them out on the lawn and there was private information in there. It was occasioned by a labour dispute. However, the result of it was lack of appropriate care and attention to clients' personal files, within which are some aspects of personal health information. We would all say that's not appropriate. But there's not clear law that governs it in some of the organizations, for example, that you represent.

Could you undertake to go back and discuss with the staff in the various residences what kind of health information—examples, not detailed charts—may be contained in a client's personal file that is kept on-site? That might help us look at to what degree should any of these protections apply to the business that you're doing in providing daily supports to individuals. I'd just ask if you could do that.

Mr Kyle: That's a fair request. We could do that, yes.

Mr Barber: I can say that we do have very strict policies concerning confidentiality.

Ms Lankin: But there's no consequence that an individual has other than the goodwill of the organization, and there is tremendous goodwill in your organization. But when it's subject to small-c corporate policies set by boards, that's subject to change. When it's set in law, it's a right that's guaranteed to the individual. The whole premise here is about health information privacy being the right of the individual.

Mr Barber: I think we're required by the Ministry of Community and Social Services to have such policies on confidentiality.

Mr Kyle: As I said earlier, I think in order for us to have continuity of that, it seems appropriate to me that those safeguards be extended from the existing policies within MCSS. If they're—

Ms Lankin: On that point—

The Chair: I'm sorry, Ms Lankin; you're well over your time. Thank you both, gentlemen, for coming before us here today to make your presentation.

DAVID PRICHARD

The Chair: Our next presentation will be from Mr David Prichard.

Mr David Prichard: Good afternoon, Mr Chair and members of committee.

The Chair: Good afternoon. Welcome to the committee.

Mr Prichard: I appear before you as a citizen. I have no particular qualifications in law or medicine and I won't pretend to interpret on that. I do, however, have grave concerns. You will probably hear me make reference to certain addiction programs. I have over 20 years in a particularly well-known organization. I think the fact that I once drank at Molly 'n' Me, and the bikers were afraid of me, may testify to how successful those programs are. Having said that, I neither represent nor speak for any of these organizations.

It is to be noted that for the purposes of this proposed act exceptions cover individuals like aboriginal healers, those with a religious mandate, while not touching on a variety of self-help organizations such as Alcoholics Anonymous, Narcotics Anonymous, support groups for cancer and other ailments. That the addiction research centre in Toronto has discontinued its outpatient program due to the fact that such organizations have a better rate of recovery is an indication that they do have a medical, therapeutic effect, though it is not the intent of such

organizations, nor it is that they would they consider themselves to be medical practitioners of any description.

However, whether it be for the purpose of lifting the scourge of substance abuse or for the relief from some other ailment, such organizations succeed by members freely exchanging information about their own conditions, what they do to cope with and alleviate their conditions. Were a fee involved with such organizations, members would fall under the purposes of this act, as information of a medical nature is often exchanged in such venues: one sufferer might identify with the experiences of another. Yet should a member of one of these organizations elect to set himself or herself up as a lay therapist and charge a fee, they are considered a practitioner or health information custodian.

This bill does not seem to address the fact that many lay therapists comprise a broad gamut of services in our society. It would appear that simply accepting a fee, under the definition of this bill, infers professionalism. The fact of the matter is that pet care providers in our society face more stringent regulation than lay therapists. While some practitioners have banded together to provide professional associations, and the government currently explores the field of naturopathy, it remains that there are no statutory regulations, no standards in training or education, or avenues of redress against such practitioners save the courts. Nowhere is this more particularly evident than in the field of the mental health lay therapist.

With a great many individuals turning to alternative therapies, such roles and services are currently being studied by both the conventional medical profession and Legislatures for inclusion into the broad spectrum of treatments. Central to the debate is that many therapies offered are untested and unproven. It is of grave concern that this bill might lend to unqualified and untrained individuals a professionalism both before the public and the law that is neither earned nor warranted.

The relationship between patient and physician is by and large sacrosanct. We have seen in the past arguments regarding the intrusion of medical funders, either public or private, into that relationship. It has also been legislated that physicians are required to notify authorities should they believe their patient presents an immediate threat to another individual. Yet this bill does not seem to address the fact that both the medical practitioner and the patient may present a threat to another individual. Many self-help groups have an axiom that a person's habit affects 20 to 25 other people—spouse, offspring, employer etc.

We have seen in recent years, particularly in the alternative community, treatments whose longevity and objectiveness seem to have more in common with the fashion industry than the medical. It seems that every other day one can pick up a newspaper to learn that last year's research fact is now a blunder.

With established medical treatments, there is some recourse through self-regulating bodies and articles of law. With alternative practices, one can only fall back to the law. Within such practices there ranges everything

from peer-reviewed experimentation to what amounts to little more than medical fads. The issue is, at what point privacy and privilege? Do we grant to the unregulated, and perhaps even untrained, therapist that accorded to the physician who has years of training?

In any person's life there are a host of people who might be concerned or affected by their welfare: a parent of an adult child, a partner, an employer or a friend. It may be argued that they need access to medical records or to be able to alert a competently trained third party to review such records. Much about the practice of medicine is subjective. This is particularly true of those who practise in the various disciplines of mental health. The question that needs to be asked is, will this statute hamper the inquiries of a third party who has reason to question a course of treatment?

Also to be considered is the third party who is affected by the ailment of another. An excellent example of this might be the experience in New Zealand regarding the now-discredited repressed memory syndrome. In a decade, approximately 80,000 cases were discovered, largely through the lay therapy community. The vast majority of sexual abuse charges either didn't get as far as the courts or were dismissed. When the government of New Zealand ceased awarding compensation to alleged victims, the caseload for this syndrome all but vanished. What of those falsely accused by this fad? Would this bill endanger their defence? In seeking to preserve the patient-provider relationship as one of trust, does it do so at the expense of another party's wealth, health or liberty?

Simply accepting a fee for a service does not make one a health care provider, as the bill seems to do inadvertently. At worst, it would appear to give licence to quackery. A question facing this committee is, should this bill offer the protection of law to the unregulated?

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The issue of third parties needs to be addressed more thoroughly. Whatever agency, be it the police, a concerned relative, or another individual affected by another's ailment, should not have unwarranted access to the provider-patient relationship. Neither should such information remain untouchable. We currently have in place a system for dispute resolution called the courts.

This legislation needs to reflect that those who have just reason, as determined by the courts, may seek access to such information as required for their legitimate purpose. Without such safeguards we are not protecting the medical relationship in society, we are isolating it.

Daily we hear of some new medical advance, a stride that has portent for our well-being. The law should not inhibit such change, but it may well be it hampers, either to institution or individual, the ability to question or examine the practice of health care and the changes which are thrust upon us, many of which are untested.

As members of this committee will be aware, there are ongoing debate and rulings at the level of the Supreme Court of Canada as to the nature of what may be admitted as evidence and the extent to which a patient's medical records may be accessed. At the other end of the

spectrum we have a very fluid media in which diagnosis by Oprah and prognosis by Roseanne seem to permeate the public mind.

Unproven and untested therapies are presented to the public as solutions to their ailments. While they may be abhorrent to the medical profession, they can be used by both the unscrupulous and the sincere as treatment—treatment which history shows us may bear more harm than good.

It is of the utmost importance that any measure drafted by this Legislature not conflict with federal legislation and be fluid enough to reflect changes to legislation at that level. Nor should it be written in such a way as to be seen to offer a cloak to the quack. Simply accepting a fee is not the practice of medicine.

If I may just for a moment, I do have a particular reason for wishing to address this. The matter is before the courts. I don't want to seem secretive but I trust you appreciate I have to be somewhat circumspect.

About 15 years ago, I dated a woman who was a lay therapist. We split apart for a number of reasons. One basically was that you couldn't say good morning without there having to be some sort of psychological reason, and I didn't find that particularly healthy myself. That she took up with an active manic-depressive as her next partner sort of testified to my belief that she was looking for a live-in patient, not a live-in partner.

Just by coincidence, 15 years later I rented one of my apartments to a woman. We got on famously. Her sons and I got on. It got to the point that I saw her come home from school with the boys and she looked absolutely beat. I told the boys, "Come down for breakfast tomorrow. Let your mother sleep in," and that started several months of their coming down and basically I was doing dinner. I enjoyed it thoroughly. During the course of one meal it was discovered that I had thrown over her lay therapist. The day after that this family never came to eat in my place again. You can't tell there was not some influence by the lay therapist. I was astonished to learn several months later from a mutual acquaintance that my tenant had told him that I had a history of being a stalker. I have no history of being a stalker. It came from the therapist, as far as I'm concerned.

The point I am trying to make here is that this woman is completely unregulated, she's completely untrained and—this is my own personal opinion—she's not particularly healthy. I have, in my case that is ongoing now, no recourse. There is no public body. She belongs to no institution. There is no way of going after her except through the courts. This woman, my tenant, was most horribly treated by her ex, the most severe domestic abuse I have ever seen without a fist actually being raised, so much so that—and I found myself in that uncomfortable position of, how far can you go in to intervene in another person's life? He drove her into the Clarke, and he told several of us that he intended to drive her into the Clarke. She was there for almost five months on a suicide watch. I don't believe this therapist is particularly good for this woman, but it's beyond my control. She has since moved out. She has a life of her

own. But as I say, there came a legal matter between us, which is ongoing in the courts. I have no recourse to go after this woman. Even while this woman was under her treatment and we were on good terms, there was no third party to which I could say, "Hey, I think something's amiss here; this woman is not getting treatment."

I think the regulation of lay therapists, be they mental or naturopaths or whatever, is something that may not be within the jurisdiction of this committee, but I think it is something that the government needs to examine very carefully. I believe what is in the jurisdiction of this committee is that those who are not qualified, those who do not have any sanctions or training, those who might be just—

Friends of mine who are medical professionals tell me they get bulletins from things like Redbook and Good Housekeeping, when they're having articles on health, to alert the doctors that they're going to have a lot of patients coming in and discussing these issues. Somebody reads in Redbook that they might have this, and they're in to their doctor's two weeks later. That's the effect. I'm trying to put it in a flavour that the media—we've seen Oprah's book-of-the-month club. I've never enjoyed any of her choices, but that's another story. But then do we give credit to her medical theories as well? I'm using that as an example—I don't mean to slight her—of just how invasive and how trendy certain things have become in our society in regard to medical treatment. I have great fear, and this bill to me reads, that simply accepting a fee makes somebody a medical practitioner. It could very easily serve to cover the quack, and I would like to see that avoided.

The Chair: Thank you very much, Mr Prichard. We appreciate you bringing that perspective before the committee here today.

ONTARIO HIV TREATMENT NETWORK

The Chair: Our final presentation today will be from the Ontario HIV Treatment Network. Good afternoon and welcome to the committee.

Ms Patricia Balogh: Thank you, Chairman Gilchrist and members of the committee. I am Patricia Balogh, the executive director of the Ontario HIV Treatment Network. I'm joined this afternoon by the co-chair of our board of directors, Mr Derek Thaczuk, and by one of our consultants, Mr Ed McDonnell.

It's a privilege to address the standing committee on general government this afternoon on behalf of the Ontario HIV Treatment Network. To begin with, I wish to state that the OHTN compliments the government for introducing the legislation, which has been so much needed in Ontario since Justice Krever's report of the royal commission on confidentiality of health information back in 1980.

It's apparent that the protection of confidentiality and privacy of patient information has been largely based on ethical principles and professional codes of conduct for the last 100 years or so. In this day and age, this approach no longer provides an acceptable standard for the public,

for health care providers, researchers and other stakeholder groups throughout Ontario.

Regretfully, repeated attempts to address this issue by successive governments over the last 20 years have been to no avail. Given advances in medical care and treatment, notably in the field of HIV-AIDS, the complexity of the current health care delivery system and progressive developments in the electronic transfer of health information, there certainly, from our perspective, is an urgent need for legislation which protects individuals and the public at large.

In deference to those of you who may not be familiar with the Ontario HIV Treatment Network, I wish to provide a brief overview of our agency. The OHTN is a non-profit corporation funded by the Ontario Ministry of Health and Long-Term Care. Our board of directors was mandated by your government to pursue three initiatives in order to promote timely and state-of-the-art health care for people living with HIV-AIDS in Ontario. These three programs include our investigator-driven research program, which supports innovative, Ontario-based HIV research in the areas of basic clinical, epidemiological and socio-behavioural science. Since our inception, our board of directors has committed over \$12.4 million to support such research in the province. In addition, we have endowed an HIV chair at the University of Toronto.

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Our second program, the priority initiatives program, distributes funding to support time-limited initiatives which address priorities identified by our stakeholders, again to enhance care and treatment for people living with HIV.

The reason that brings us in front of you today is our third program, the HIV information infrastructure program, which I shall subsequently be referring to as HIIP. This is an innovative program which uses information technology to improve care and treatment and to increase the security and enhance the management of personal health information. This program consists of three parts: a clinical management system, which is an electronic health record equipped with decision-making tools to assist the physicians in delivering improved care; a central research database, which is a voluntary and anonymous database that will be used by researchers to answer important questions about HIV in Ontario; and finally, a secure communications network that links health care providers and other institutions with one another to ensure more efficient and secure communications between and among HIV care providers.

The OHTN is extremely proud that our HIIP project has been endorsed by the Ministry of Health and Long-Term Care's smart systems for health as one of their own priority initiatives. Earlier this week it was gratifying to attend the Honourable Minister Clement's inaugural address at the ITAC Ontario health care conference, where he conveyed the government's commitment to supporting projects such as ours.

Now I turn to the draft legislation which brings us together today. My comments, and our written document, which has been submitted to assist you in your delibera-

tions, reflect the wisdom gained by the OHTN as it has developed and implemented HIIP. In addition, our comments are intended to convey our desire to participate in your ongoing efforts to design and pass legislation which effectively addresses the complexity of this issue.

The OHTN brings a unique perspective to this debate, reflecting the diverse composition of our board and other governance structures, and our mandate to enhance the participation and collaboration of those with relevant experience and expertise. I refer to people living with HIV, their health care providers, researchers and others involved; all of these groups helping to make Ontario a leader, both nationally and internationally, in HIV care, treatment and research.

I wish you to note that we generally support the essence of the submissions which you have received from the Privacy Commissioner of Canada, the Information and Privacy Commissioner of Ontario earlier this morning, the HIV and AIDS Legal Clinic (Ontario) and the Ontario Medical Association. I will not repeat the concerns about Bill 159 expressed in those particular submissions but urge the committee to require amendments to the legislation that respond to the criticisms outlined by these notable individuals and organizations.

It appears that Bill 159 may intend to exclude anonymous research databases, including the HIIP clinical research database, from its provisions. However, given the definition of health information custodian as outlined in subsection 2(1), paragraph 13, the true reality appears ambiguous. Neither the OHTN nor the public has any way of knowing at this important juncture whether our CRD will be subject to Bill 159 or not. Furthermore, it appears there will be no opportunity for effective public scrutiny by our stakeholders of a unilateral decision by the government after Bill 159 has passed not to prescribe the OHTN as subject to the regulations.

The OHTN acknowledges that the electronic sharing of personal health information raises major privacy issues. For this reason, we have dedicated three years during the development of HIIP to judicious consideration of these issues. With the active participation of all of our stakeholders, including our colleagues at the AIDS Bureau in the Ministry of Health and Long-Term Care, we have developed policies which include—and there are so many of them at this point, I'll just mention two particularly relevant here—consent and dispute resolution. We have developed, I would say, state-of-the-art policies and procedures for those involved in our CMS and our CRD in both of these areas.

Aside from the policy aspects, in addition, we are employing state-of-the-art technological functions, including public key infrastructure, pseudonymization and encryption to ensure maximum protection of the data voluntarily, which is being entrusted to us by people living with HIV. Given the advanced stage of our HIIP project, we contend that section 13 should be amended to specify the requirements to be met by health information custodians, rather than deferring these to be prescribed in the future by regulation.

We have serious concerns that the bill includes excessive ability to deviate from the established roles by virtue of regulations. Throughout the legislation, significant issues are deferred to be addressed at a later date in the regulations, leaving too much decision-making in a non-public forum.

I also wish to note that the use and disclosure of personal health information as described in sections 27, 29, 30, 31, 33 and 36 is of grave concern to the OHTN. Certainly, as a health care consumer myself and a professional social worker who has worked for 30 years in this province in a variety of clinical, administrative and policy positions, I must say I am truly dismayed. The breadth of Bill 159 in permitting the use and disclosure of personal health information without consent is not acceptable.

To illustrate our concerns, let me explain. The CRD component of HIIP is the continuation and expansion of an earlier database, the HIV Ontario Observational Database—HOOD, as some of you may be familiar with it. It gained full political support from the Minister of Health from its inception back in 1992. Due to the sensitivity about a person's HIV status, the high level of voluntary participation which was achieved through the forerunner of HIIP was achieved for one, and only one, reason: complete security of the contents from disclosure for any purpose other than research. That was agreed to at the time by everyone concerned, including the Minister of Health of the day.

The board of directors of the OHTN and all stakeholders associated with us retain a strong ethical and moral commitment to this tenet. To destroy client confidence in this fundamental premise, which Bill 159 has the potential to do, will deprive Ontario of one of the most robust HIV databases which exists in this country, one which your government is funding us to enhance, a fact for which we are extremely grateful.

As others have told you, legislation which threatens the physician-patient relationship will not only diminish the quality of health care but, in our opinion, also prevent Ontario from continuing to position itself as a world-class leader in HIV research.

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The OHTN strongly supports the principle that collection, use and disclosure of personal health information related to research must be subject to approval of a properly constituted research ethics board. In the absence of any legislated requirements to do so, we have already sought approval for our CRD from the University of Toronto, as did our forerunner, HOOD, back in the early 1990s. In addition, our director of science requires university REB approval to act as principal investigator for our CRD due to his own academic affiliation with the university.

Section 32 requires REB approval from some other institution without any obvious benefit for a duplicate review. In our opinion, Bill 159 must be amended to authorize REBs established by Ontario universities to approve projects for the purposes of this legislation.

The broad access of information about HIV status of individuals provided by section 31 in our opinion is completely at odds with clear restrictions imposed upon the disclosure of such information by Ontario's current public health legislation, the Health Protection and Promotion Act. The OHTN submits that the provisions of the HPPA reflect a much better understanding of the serious policy implications to individuals and to public health of a legal framework such as Bill 159, which fails in fact to protect this information.

In summary, I submit that Bill 159 is flawed. However, the importance of passing judicious personal health care legislation to protect the public, including people living with HIV, health care providers and researchers, cannot be denied. I commend the government for its commitment to this endeavour.

In closing, it is essential to reflect upon the fundamental importance of protecting the privacy of personal health information to ensure the Ontario HIV Treatment Network's ability to fulfill its objectives: to foster excellence in the delivery of health care to people living with HIV in Ontario and to the research related to those folks. The ability of people living with HIV to speak frankly and openly with their health care providers, and the confidence that they can do so without fear of state and other intrusions upon the integrity of that relationship, are the cornerstones of our efforts at the OHTN. Without these, the OHTN and many other organizations and service providers in Ontario will undoubtedly be compromised and potentially fail in their undertakings.

Thank you for your attention. Mr Chairman, I wish you and the committee members well in your deliberations.

The Chair: We have about two minutes left. The next party up in rotation is the NDP.

Ms Lankin: In your conclusion you set out a number of principles around the protection of information in databases. Without going through it, I want to suggest to you that in various parts of the legislation it attempts to provide those exact protections. But you're right in identifying all of the regulation-making power and the directed disclosures as pulling the rug out from under that if at some time in the future some government chose to do that. We've heard that clearly with respect to a number of aspects of the legislation. We're going to have to turn our minds to that.

You also indicated that you supported presentations by a number of previous groups, including the OMA. The OMA very clearly said they don't support lockbox provisions which allow people to have that final control over their information, and they're opposed to standardization attempts for charting.

Some of what you and your predecessor organizations have been able to accomplish in standardization of treatment guidelines and protocols, all of that, has been so incredibly important that there is standardization and the ability to transmit standardized information there. If we take a look at primary care reform or particularly at disease management, those principles for that sharing of information are important not to compromise individual

control. My question to you is, in terms of health practitioner control, should the health practitioner be able to stand in the way or should all that control just rest with the patient? So do you support a lockbox and do you support standardization of charting if consent is given to transmit standardized information?

Ms Balogh: The authority and responsibility should be vested in the patient. That's the fundamental position of the OHTN. In terms of the lockbox, Ed, did you want to make any comment?

Mr Ed McDonnell: I think one of the things that we've grappled with is striking that balance between health care providers needing to have information—other presenters made that point earlier today—and maintaining control of the individual's own personal health information. I think the lockbox itself would be one of the things we rejected in the model of the electronic medical records that we developed at the OHTN through HIIP. I think it's due to the fact that we want the health care provider and the patient to have to come to accommodations about what information is shared and how that's done. So we've provided a flexible model through the technology, but I don't think we've come to a conclusion in terms of where to strike the balance on a lockbox.

The Chair: Thank you all for appearing before us today. We appreciate your presentation.

Committee members, I want to thank you all for your participation in the quite a few days that we've applied ourselves to this task. Notwithstanding the fact that we are not empowered to sit again as a committee until the House reconvenes, we have of course discussed the opportunities to meet to review the presentations that have been made, the synopsis that the research officer will be providing and whatever other thoughts folks like Ms Cavoukian and the ministry would like to provide. So on the understanding that those opportunities can and will take place, I just wanted to thank everyone.

Mrs Pupatello: Just before we leave—hopefully, we'll go into subcommittee work—could I ask research one additional question? It was concerning to me, the number of deputations that came before this committee that didn't seem necessarily to fit just into the discussion of privacy. Those were the alternative therapy discussions that have come forward in a number of presentations. I wonder if I could ask the research officer to provide us with a list of where within government, within which appropriate ministry division, we could have that discussion. It seems as though these particular groups have come forward to try to fit this discussion about appropriateness of therapies and their acceptance into the privacy discussion. My first response has been each time that there has got to be a different place that that discussion can be had, and I'm not certain what it is. Could the researcher provide us with that?

The Chair: Thank you. Are there any other questions for the researcher before we rise? Again, thank you, everyone. Officially, we will stand adjourned until the House reconvenes.

The committee adjourned at 1319.

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